PARLIAMENTARY CRIME AND CORRUPTION COMMITTEE

Members present:

Mr TJ Nicholls MP (Chair)
Mr MJ Crandon MP
Mr SR King MP
Mrs MF McMahon MP
Mrs C Mullen MP
Ms JE Pease MP
Dr MA Robinson MP

Staff present:

Ms E Pasley (Committee Secretary)
Ms H Rae (Assistant Committee Secretary)
Ms E Jameson (Inquiry Secretary)

PUBLIC HEARING—REVIEW OF THE OPERATION OF SECTION 329 OF THE CRIME AND CORRUPTION ACT 2001

TRANSCRIPT OF PROCEEDINGS

FRIDAY, 8 JUNE 2018

Brisbane

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The committee met at 12.01 pm.

CHAIR: Good afternoon. I declare open this public hearing for the committee's inquiry into the review of the operation of section 329 of the Crime and Corruption Act 2001. My name is Tim Nicholls. I am the member for Clayfield and chair of the committee. Joining me today are: Ms Joan Pease MP, the member for Lytton and deputy chair; Mr Michael Crandon MP, the member for Coomera; Mr Shane King MP, the member for Kurwongbah; Mrs Melissa McMahon MP, the member for Macalister; Mrs Charis Mullen MP, the member for Jordan; and Dr Mark Robinson MP, the member for Oodgeroo.

The purpose of today's proceeding is to hear evidence from stakeholders who made submissions as part of the committee's inquiry. Only the committee and invited witnesses may participate in the proceedings. While witnesses are not required to give evidence under oath, I remind witnesses that intentionally misleading the committee is a serious offence.

These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard, I remind members of the public that, under the standing orders, the public may be admitted to or excluded from the hearing at my discretion or by order of the committee. The proceedings are being recorded by Hansard and broadcast live on the parliament's website.

Media may be present and will be subject to my direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings. I ask everyone present to turn mobiles phones off or to silent mode. The program for today has been published on the committee's web page and there are hard copies available from committee staff.

CARMODY, Ms Karen, Parliamentary Crime and Corruption Commissioner, Office of the Parliamentary Crime and Corruption Commissioner

KUNDE, Mr Mitchell, Principal Legal Officer, Office of the Parliamentary Crime and Corruption Commissioner

CHAIR: I welcome our first witnesses. I invite you to make a brief opening statement, after which committee members may have some questions for you.

Ms Carmody: I do not know whether committee members have before them the 20 October review I did of the operation of section 329. If you have that before you, you will see that at paragraph 51 I conclude that 'the situation needs to be monitored with respect to the definition of improper conduct to ensure that the committee is not overwhelmed with notifications of less significant matters relating to procedures and management'. My view is now, having observed and been in the role for some time, that the point has been reached where there should be some decrease in the bureaucratic and administrative type notifications. That is mainly because the CCC—I should imagine out of an abundance of caution—are forwarding matters that really were not meant to be within the purview of either the committee or the commissioner. I think it is an excessive use of your time, my time and resources when they should be directed towards more important matters.

I do not think I necessarily need to give you examples. You would have experienced them over time. You will be aware of them. Breaches of minor policies and procedures are not something your time should be troubled with.

If you have before you the report of the CCC, you will see at page 7 there are some suggestions of what the CCC thinks should be changed with respect to improper conduct. In general terms I support those changes with some variations. I do not know whether you have a copy of 329(4) before you at the moment. In the event that you do not have it, the differences are simply—

CHAIR: If I could hold you there for a moment while we navigate our way through the system.

Ms Carmody: We have prepared a copy of that section with our suggested amendments. If we could hand those up to you that might be of assistance.

CHAIR: That would be terrific. For members of the committee, I point out that section 329 is included in the reference material at the end of the briefing material that has been provided by the secretariat.

Ms Carmody: There are a number of disclaimers. I am not a parliamentary drafter so once this goes to the appropriate department there may well be wisdom there that says that these cannot be used, but this is the type of thing we are looking at. You will see that (a), (b) and (c) remain unchanged. I think that is the view of the CCC. They are the critical ones. With (d) we simply insert the words: 'that is not of a minor or trivial matter'. I think we still need to know if confidential material has been disclosed, but we do not want to know about minor breaches that are really of no consequence in terms of the outcomes they might have.

We think that (e) in its totality could be deleted because (g) has effectively the same intent. Rather than just saying noncompliance it should be repeated noncompliance. If there were an example of someone failing to fill in one form we do not think the committee needs to be alerted to it. If it happens on a number of occasions, which we have seen examples of, I think that should still be advised to the committee. You will see also in (f) we have just put 'not of a minor or trivial matter'.

They are roughly the kind of changes we would be agitating for subject to the CCC perhaps pointing out why they would not be effective and subject to the parliamentary drafters saying whatever they feel about the effect of those terms. In essence, we agree that there has to be a reduction in the bureaucratic and administrative matters you are receiving. As I have indicated previously, I think the CCC, in an effort to maintain a spirit of what we are trying to achieve, has always erred on the side of caution in terms of giving us things that were borderline but that they think are best to give to the committee.

One of the comments in the CCC's submissions—and I will read it to you so you do not have to locate it—reads, 'In the CCC's view and in light of the goodwill that exists between the committee and the CCC ...' It goes on to read 'it's appropriate to move on and perhaps make these changes'. I am not supportive of that concept in the sense that this legislation has to stand the passage of time. There may well be a goodwill arrangement now but in the past and no doubt in the future there have been times of friction.

I do not think we should say we have a good relationship so everything is fine now. I think the legislation has to withstand the passage of times when it is not so fine. Unless I can assist you further they are the submissions from my office.

CHAIR: I am sure we will have a couple of questions in relation to your submission. In your opening remarks you said that after time in the role you have developed and perhaps modified your view from early on in the piece. Can you give us a little more information about how that experience has led you to change your position or to come to the conclusion that you have now settled on.

Ms Carmody: Some of the breaches you will recall—and I have to think carefully to make sure they are ones that we can discuss—are inadvertently sending an email to the wrong recipient, with the caveat that the contents of the email cannot be significant and cannot be a major piece of information being conveyed. Issues along those lines I do not think the committee should be concerned with.

Delegation issues where an officer has an authority to approve purchases up to a certain amount and for whatever reason they go over that amount should not need to be reported to the committee if they are of a low level. For example, if you had $5,000 that you were authorised to buy such and such with and you instead authorised $55,000 that might be something that should come to you, but the more minor ones need not. The problem will always be the fine line—when does it become something that is not trivial or minor and becomes major. Those will be easy. There will be a small category where it is not quite certain whether they are considered minor or not. The hope would be that the CCC, as they have in recent times, referred them on when there was the fine line point of not being entirely certain.

They are the kinds of things that I do not think the committee should be troubled with. I think they are internal administrative matters that should be dealt with by management within the CCC rather than the committee. That is why you will see in (g) we have the word 'repeated'. If this is happening constantly then we would say that there is a problem within the management structure. When we say repeated is it twice or three times or five times. Again, it will depend on the nature of the noncompliance.

Some of those policies or procedural guidelines are very important depending on what type of task they are applied to. I just do not think you need to get all of them, it is just the more major ones. They are the two examples that spring to mind. There have been others over the last year or so that I can recall. They are all of that kind of calibre.

CHAIR: They may be minor issues but if they are constant there is a systemic problem there that needs to be addressed. Do you believe 'repeated' deals with that?

Ms Carmody: I think the CCC uses wording like an isolated incident. They are all things that the parliamentary drafter could have a look at as to what the effect is. Even if they are repeated fairly minor events it would, as you say, indicate that something was going wrong with the management and would that reflect other areas where there are also deficiencies. I should imagine that would be a fairly rare category, but I still think it should be within the act.

CHAIR: When you say 'minor or trivial nature', what examples would you consider? You have said the delegation number—

Ms Carmody: The sending of an email.

CHAIR: If we go to a conduct type of issue in relation to the function of the CCC rather than an administrative issue, which is paying too much money, or exceeding a financial delegation—

Ms Carmody: Yes. For instance, there are certain reports—or schedules, some of them are called—that need to be completed. Some of those schedules could or could not have pretty serious consequences if they were not completed properly. There would have to be a distinction between a schedule that kept, for example, the number of warrants that had been refused. That would be an important schedule. You would want to know reasons for the warrants being refused and, if they were for obvious reasons, why the application for a warrant was made at all.

There might also be—and I have no idea—other, more insignificant schedules that, if they were not attended to, did not jeopardise the integrity of the anti-corruption system on the whole. Without looking at a multitude of forms—and I am sure the CCC would be able to assist you further—they are the types of things that I do not think the committee should be troubled with. Again, I am trying to divide in my mind the category that I can discuss openly and those that I cannot, so it is not without difficulty.

CHAIR: Yes, sure.

Ms Carmody: Can you think of more examples?

Mr Kunde: No, not off the top of my head. They were the ones that I would refer to, yes.

Ms Carmody: We have had a number of those. We have had a number of those delegation problems where the authority to authorise certain events, or purchases, or whatever, has been exceeded because of what seems to be a breakdown in the distribution of the new delegation notice and a failure to read that notice. That has happened a couple of times and I understand that it has been corrected by the CCC.

CHAIR: Thank you.

Ms PEASE: With regard to the 329 referral process, I know that the other jurisdictions throughout Australia operate differently. Is there a similar form of referral process within other jurisdictions?

Ms Carmody: We have discussed this. As I mentioned at the earlier meeting this morning, when we meet with the other inspectors, or whatever, that is the type of thing that we discuss. This sets the lowest threshold, I would say, in the sense that you get more matters referred to you currently than do a number of the other jurisdictions. Nothing is exactly the same, but it is similar.

As you are aware from having read, I am sure, briefing papers, et cetera, this was brought in to mitigate a specific event that should never have occurred. Perhaps it was an overreaction to make sure that it could never happen again but, in practice, it has turned out to be excessive and cumbersome. It was probably appropriate at the time, because it probably addressed issues that have now been rectified. I will leave that again for the CCC.

Mr Kunde: Can I just add that, in other states, there is not necessarily a positive obligation on the anti-corruption body to report complaints that it becomes aware of in-house, for example. They are obliged to report complaints made to the oversight body. Yes, I think Karen is right: this would be the lowest threshold and the most significant reporting obligation of any of the anti-corruption bodies around Australia as it presently stands.

Mr CRANDON: In relation to section 4 that you have given us some wording for—and 4(g) in particular—in its current form it reads—

Noncompliance with a policy or procedural guideline set by the commission, whether inadvertently or deliberately, that is not of a minor or trivial nature.

If there is noncompliance, it needs to be reported.

Ms Carmody: Yes.

Mr CRANDON: You are suggesting to put the word 'repeated' in.

Ms Carmody: Yes.

Mr CRANDON: That suggests to me that the manager of the individual could have a look at that and say, 'This is your first noncompliance of a major issue. It is a major policy procedural guideline. This is your first one, so we are not going to report that. We are not going to send that one through, but if it happens again;' is that what you are suggesting?

Ms Carmody: Yes. It might just be the second one, it might be the third one—it depends on the nature of the policy and the failure—but that would be the number we are looking at. We are not looking at 10 failures.

Mr CRANDON: That does not say that, does it?

Ms Carmody: That is why I am saying the parliamentary drafter might say that the word 'repeated' is not precise enough. The drafter might say, 'On two or more occasions.'

Mr CRANDON: What time line?

Ms Carmody: Whether it is two or more occasions within the space of one financial year, or something along those lines, that is where the expertise of in-house people who specialise in that area would have to consider it. All we have given is an indication. You are right: there may have to be a time line. That is a relevant point. If they did it once in 10 years, or twice in 10 years, as opposed to twice in one year, that could be an important distinction.

Mr CRANDON: I am just wondering whether it would be workable to put that word 'repeated' in there. It says, 'That is not of a minor or trivial nature.' We are talking about serious issues. For them not to be required to be disclosed—and that is for every individual in the CCC, is it not?

Ms Carmody: Yes.

Mr CRANDON: Okay, 'You are right.' The next one takes the hit. They do not have to report, they do not have to report, they do not have to report. It could be of a similar nature—something that is a procedural guideline or policy of a similar nature—that is being breached. The first breach has not been flagged. Somebody sees that that first breach has occurred. They go along and do the same thing thinking that it is okay for them to do that.

Ms Carmody: That is right.

Mr CRANDON: They have now breached and so it goes on. I just wonder whether the word 'repeated' is workable.

Ms Carmody: I think the point you are making is valid. I do not think there is any doubt that what you are saying could absolutely happen. It may be that 'repeated' is an inappropriate word. Alternatively, it might be that there should be no change—that it should stay just the way it is—given, as you say, there is the rider of it not being of a minor or trivial nature. They are all the types of things that would need to be explored more comprehensively.

Mr CRANDON: That in turn comes back to the question of whether 4(e) should stay there. You suggested that 4(g) was saying what 4(e) says and, therefore, delete 4(e). If 4(g) is not going to have the word 'repeat' then we would have to come back and reconsider 4(e).

Ms Carmody: If you go back to 4(e), you are back into that morass of a multitude of notifications of things. You are back having to try to sort that out. That is why it is a complex issue. It is not something that can be done simply.

Mr Kunde: In order to address your concerns, perhaps a noncompliance with a policy of procedural guideline set by the commission, or repeated noncompliance with one that is of a minor or trivial nature. If it is a one-off of a more serious one, that has to be reported. If it is a trivial matter, then perhaps repeated of those. That would address that issue perhaps.

Mr CRANDON: Sorry to interrupt, but 4(g) excludes things that are not of a minor or trivial nature. We are not talking about the repetition of stuff of a minor or trivial nature in that particular one.

Mr Kunde: Sorry. Yes, you are right.

Ms Carmody: That is just a demonstration of how hard it is to change legislation. You end up getting wordier and wordier because you keep on saying, 'Except for this circumstance' or 'Except for this circumstance.'

CHAIR: You end up with a tax act before you are too far down the road.

Ms Carmody: Exactly.

Mr CRANDON: I take the point that the chair raised about it being not of a minor or trivial nature. Then we get into the definition of what is minor or trivial.

Ms Carmody: That is the point that I made before. Certainly—and, respectfully, as they are sitting behind me—they have followed through in the spirit of what was required of them to do in the sense that they have given us virtually everything. Whether other regimes or other officers in the future will be more stringent is what the act will be trying to overcome. It is not an easy thing to amend legislation without having consequences that were unexpected at the time. The ones that you have just pointed out are classic examples.

CHAIR: Do you think the officer's intent would be something that would need to be taken into account in terms of the breach of the procedure?

Ms Carmody: No, I think in most of these things they have to be inadvertent, or deliberate. It is not what they have done that is a concern in an anti-corruption sense; it is the consequences of what they have done. Whether there was any intention does not really matter; it is what they have failed to do or done that may lead in some way to a deficiency in an investigation, or an outcome, or whatever. Some of these things seem minor, but if a policy or procedural guideline is not followed in certain areas, it has consequences down the track that we cannot always predict.

Mr CRANDON: Just to clarify then, given that you have just provided this to us and we have now had a bit of a discussion about it, do you want to withdraw your suggestions?

Ms Carmody: No, I want to let you know that that is the rough feeling of what this office's position is.

Mr CRANDON: You are more comfortable now—

Ms Carmody: But that it needs to be dealt with—

Mr CRANDON: It is not necessarily those words.

Ms Carmody: Yes, and the wordsmith, to use that term, may in the end come back to say to you, 'If we do anything along these lines you are going to lose the effect of this, this, and this.' Not being experts in that area, if we were told that, we might agree. That is the effect of what this office suggests would be appropriate. I must say that the previous committee under Lawrence Springborg was agitating quite often at meetings. They felt burdened by the number of fairly minor notifications that they were receiving. It is not just something that you may or may not feel; it was felt previously. Mr Kunde might be able to say whether it was something that was felt right from 2014 when the changes were made.

Mr Kunde: It was something that we anticipated would be a decrease in our workload. We were aware of that, and it has been, but it is not unworkable.

CHAIR: Nor is it for the committee, thank you.

Ms Carmody: It is just a question of taking your time on things that you could more appropriately deal with and sometimes the financial implications in terms of investigations and letters back and forwards.

CHAIR: Over and above your helpful suggestions with the legislative changes, you have had the opportunity to consider some of the other submissions that have been made available on the public record there?

Ms Carmody: Yes.

CHAIR: Some submissions have raised concerns about the lack of clarity of the meaning of the terms 'disgraceful' and 'improper conduct', which also come up frequently, as you know. Given your submissions, do you hold real concerns about those terms and the definition of those terms? Do you believe that they could use some greater clarity, or is there sufficient assistance provided by decided case law in relation to that?

Ms Carmody: There is significant decided case law in these types of acts over many years trying to refine it, just as you are trying to do now, to the appropriate words. There are variations in different acts. I do not think it is possible to nail it perfectly. There is always going to be an argument about 'disgraceful' and 'improper' and then we will turn, as we have done in the past, to previous

cases to see what judges in the past have said. The current judges might say, 'We don't accept that. We think it now extends to this,' or, 'It doesn't extend to this.' I do not think there is much you can do with that wording. Mr Kunde, over the years, have you felt—

Mr Kunde: No. I think the commissioner addresses this in paragraph 23 of her submission. That gives some pretty good guidelines about what should be considered 'improper'.

Ms Carmody: What did I say? Was it good?

CHAIR: It was well reasoned and well thought out.

Ms Carmody: Yes. I have also discussed somewhere in my report the different types of acts that are used to represent this type of legislation. You will see there a multitude of different acts. In paragraph 50, in terms of the term 'improper conduct', it is used in the Tattoo Industry Act, in the Fair Work Act and in the corruption act. There is a huge diversity of these terms as they are used in all kind of acts. By now most of them have had decades, if not on occasions centuries, of trying to pick the exact term. Whether we are there yet, I know, is another question.

I have looked at some of the terminology in the United States, because one of the expressions we were thinking of looking at was 'flagrant', which is a term in a lot of US legislation. 'Flagrant and improper conduct' were the terms. We looked up the definition of 'flagrant' and we thought that it was a bit too strong. We are not going to find many people who flagrantly did something wrong. It is really the people of a lesser category who did something wrong under a misunderstanding, or believed that, if they did that, they would save someone—all of those types of things. The agony with the English language—and it is beauty—is that it has so many wonderful terms.

Mr KING: Following on from what my colleague Joan said before, when you looked at other jurisdictions, did you find anything that would be beneficial to adopt in Queensland?

Ms Carmody: I think the main thing would be the fact that they do not have this minutia. Our meetings with the other jurisdictions have revealed personality differences, which means they act or interpret in a different way. Without saying which state it is, there is one particular equivalent to myself who meets regularly with the equivalent of Mr MacSporran, because they have known each other for 40 years. We discussed with the previous committee whether that was appropriate. It could be perceived to be inappropriate if someone saw them having dinner together or whatever.

The example I am giving now is of a pair of very senior legal officers who went through the DPP together, they were articled clerks together and they have known each other their whole lives. At the meeting, the inspectors and commissioners discussed the appropriateness of that kind of communication. We accepted that in that case, given their seniority et cetera, theirs is a distinct case of a special relationship and, while it might be acceptable with them, on the whole we did not think it was acceptable. I do not think it would be acceptable for Alan and I to be seen having frequent lunches, because of the perception it gives.

That was one of the issues that we discussed at quite a bit of length at that meeting, because we were a little bit horrified when he first told us. We pursued further why it was justifiable in their circumstances. The person concerned also felt that he could resolve things with a quick coffee conversation by saying, 'Listen, Tom, don't you think you were a bit heavy-handed there,' or, 'You should have gone further there.' They felt that their relationship was such that they could resolve some of those things rather than take up time with lengthy investigations. That may well be right, but as a general rule it is probably not appropriate.

When I was interviewed I was asked what I imagined my relationship with the CCC would be. Remembering that they are at the back and even though I am tall and Mr MacSporran is taller, I said, 'No relationship.' Other than courteous exchanges, I did not envisage that there would be a close relationship of any kind.

Ms PEASE: Further along those lines, how do other jurisdictions define improper and disgraceful behaviour?

Ms Carmody: Lots of them have exactly that terminology. That is the terminology used in a number of acts.

Ms PEASE: In other jurisdictions; I know you have talked about Queensland.

Ms Carmody: We could look at that a bit more, actually, to give you some more specific examples; however, they will be taken from case law.

CHAIR: It may change on a daily basis as well, for someone going for an early morning jog for example.

Ms Carmody: Yes and other examples.

CHAIR: Do you have a view on the utility of your own-motion powers under section 329 of the act?

Ms Carmody: I am delighted by them.

CHAIR: Terrific.

Ms Carmody: Mr Springborg asked me the same question. Hopefully, I will never have to use them. Presumably they are there in case, in a moment of political intrigue, you all said, 'We don't want this to be looked at, because they will find that we did it, too.' I imagine that is why it is there. I think it is important to have the ability to use that provision, but I do not imagine—

CHAIR: It is almost a reserve power in that sense, do you think?

Ms Carmody: Yes. It is just if the committee says, 'We don't want anyone to look at that; it is fine and does not bother us,' but I am sitting here thinking, 'Well, it's not fine.' As I said, I hope sincerely I will never have to even think about that.

CHAIR: There is also the CCC's protocol around section 329 notifications. That has been settled for some time. Are there any opportunities around that for improvement or change?

Ms Carmody: I have not looked at it recently or in enough detail. I am sorry, I could not assist you with that.

Mrs MULLEN: An issue has arisen in relation to whether the commission is required to notify of an officer's improper conduct prior to employment by the commission. I was interested in what your position might be in respect to the application of section 329 and the prior conduct of commissioned officers?

Ms Carmody: That issue has been canvassed over the years. I think integrity organisations such as an anti-corruption body, ICAC or whatever need to be seen to be of as high a calibre as they can. The last thing you want to do is find that someone has been employed and their history would have been of concern. For that reason, I think it is perfectly appropriate that everything from their prior history should be there before you as well.

Mr Kunde: I do not think that would apply to (d), (e), (f), (g) and (h), which all seem to refer to the conduct of a commissioned officer at the time. I do not see why it should not apply to at least (a), (b) and (c). Paragraph 41 of the commissioner's submission talks about the definition of what has to be reported in Western Australia. You will see what the commissioner is saying—

> It relates to any matter or information received in any way by the commission which concerns or may concern the conduct by act or omission, publicly or privately, of an officer of the commission in an adverse manner in that it may directly or indirectly reflect adversely upon the person's fitness for office as an officer of the commission.

That is reported under their legislation.

Ms Carmody: That is an example of trying to catch every category and what you end up with. As lawyers, we have to sit there and we have to take that first little bit and think, 'Does that apply in this case?' and then take the next little bit. Sometimes you have to add them all onto each other. It is a fraught exercise. That is why you really need to be qualified to do that. That is why I defer to your people here to attend to these possible changes.

Mr CRANDON: Reflecting on what you just said, it seems to me that the lawyers started it, arguing and debating what a word means et cetera.

Ms Carmody: We started it to save our clients from injustice.

Mr CRANDON: My substantive question is: do you have any comment on the way that section 329 notifications are currently managed where the conduct relates to the telecommunications interception regime?

Ms Carmody: Yes. The section 329 notifications are completely appropriate. My comments go more to the act itself. This is something that has concerned me for some time. There is no requirement in the act for a breach to be conveyed in any way and there is no sanction for the breach. At the moment, when there has been a breach with respect to a telephone intercept warrant a report needs to be given to the state Attorney-General. It is a matter of whether someone sits in an office, looks at those reports and says, 'This needs to be attended to.' The notifications are fine; it is just a question of the consequences. That is something that I might or might not raise in the conference that I talked to you about this morning. We do not know whether they will descend to that level of detail, but that is one of the issues.

As PIM—and I have explained the role of the PIM to you—I took the view that the entity itself must report its breach. It could be a breach of a telephone intercept warrant, for example, if for whatever reason the telephone intercept went for longer than it should have. There is what is called a 'compliance affidavit' in respect of surveillance devices. The entity has to come back and say, 'We

had a surveillance device in someone's house for 21 days and because five officers were ill on the same day we could not get back in and get it out within the time that we were supposed to.' Under the TI Act, there is no requirement that anyone tells us about a breach, so you have to rely on the entity itself coming back and saying, 'We're sorry, but we realised that this has happened.' The question then is what you do. It is always difficult, because there are no sanctions.

Theoretically, and one thing I have been thinking about, is that you just go back to the judicial officer who authorised the warrant in the first place. As I said, if it was a surveillance device as opposed to a TI device you would go back to the Supreme Court. You would tell the judge what happened. The QPS or whoever would discuss it. It would be for the judge to decide their position. They might revoke the warrant as of a certain date. They might say that all of the information discovered under that warrant can no longer be used. I do not know what they would do. That is one thing that bothers me with the TIs, but not with respect to the actual section 329 notifications.

Mr CRANDON: Following on from that, would it be an issue if it went past the 21 days but there was no ongoing monitoring beyond the 21 days?

Ms Carmody: Yes. With respect to a warrant that has a final date, anything recovered, whether it be by intercept or otherwise, cannot be used, because in most circumstances it was unlawfully obtained. Those cut-off dates are absolutely critical.

Mr CRANDON: You lose access to all of the—

Ms Carmody: Yes, except in exceptional circumstances where you could argue why you should be allowed to keep it, but in general terms you cannot use it. I would again defer to the CCC to give you a better explanation of that, but that is why the time is so important. On the TI warrants, technically you do not have a time because the telecommunications companies are the entities that record. As I understand it from the CCC, they set the recording devices to operate at midnight. You do not have to say, as you do under the other warrants, that it was issued at 3.28, so that everybody knows that it expires at 3.27 in 21 days. A TI warrant expires at the end of the night. There are little technical differences between them. As I said, there are exceptions—and I defer to the CCC—when you can get that evidence in, but in most cases the defence will say it was inappropriately obtained.

Mr CRANDON: Can you apply for an extension?

Ms Carmody: You can ask for an extension of the warrant, but you would not normally be able to convince a court by saying, 'We accidentally discovered this, so can we please have a warrant to cover that period?' I know of an example where they were authorised under a warrant—and I will have to dig around in my brain for the detail. This was before the TI intercepts. They were putting a surveillance device in a kitchen somewhere. While they were there they saw some drugs on a table. It was something along those lines. This is a fairly classic example. They noted that the drugs were there. The issue then became whether they were obtaining information that was not provided for under the terms of the warrant. The warrant was just to go in and put in the device and then leave. Were they allowed to use that? It became quite a difficult area, whether or not they were allowed to do that. There are sections of the Criminal Code that provide for what you need to do in those circumstances. Again, I will defer to the experts behind me. Again, it shows how important are the terms of the warrants.

I think I discussed this with the previous committee: concerns were raised by the Supreme Court that putting a surveillance device in someone's bedroom and, therefore, being able to watch a sexual act should not be allowed under any warrant, unless there was evidence that the crime was occurring in that bedroom. I think I mentioned this to you on the last occasion. If they saw presumed drug traffickers coming to the house and two minutes later the blinds in the bedroom were shut, they might accept that that is where the transactions are occurring. In those circumstances you might be allowed to put the device in the bedroom. Other than that, you have to think about the public's view, which is the role of the Public Interest Monitor. What would the public think of anti-corruption agencies using their investigatory methods to invade someone's privacy by being able to watch sexual acts between parties? Why don't you ask the CCC these questions?

Ms PEASE: We are about to.

CHAIR: Stay around. Are there any other questions from members of the committee at this stage? I think I have covered off on everything. Thank you very much, Commissioner Carmody, for your time both this morning and this afternoon, and for the submission that has been put in. Thank you, Mr Kunde, for your expertise and assistance. Thank you very much for your presentation to the committee this afternoon.

Ms Carmody: Thank you.

MacSPORRAN, Mr Alan, Chairperson, Crime and Corruption Commission

O'FARRELL, Ms Jen, Acting Chief Executive Officer, Crime and Corruption Commission

CHAIR: I now welcome Mr Alan MacSporran and Ms Jen O'Farrell from the Crime and Corruption Commission to this afternoon's public inquiry. Good afternoon to you both. Mr MacSporran, I invite you to make an opening statement, after which we will delve deeper into your statement and your submission and ask questions.

Mr MacSporran: Thank you, Mr Chair. Thank you to the committee for the opportunity to come along and speak to you today on what we think is a very important issue. As the committee would be aware, section 329 of our act was substantially amended in 2014. The 2013 Fitzgerald documents issue, which gave rise to the amendments, has been well documented. The amendments to the section were one of a suite of legislative changes following that issue. One of those, if I remember correctly, was the creation of the role of CEO to split the administrative and operational functions between the chairperson and the CEO.

At the outset, I think it is fair to say that the significantly expanded section 329 has been effective in bringing to the committee's attention conduct of commission officers which meets the definition of improper conduct. Whether or not the conduct is, in the majority of cases, really improper, in the ordinary sense of that word, is clearly, in our view, open to debate.

It is the breadth of the definition of 'improper conduct' that has ensured that this committee has in recent years received unprecedented detail about matters which would likely never be required to be reported in any other department or body. If they occurred in the Premier's department, for example, or any other public sector agency, many of the matters reported to the committee would be managed in an appropriate but expeditious way. I hasten to add that none of the comments I am making now should be interpreted as diminishing the legitimate value and oversight of the activities and conduct of commission officers. The issue is that the disproportionate resources presently being applied to relatively minor matters is something that requires, in our view, careful examination.

In this regard, we have prepared a summary of matters notified under section 329 since May 2014, when the amendments took effect. I think you should have a document we provided to the committee secretariat which is a summary of the categories of notifications made since that time. That analysis reveals that 87 matters have been notified to the CEO where it has been determined that the obligation to notify the committee does not exist. These are nevertheless reported to the committee at each meeting of the CCC and the PCCC. I think that is an important point. Any sort of breach is still notified to the committee, whether it is a notification under 329 or not.

CHAIR: We only received your statistics yesterday so we have not had much of an opportunity to go through them at this stage. I just let you know that that is the case. I appreciate the point that you have made. You notify irrespective of section 329 in that sense?

Mr MacSporran: Yes, in the sense that we give you a list of matters that come to us and that we have dealt with. We do not outline any detail about how we have dealt with them. They are all there as records of what has happened. In addition to that, we notify you under section 329. In the period we are talking about there were 67 notifications made under 329, and the majority of those were under section 329(4)(d) or (g).

If I could take you very quickly to those figures, on the first major page you will see bar charts. Of the 67 notifications, only one resulted in termination of employment and two resulted in disciplinary outcomes. The outcomes of those notifications more generally resulted in the provision of managerial guidance—that happened in 55 per cent of times—or changes implemented to improve compliance, provide additional training or make policies clearer. Of the matters notified, only 12 per cent were determined to not be substantiated or dismissed for lack of evidence. You will see that the bar chart has most of the notifications being both 24 of the 67 under subsections (d) and (g) and the rest being relatively minor numbers under each of the other subsections. The outcomes are in the graph below. You will see that 37 of the 67 were managerial guidance.

The one that was terminated—without going into names or full details—involved someone who was charged with fraud on the commission and stalking someone. The point I make here is that a lot of these matters—however you want to characterise them—are captured by subsections (a) and (b) of 329 because they are clearly, as in that case, deemed to be conduct that is improper or disgraceful.

As wide as those phrases are, I think in general terms we all understand from an employer point of view what conduct is and is not disgracefully improper—for instance, if it is capable of bringing the organisation into disrepute or reflecting badly on the organisation itself. You will have a chance to look at those figures more generally, but they are the main points that arise out of them.

CHAIR: In respect of the person whose employment was terminated, under what paragraph of subsection (4) was that? The graph does not show that.

Mr MacSporran: It was (a) and (b).

CHAIR: It could fall under more than one of those definitions, could it not?

Mr MacSporran: It was under (b), I am told. The breakdown of those is in the pages that follow. That one in particular is on page 3, under (b). You will see there are four examples of (b). One of them is (b) and (c). It is the first subcategory (b). It is item 1405A4. It is four years ago that the person was terminated.

Another example is of a police officer. The police officers in our organisation are on secondment. The CEO has the right to terminate that secondment or bring it to an end at any stage with no reason given. An officer was reported for, in a private capacity, using his police powers during the course of making a private purchase. He behaved badly and then used the police computer to look up some details about this person he was dealing with in a private capacity. That secondment was terminated as a result of that. The matter was notified to the committee under paragraph (b). It is again improper—(b) and (c). They are examples of how most of these matters could be characterised under the first couple of subsections, as opposed to having to try to articulate further subsections which become wordier, as the parliamentary commissioner has just said to you.

It can be seen that, whilst the breadth of the definition of improper conduct has resulted in an effective system of notification being established, the question of whether the system is efficient is what really needs to be considered. As we outlined in our submission, it is estimated that approximately 25 per cent of the CEO's time is spent on administering the 329 process. It is difficult to imagine such an impost was contemplated when the legislature took the prudent step of creating the CEO's position as separate to the chair's role. As we have indicated also in our submission, the director of integrity services—another very senior position within the organisation—spends about 30 or 40 per cent of her time dealing with recommendations about improper conduct according to the protocol.

The way it works is that the CEO is notified of the complaint. The complaint is delegated to the director of integrity services, who might then delegate an investigator to look at it. A report is compiled. The director of integrity services then compiles a recommendation in a report to the CEO. Then the CEO compiles a report that comes to you as the committee. It is a huge administrative impost and takes up that percentage of the time of those senior officers.

The figures, along with the relatively high number of what I would call minor managerial matters, revealed in the analysis are truly unattractive statistics. I say this because the commission is devoting a significant amount of its resources on an exercise which adds little if any value to the effectiveness of the committee's oversight. If not for the legislative requirement to do so, it would be hard to otherwise justify the expenditure of such resources on these arguably low-level matters.

In that context, in most employment situations a CEO would be responsible for these sorts of matters and the disciplinary and corrective action that was taken. That is in large part where it should rest, in our submission. The CEO's role is to deal with those matters. All the routine ones—most of which you have seen in the notifications—would be dealt with by way of corrective managerial guidance, change in policies, extra training and all the ordinary things you would expect to happen in an organisation of our size, rather than having the extra layer of the reporting process to the committee in addition.

I have personally observed that the very onerous notification regime established by section 329 in its current form has focused the attention of commission officers on the need for transparency and accountability. However, a balance should be struck between transparency and getting results. In an organisation which values agile and creative ways to uncover corrupt conduct, section 329 may in fact stifle that creativity or agility in investigation matters for fear of a referral to the parliamentary committee if, for example, a policy is breached. Attraction and retention of sufficiently courageous investigators could become problematic and lateral thinking could be discouraged for the same reason. These are good reasons to temper the current language in section 329 to focus on the type of improper conduct no organisation should accept without consequence.

There is reference in the Bar Association's submission of October last year at page 10 to what they perceive to have been the proper intent of the legislature in amending 329 to capture conduct that was more akin to corrupt conduct than minor level misbehaviour. They made the point endorsing what I have just said about needing to encourage investigators to be agile and concentrating on their role rather than being fearful of breaching a policy resulting in referral to the committee and the detail and stress that is associated with that.

We have given consideration in our written submission to how section 329 might be tempered. The most problematic provisions are subsections 329(4)(e) and (g). Subsection (e) prescribes that improper conduct is failure to ensure a register is kept up to date or documentation is kept on a file. The vagueness of this criteria is problematic. As our analysis in the document provided to you reveals, subsection (g)—which is noncompliance with a policy—is also problematic because the threshold is so low, noting that some circumstances may be suitable for exemption from adhering to policies on the basis that the exemption has the appropriate authorisation. We commend the initiative the parliamentary commissioner has taken to attempt to limit the breadth of some of those subsections to more confine them with what we think may have been intended originally.

It is worth noting that some of the subsections could be subsumed into other categories of improper conduct. For example, subsections (d) unauthorised disclosure, (f) unauthorised exercise of a power and (h) abuse of power are all categories of conduct which would be captured by subsection 4(a) in any event as they are disgraceful or improper conduct in an official capacity.

In notification under these subsections, the response in most instances is managerial guidance. That guidance would be given in any event, and but for the section 329 obligation that guidance would often be given much more promptly. As you would appreciate, the impact of the guidance will often be lost when it is given weeks or months after the event, and that arises out of the protocol which requires us to report and then for you to come back to us with a proposal as to whether you agree with our recommendation or whether there is another system you would like to put in place. I am not being critical. It is just a fact of administration that that can sometimes take months and that issue cannot be resolved at our end until we get the imprimatur from you.

We have set out in our views on the protocol issue what we would like to see happen there. The first is that the CEO should be able to delegate the reporting obligation to take some of the responsibility off that person's shoulders. Secondly, we should be able to commence the investigation before you give us the go-ahead, as it were. Bear in mind that, whatever you came back to us with and whatever you did, we would be very keen to accommodate your recommendation or request, even though we are not obliged to because it is our role. We have always taken very seriously what guidance you have offered and what suggestions you have made. They can be taken up even if, in an extreme case, we might have finished the investigation and be ready to report back to you, but if you thought you had another avenue you wanted explored we would undoubtedly take up your suggestion and carry on in that way.

The other thing to note—and you would have seen this in your contact with the parliamentary commissioner—is that she has a wide range of powers including now own-motion powers. She has a good working knowledge of how our organisation operates through the contacts she has with us face to face. The auditing process she goes through brings to light many of the issues that might be relevant to section 329 or other disciplinary issues. Anything that she sees or Mitchell sees in the course of their dealings with us can be the subject of a request for further information or a request for a report from the CEO or other responsible officer as to what is behind that behaviour and what we have done about it. If necessary, there could be a protocol such that everything that comes to the CEO by way of a breach of any policy or guideline or any other minor matter that might not have to be reported to you under the revised system could nevertheless be the subject of an overviewing report. It could be just verbally to the parliamentary commissioner that these matters have come up, there are 10 in this category, they were all dealt with this way and that is explained, and any further information the parliamentary commissioner wanted could be provided. Indeed, it could go as far as the parliamentary commissioner thought was justified.

There are mechanisms in place already to ensure, as is the intent of all of this, that nothing happens at the commission that is a serious aspect of misbehaviour by an officer within the commission that will go unnoticed. It is just a matter of how we can ensure that continues to be the case without an overly onerous reporting obligation that has us both—the committee and the agency—bogged down in paperwork for little return, really.

The comment about the confidence the committee has shown in the way the commission operates is not meant to say that there is no need for oversight. What it is meant to do is to demonstrate that the message has resonated since the Fitzgerald document issue in 2013. I think we

have some runs on the board since then both under the current parliamentary commissioner and the former commissioner, whose term went for about two years after the amendments came in. He will be able to tell you something about what he noticed in the process.

We accept that the protocol and the requirements in the legislation have to withstand changes in personnel, but we would say that we are an organisation that now has demonstrated pretty conclusively that we are aware of the seriousness of our obligations and that any serious matters will be dealt with, as they should be, seriously. That is really all I wanted to say by way of opening. I am happy to answer any queries.

CHAIR: Thank you, Mr MacSporran. That was pretty comprehensive. I will throw it open to questions.

Mrs MULLEN: In your submission it states—

There is now a high awareness of the effect of s.329 amongst middle and senior managers, and the obligation on all commission officers to report possible improper conduct permeates everyday thinking.

Would a change to section 329 potentially diminish that awareness or that permeation?

Mr MacSporran: I do not think it would because we have a very high expectation, which is understood, for self-reporting. It is part of a culture that we have developed. It is part of our 'One CCC' culture and the self-developmental culture. You are expected to be very frank about your own failings, because, as an agency that deals with the sort of work we have, any failure to report is serious. What is more serious is an attempt to cover up a breach. That has been very clearly indicated. The expectations are very high and there is a very high level of self-reporting.

What we are trying to avoid is people being afraid of the consequences that go not just to us but to you against those individuals for things that are essentially quite minor and that can be dealt with in the ordinary way. We take the view that for truly minor matters and for first breaches of what might be more serious matters the first question is, 'Has it been reported?', and that is good. The second is, 'Why did it go wrong?' and the third is, 'How can it be corrected in the most effective way?' We do not think the most effective way in any circumstance is to beat someone over the head with the details. It is to understand where they went wrong, counsel them and absolutely guarantee that it does not happen again.

A lot of these instances are people who are new employees. In their first couple of days they send out an email that breaches some policy or they incorrectly record something. That is easily fixed, but under the current regime we have to report that to you. They are new and they are being reported to you in their first couple of days. I do not think it will affect the level of understanding and obligation in their own minds that we expect them to report everything and we need to know about it, firstly. That is the most critical thing. Secondly, we deal with it in the most efficient way to make sure it does not happen again.

Mrs MULLEN: In your submission it states—

... in light of the goodwill that exists between the Committee and the CCC, the version of s.329 immediately prior to amendment in 2014 would adequately address ...

As you appreciate, there has not always been that goodwill between the CCC and the committee. I also note the comments of the parliamentary commissioner that legislation needs to stand on its own. I am interested in your comments in relation to that.

Mr MacSporran: I would agree in large part with that sentiment, but the problem is that the more you try to set out and articulate the matters which precisely have to be reported and the categories I think you get into trouble. You create a minefield because it is difficult to characterise and cover every instance you want to by specifying it. What is far better is what we have in (a) and (b), which is broad enough to cover most of these things, if not all of them.

There is no doubt that a disclosure of confidential information that is not of a minor or trivial nature is disgraceful and improper conduct. There is no doubt about that. It may well be a criminal offence. The more you try to set it out, the harder it becomes—oddly enough—to reflect the intent behind it. The reality is, as I was saying before, that the employment of a CEO specifically to deal with these sorts of things as part of the overall governance of the disciplinary system within the organisation is no different from any other employment place. It is their job to exercise judgement about how serious a breach is and how it should be corrected. Clearly, if this protocol is changed it will be on the CEO's shoulders to report appropriately, and if they do not it will become apparent pretty quickly by the parliamentary commissioner noticing it or you noticing it if things are not coming through at all. You have interrogated the other matters that have been reported and why they did not come to you. It will become apparent very quickly that the system is not working.

I have no fear at all that that is going to happen. With the way we operate, our reputation and our credibility are critically important to us. The last thing we want is to have a suggestion that some employee of ours has done the wrong thing and we have tried to cover it up or fudge it or let it go through to the keeper because we are worried about anyone else finding out. We are the agency that trumps transparency and accountability. It would not be a good look.

Mrs MULLEN: If (a) and (b) were to become the main indicators, we have had some submissions indicating that there needs to be a more explicit definition of 'disgraceful or improper conduct'. What are your thoughts on that?

Mr MacSporran: I do not think you do, frankly. I think there is a pretty widely accepted range of conduct that falls squarely within those terms. As Ms Carmody mentioned, there is a body of case law in the disciplinary sense about what those terms mean. You could retain (c)—corrupt conduct is an obvious one, but if you want to spell it out there—and (d) disclosure of confidential information as a separate important category, although I think it would be caught by the others anyway. If you wanted to have those four categories which are sufficiently broad, I think that would be sufficient, frankly. I do not think you need to play with concepts which in the disciplinary regime have a pretty well understood meaning.

The other thing to note is that if there were a concern by us—if we were debating internally with the CEO about whether something was truly improper conduct to be notifiable to you—I think the answer would be that we would take a conservative approach and notify it anyway. You might say, 'Thanks but we did not need to know about that.' We will know next time. That is how these things would work, and that is what we have been doing. Under the current regime we really have no choice. Almost everything has to come your way, and that is the problem. We are trying to avoid that.

CHAIR: That leads to the question from your perspective of what you consider to be disgraceful and improper conduct in those circumstances. You say that you take the conservative view but, nonetheless, you must have a view about what the appropriate threshold for an officer is. Perhaps it also goes to what the commissioner said in terms of minor or trivial and what the examples there might consider and where you see the line falling.

Mr MacSporran: I think the obvious example is criminal offences. That is clearly disgraceful and improper. Leaking information would be the same. Dishonesty of any sort is another clear example, as is sexual harassment or misbehaviour in the workplace. Some degrees of bullying could come into that category.

CHAIR: Personal behaviour in that sense?

Mr MacSporran: Yes. Personal behaviour outside the commission when off duty if it brought the commission into disrepute or created reputational damage, as it always would if a commission officer is found to have done something outside the commission, would qualify. One of the examples in the material refers to an appointment being withdrawn. That was private behaviour. Domestic violence—not physical violence but abuse—was something we thought was entirely inappropriate and we withdrew the appointment of that person. That sort of conduct qualifies. They are really obvious when you think about it. Anything that is going to reflect badly on us as an organisation in having people like that working for us and not maintaining the high standards that we expect would qualify.

CHAIR: Does it depend on the chair and the CEO's subjective view of that? What one might consider would be improper or disgraceful is not necessarily what another would do—abusing a referee at a football match, for example.

Mr MacSporran: That would come close because it is not the sort of conduct you would expect of someone who is employed by us, but if it was a one-off in a heated exchange where, for instance, the child of an officer at the commission was effectively assaulted on the field and the referee declined to take any action and that was how the heated discussion arose—it is very hard. You can see immediately how you can categorise all of these things. I do not suggest that we would be the sole arbiters—the CEO and me—because I think these categories are fairly clear. I do not think there would be a case where it would be our judgement to the exclusion of others who might think quite differently about these things. You would have to treat every one on its merits, but I think you know when you have one that is serious and you know when you have one that you think can be corrected as it was an inadvertent failure to follow a policy as opposed to a deliberate attempt to circumvent it. That might be much more serious, especially if it has serious consequences. If someone, for instance a police officer, deliberately gave a judicial officer incorrect information to ensure a warrant was

issued—a search warrant or a surveillance device warrant—that would be something we would terminate the secondment over and report to you immediately. That is serious, but inadvertent failure to include an element through overwork, tiredness or whatever—a one-off, no history of that—would be quite different and quite minor and would be met with managerial guidance and correction.

CHAIR: Would it be your view that the changes that were brought in in 2014 led to the commission having a close look and reassessing its actions in relation to the transparency and openness that you mentioned earlier in your opening address so that officers are now focused very clearly on the need to comply with what may seem trivial or somewhat frustrating policies or rules or sometimes things designed to slow you down rather than speed you up? Has it led to, if you like, a change in culture within the CCC itself that you are trying to drive with your 'One CCC' program?

Mr MacSporran: To be fair to the staff, I would not say that it has resulted in a change. I would say it has resulted in them becoming acutely aware of their obligations so that they are now front and centre of mind as opposed to an awareness but possibly not the degree of importance attached to it. I think, in fairness to us, the Fitzgerald inquiry documents issue was fairly limited in terms of its exposure to our staff and who was found to be in breach of the obligations. It was a fairly confined part of our staff who were involved in that exercise. I think the rest of the staff, I would be confident, were always aware of the obligations, and the self-reporting that has continued since is a good indication of that, but I would say that there is now a heightened awareness because now everything has to be reported and they understand that. It is just that it is creating what we would say is too onerous a burden on them.

Mr CRANDON: You seem to be arguing against your own request or your own suggestions in your report. Is it not these changes that were made in 2014 that have heightened the awareness of everyone? We are not just talking about now under Alan MacSporran and acting chief executive Jen O'Farrell. We are talking about into the future; we are talking about the next chairperson, the next CEO and the one after that and the one after that. This heightened reporting is there. I am looking through this report that you have given us in relation to numbers. I wonder why you even bothered under (e) and (g): no investigation required, minor noncompliance, no action or minor incident, immediately rectified. According to 329(4) you did not have to report those, but you did report them. Was that because you decided to go that step further or you were trying to build some numbers here to support your argument about 329? I am just wondering why you have reported as many as you have reported, given that you have taken no action anyway on some of those. You are arguing against your own suggestion.

Mr MacSporran: I do not think so, with respect. The obligation to report is pretty clear. I cannot talk about the individual case. We might dig that up. It might be that after the investigation was done it became clear there was nothing at all in it but at face value it was reportable because the threshold is so low that most things are reportable. Our point about the figures is that a lot of them go nowhere because they are truly minor.

Mr CRANDON: I am not sure about that. There is managerial guidance on quite a few occasions, so that is not going nowhere.

Mr MacSporran: Under (4)(e) there is no discretion. If it is a failure to ensure a register is up to date it has to be reported.

Mr CRANDON: '329(4)(g), no investigation required, minor noncompliance. 329 compliance improvements'. Some positive things have come out of this that had nothing to do with (a), (b) and (c). '329(4)(f), 329(4)(g), compliance improvements, managerial guidance'. It seems that there are a lot of positives. I reflect on what you were talking about in relation to the amount of time taken up in this. Was there additional funding given? When these changes were made did the CCC receive additional funding to take it into account?

Mr MacSporran: No.

Mr CRANDON: You got the same dollars through the door, and in future years what happened? Did you put in a submission that you needed more money or did you say, 'No, we are right'?

Mr MacSporran: We got more money in the sense that the CEO's position was created, so that is one indirect way of funding it, but we think we can do a bit better with the CEO's time than 25 per cent of it taken up with this sort of thing. The sorts of things you mentioned as positives would have been done anyway. That is routinely done by us. We do all of that. What we are saying is that we do not want to report to you about it all the time. You can have a look at it if you want to.

Mr CRANDON: By all means, but that is under your watch. I can reflect back to 2013 and 2014. I was here. I saw what went on in that period of time. Some of the issues that you raised a short while ago were one aspect of the CCC in those days back in 2013. It was one area of the CCC, but as we delved further we discovered that there were more issues in other areas. You highlighted one particular matter—the Fitzgerald matter—but we discovered that there were far more things in other areas, hence the reason these changes were brought in. They have just improved things and under your watch there is a good relationship, no issue and that is fine, but what about the future?

Mr MacSporran: All I can say is that I think the culture is such that I am very, very happy with the way people are self-reporting. We deal with those matters, we think, appropriately, and that is well and truly embedded in the last four years and certainly the last three that I have been there. That is what I have seen. That is all I can talk about, I suppose. I was not aware there were other issues apart from the Fitzgerald documents issues that gave rise to these amendments. I accept what you say about that. All I can talk about is what is happening and has been happening in the last three years, and over the last four years the figures indicate that what I am seeing probably started before I got there and I have continued it on.

Ms PEASE: Thank you for your submission and the report with regard to the statistics. You mentioned that there are a number of issues that you have reported that do not fall within section 329. Is there any consideration that section 329 is not sufficient for you to meet the requirements of reporting?

Mr MacSporran: No. I think the breadth of it really means that most things, if not all things, really get reported, and that is the issue. I do not think you can expand it further to correct the problem. I think it needs to be constrained a little to make it the serious matters we properly report to you and the rest of it we deal with as employment issues that we would normally deal with anyway. If, for instance, we have not reported something because we do not think it is serious enough but during the course of our inquiries into it something else emerges that makes it more serious then we would report it. All these things are available to us to make sure you do not lose oversight of any of this at all.

Ms PEASE: Going back to what the member for Coomera was talking about in regard to the 329 reports that fell outside of (d) down to (h), would they possibly have been reported under (a), (b) or (c) of section 329?

Mr MacSporran: Yes.

Ms PEASE: That is the argument that you are trying to put forward: they would have likely been reported regardless by falling within (a), (b) and (c)?

Mr MacSporran: I think most of them would, but we are saying that there needs to be a proper understanding of the CEO's discretion to report the serious matters, which do come within (a), (b), (c) and (d) if you like. Our point is that, under the current regime, anything serious in any of those other categories would be captured by the first two limbs anyway.

Ms PEASE: You answered a question from the member for Jordan with regard to the terminology or understanding of improper or disgraceful behaviour and that it could be your interpretation or the CEO's interpretation. Is there any consideration to formalise those in a different way?

Mr MacSporran: I think that is problematic. As I said before, the more you try to define what those terms actually mean and what they do not mean the more you get into trouble. I think you do need to have a broad enough definition that gives the CEO in this case some discretion as to what falls within it and what does not. I think the reality is that we all know what those categories are without having to spell it out. By spelling it out you might end up unintentionally cutting out some issues that should be included. There are myriad different combinations of circumstances that you cannot possibly legislate for. That is why they have these broad terms: to give that all-encompassing role.

CHAIR: Dealing with the practicalities of it and obviously not referencing or referring to individual matters, how does the commission go about dealing with 329 notifications and communicate with your staff in relation to that? How do you manage that process in terms of how that goes and the impact that that has on the staff who are subject to section 329 notifications—adverse impacts on staff, delays and that type of thing? You touched on it briefly in your introduction.

Mr MacSporran: I might get Ms O'Farrell to talk about the detail of that and how it is conveyed to staff. It starts at the induction. She will flesh that out for you.

Ms O'Farrell: Before commission officers commence employment with the commission they are all provided with the code of conduct. On day one they attend an induction and at that induction the requirements of section 329 are conveyed to them. In terms of the process for when someone

may be subject to a notification under 329, if it is self-reported then, of course, the commission officer is aware that it may be reported to the committee. They are not communicated to about whether or not there has been a notification until after the committee has responded to the notification.

CHAIR: After this committee has responded to you?

Ms O'Farrell: That is correct. The protocol says that no communication should be had with the commission officer. If the commission officer does not self-notify and it is picked up by their supervisor or another commission officer then that commission officer will be unaware of any matter regarding their conduct until after the committee has advised that it agrees with our recommendation, for example to investigate the matter. If the recommendation is managerial guidance, for example, it is only at that point that they would be aware of the notification.

In circumstances where the outcome of a notification is neither an investigation nor managerial guidance but it is about systemic improvement, then it is often the case that the CEO will send an email to that work area that is affected by the issue or, in fact, it could be across the entire commission. An example of that might be where there might have been a couple of instances of an improper or inappropriate exercise of a delegation. As CEO, I might send an email to all staff reminding them of their obligations to ensure that they have regard or refer to the current instrument of delegation to assure themselves that they have the delegation to authorise a payment or make a disclosure, for example.

CHAIR: What would happen in the circumstance where it might be someone involved in an ongoing investigation of a more serious nature?

Ms O'Farrell: Certainly our position and our protocol is that that person, if they are unaware, is not to be made aware of that.

CHAIR: Sure.

Ms O'Farrell: Any officer who might be a witness to that conduct or in that investigation is warned by the investigator to maintain the confidentiality of the investigation.

CHAIR: But for the officer involved, it may involve relocation, reassignment or something like that. Presumably, that would be difficult to achieve without some explanation.

Ms O'Farrell: Yes, indeed it would. We have not had that instance yet, to my knowledge. There may well have been alternative duties, for example, where someone might have been suspected of fraud. If that was fraud on the commission, I would expect that that person, without notifying them of the allegation, would be able to be redeployed to other duties where they are not handling cash or portable or attractive items, for example, to the extent that we could. Otherwise, we would suspend them on full pay while the investigation occurred and then, of course, they would have to be aware of it.

Mr CRANDON: I am sure you are aware that your term as the acting CEO has been extended. We have given bipartisan support for that to occur until 24 August 2018 or until someone has been appointed to the role. Given that we have such a long time line—the current CEO, Mr Forbes Smith, wrote to the Attorney-General back on 28 February—we are talking about the situation where—

CHAIR: Michael, can I ask where you are going with that?

Mr CRANDON: Given the time line from 28 February, I am just trying to establish what input you may have had in relation to ensuring that a timely process was undertaken in relation to the replacement of the retiring CCC CEO.

CHAIR: That is not really the subject of what we are talking about here. We might reserve that for another time, if that is all right with you?

Mr CRANDON: Sure. If you could take that on notice?

Ms PEASE: No, it is not part of the public hearing.

CHAIR: Thank you. It is not appropriate at this hearing. The chairperson does not have to answer that question here. We will resolve it at another time at another location. Thank you, Mr MacSporran, for your presentation. Ms O'Farrell, thank you for your presentation. Thank you for your submission and your time here this afternoon. The committee appreciates your time in this inquiry. Thank you very much.

Proceedings suspended from 1.34 pm to 1.46 pm

CHAIR: We will reconvene the meeting. In the break, the committee met privately. During the discussion with the CCC, reference was made to a document that we received yesterday afternoon. Normally we would take some time to look at that document. As it was discussed in some detail by the CCC and it contains some statistics in relation to reports under section 329, the committee has resolved to publish that document. The document is now available for people who are here today. Members of the Bar Association who are next and anyone else in the public who is interested can look at it. It is only a three-page document. Ms Wilson, I am not sure it will make any difference to your submission, but you have it there in front of you.

Ms Wilson: Thank you.

MAC GIOLLA RI, Mr Eoin, Member, Criminal Law Committee, Bar Association of Queensland

WILSON, Ms Elizabeth QC, Chair, Criminal Law Committee, Bar Association of Queensland

CHAIR: The Bar Association of Queensland has made a submission. I invite you to make a brief opening statement, after which members of the committee may wish to ask you questions or have a discussion in relation to your submission and the inquiry.

Ms Wilson: Thank you, Chair. I thank the committee for inviting the Bar Association of Queensland to make a written submission and to be here today. My name is Elizabeth Wilson QC. I am the chair of the Criminal Law Committee for the Bar Association of Queensland. I am here with Mr Eoin Mac Giolla Ri, who is also a member of the Criminal Law Committee.

The effect of our submission is really summarised at page 10, where we make a number of, although very short, points about section 329. First of all, it is the Bar Association's view that, where section 329 refers to 'the notifier suspects', that suspicion should be a reasonable suspicion. That elevates the threshold a degree, which may assist. To have a suspicion is very wide, with actually no threshold. Making it a reasonable suspicion requires some threshold, although one that is very easily met. In a sense, that is the focus of our submission.

One thing that we have spent some time in setting out in our submission is the reference to corrupt conduct. Section 329 refers to corrupt conduct. The Bar Association places a lot of importance on the definition of 'corrupt conduct'. In our submission we have spent some time expressing our views on that. That may or may not be in the remit of today's hearing, but we are here to be of any assistance that we can on any of the matters that we have raised in our submission. We are happy to take any questions or provide as much assistance as we can.

CHAIR: Thank you very much for that very brief introduction. Do members of the committee have any questions that they would like to raise on the Bar Association's submission, which is quite detailed and thorough? Obviously it was with the previous committee and repeats some other things from previous submissions from earlier inquiries or changes undertaken to the legislation.

Ms Wilson: Yes. We have drawn a number of our previous submissions into this submission. I appreciate and acknowledge that the focus of today's hearings may only be on a very short part of our submission, so our time here may be brief.

Mr Mac Giolla Ri: The concern in relation to section 15 is with the current bill format and that it will exclude some very important areas, because it has gone for an exhaustive list of what might be corrupt conduct and taken out the earlier definition of 'corrupt conduct' in its present form. Corrupt conduct is important because it is the CCC's fallback position—

CHAIR: Mr Mac Giolla Ri, can you take us to the page in your submission where that is? It might help us a little.

Mr Mac Giolla Ri: It is at page 5, to start. You will see under 'The Act, currently', and looking at (b) in the middle of the page, it refers to 'it is not honest or is not impartial', 'involves a breach' or 'a misuse of information'. Turning to page 8, (b) now states that the conduct must now include collusive tendering, fraud relating to an application for a licence and in relation to those areas outlined, illegally obtaining a benefit in the form of payment or evading a tax or fraudulently obtaining an appointment. Those are quite important areas to have covered by 'corrupt conduct'. What might be excluded, for example, is if a police officer just decides to look the other way in an investigation because it involves a mate.

CHAIR: Where would you say that would fall under your suggestion on page 8?

Mr Mac Giolla Ri: It does not fall. That is the current proposed amendment. That is the proposal.

CHAIR: I am with you, yes.

Mr Mac Giolla Ri: Our submission would be that we would retain paragraph (b) from page 5. That is important, because essentially our focus as the Criminal Law Committee is on the QPS and the QPS is fantastic. If you were in trouble you would call a police officer and not a human rights lawyer, any day of the week. However, we have this ongoing need for care in relation to the management of police conduct. That is a lot of what the act is about. The situation that has arisen in the past, where the commission—it is difficult. If the commission, being the CCC, has not agreed with the commissioner's disposition of disciplinary matters—for example, there is a matter on appeal now that involved an officer who I will not name, but in that case there was a very inadequate investigation carried out. That was disciplined in a particular way. The CCC took that on. On appeal it was successful. It went back to the commissioner. The commissioner was looking essentially for a dismissal and the police officer got managerial guidance. That was very much underneath what we expected. What transpired is that the CCC does not have the power to review that decision.

CHAIR: Has that been resolved with the protocols that have been entered into between the CCC, the police, the union and the commissioned officers that was announced in October last year?

Mr Mac Giolla Ri: It may have, but I do know that there is further consideration of corrupt conduct prosecutions of police officers in situations where the commissioner should be disciplining and is not, essentially. There is further contemplated prosecutions in this area, meaning, there is something of a lacuna. The difficulty is that if we go with the current proposed definition of 'corrupt conduct', that gentleman, for example, would not fit within the current definition of 'corrupt conduct'.

Just to explain myself more clearly, the beauty of corrupt conduct is that a prosecution for corrupt conduct is a matter for the CCC only. It does not require the cooperation of the commissioner. There may be other matters that the Bar Association is not aware of that may cover that. That certainly seems like it removes, in our submission, a second layer of protection for the system.

CHAIR: I will have to bring you back to the subject matter of this inquiry, which is section 329 and the definition of 'improper conduct'. I will bring you back to that so that we can stay relevant to the current conduct. I think we also have a bill before the House. It is not appropriate for us to discuss that here, when there is a bill currently subject to consideration by the House and that is subject to another committee's reporting process as well.

Mr Mac Giolla Ri: Thank you for that opportunity.

CHAIR: Thank you.

Ms Wilson: Are there any further matters that we can be of assistance with? Our submission on section 329 was quite focused. It was really on the reasonable suspicion. At page 10, which is the nuts and bolts of it, so to speak, you can see that we have set that out. We have also said that the intention of section 329 was to create a mandatory reporting requirement only for actions akin to official misconduct, which is now termed 'corrupt conduct', and not actions akin to those listed in 329(1)(d) to (g). From being in the back of the room listening to the commissioner, I think he endorses such a view. Even though it is a short focus, is there anything that we can be of assistance on?

CHAIR: I think we are pretty right on that. I do not think there are any further questions from other committee members at this stage of the proceedings. Thank you very much for taking the time to come here and for assisting the committee with your submission.

Ms Wilson: Thank you for the opportunity.

LINDEBERG, Mr Kevin, Whistleblowers Action Group (Queensland)

CHAIR: I welcome Mr Lindeberg representing the Whistleblowers Action Group, which has made a submission here. I note that Mr Lindeberg has also made a submission in his private capacity which we have received. Mr Lindeberg, we have set aside something of the order of 15 minutes for each of your two roles, if I can put it that way, to make your opening statement and for the committee, if they do have any questions in relation to your material, to ask questions. As you know, we are inquiring into section 329. As with the Bar Association and with the member for Coomera, we would ask that you stay relevant to the matters currently under discussion by the committee. I welcome you to make an opening statement. Then we will move to questions, if any, from the committee members.

Mr Lindeberg: Thank you, Mr Chair. Mr Chair and PCCC members, on behalf of Whistleblowers Action Group and myself, I thank you for this opportunity to speak to this important review of section 329 of the Crime and Corruption Act today. Evidence set out in our public submissions I know is known to relevant bodies. I am sure you have all read it very carefully.

Mr Chairman, can I just start by saying this: blowing the whistle is a very, very dangerous activity. Voltaire gave us this dire warning when he said, 'It's dangerous to be right when government is wrong.' Whistleblowers rely on what this legislation says and purports to mean. We risk virtually everything on that premise. We trust and expect the CCC, the PCCC and the parliamentary commissioner to perform their respective watchdog roles honestly and impartially, in accordance with what the law plainly says and means in English. Our submissions, however, demonstrate legitimate, real and present concerns which we think are too significant to ignore, hence our being here today.

Parliament has or may use in section 329 and its related section 15, which defines 'corrupt conduct' as can be enlivened under section 329(4)(c)and (h), operational words like impartiality, honest conduct, improper conduct, corrupt conduct and abuse of public office as they apply to the CCC, but the CCC, PCCC and parliamentary commissioner can then reduce their English meaning to absolutely anything and nothing—and do so with impunity, we believe.

I can say this with authority by your decision, which is found in my submission: you have now set the standard of conduct which is acceptable in public office in Queensland. This is because the CCC's conduct is the exemplar par excellence for others to follow. You have endorsed it. It is a standard, however, which I and the Whistleblowers Action Group forthrightly reject, and for very sound reasons.

The CCC cannot, in my view, ethically and morally conduct this review without the assembled parliament, the people of Queensland, the media and would-be whistleblowers hearing the truth about what has really been going on behind the scenes relevant to this section in this most important area.

Your so-called acceptable standard for CCC officials comes from these facts. The CCC chair, Dr Levy, and the board decreed in March 2015 in writing to me that they would appoint a retired interstate Supreme Court judge to review the allegations of the Heiner affair papers. They then did the exact opposite. That is, the CCC secretly appointed a recently retired Supreme Court justice, the late John Muir, while the CCC knowingly deceived me into believing it was still acting as promised and kept this deception up through the entire 12-week period of the review.

On my values and experience and on the plain reading of English under sections 329 and 15, I say that when this happened I was knowingly, seriously and egregiously deceived for improper purposes. I saw this systemic cover-up continuing on. I was deeply shocked at the betrayal when the truth was finally revealed. I complained about this egregious violation of public trust to you under section 329 of the Crime and Corruption Act. For the record, the new chair—

CHAIR: Can I just ask you to wait one moment, Mr Lindeberg. I am reluctant to interrupt you. As I am sure you will appreciate, where there are current matters on foot before this committee, as a result of complaints that are being investigated through the PCCC, those matters cannot be referred to under standing order 211 in relation to what is or may be occurring under the current PCCC and what we are currently doing. Reference by you to matters that are currently the subject of investigation by the PCCC is a breach of standing order 211 and I cannot allow you to continue to do that in this hearing here.

As you recall from the beginning, when I opened up the public hearing I made comments about the hearing occurring under the standing orders of the parliament. Can I ask you to constrain your submission and your evidence to the committee to the subject matter of section 329, which is what this hearing is about. This is not a relitigation of other matters or a fresh hearing of those matters. Can I ask you to maintain compliance with the standing orders and with the direction of the committee in order to be able to do that.

Mr Lindeberg: Mr Chairman, I am here to certainly comply with what you say.

CHAIR: Thank you.

Mr Lindeberg: But also, what you have not said in that is: what I am talking about, according to your committee, is functus officio. In doing so, you have made a judgement in relation to 329 which is acceptable. I am saying that is not correct and we need to look at that.

CHAIR: Mr Lindeberg, let me be blunt to you. The committee is here and constituted to inquire into the matters under the terms of reference for the investigation into section 329. Previous decisions that the committee has made are in fact valid decisions of a properly constituted committee, whether made up of these members or others. It is not functus officio, and simply using a little bit of Latin is not going to make it so.

Can I bring you back to the point. It is not a question for argument; it is a question of you being able to make a submission here. We are very happy to have you here to make those submissions, but they must be pertinent and relevant to the matter under investigation by the committee and they must not contravene the standing orders of the parliament in relation to current investigations. Can I bring you back to the subject matter and ask that your submission continue to comply. Within the requirements of the standing orders, as I have said, you are free in front of this committee of the parliament to be able to make submissions regarding the matters regarding the definition of 'improper conduct' under section 329.

Mr Lindeberg: Well, let me respond in this way. I am trying to address the compass of improper conduct under section 329. I understand when I get a letter—or anyone gets a letter, put it that way—from the CCC undertaking to do something upon its consideration of the allegation before it, it warrants the appointment of an interstate retired Supreme Court judge, and then you find out later that they have done exactly the opposite, where does that leave us as whistleblowers?

CHAIR: Let me just halt you again, because you are referring to a matter again which has been a decision of the committee which is subject to standing order 211. If you are able to frame your discussion in relation to how you think the definition of 'improper conduct' under section 329 might be better worded or cover the issues that are of concern to you without referring to matters that have been subject to committee inquiry and have completed—because those completed matters are still subject to standing order 211—or any other matter then we are very happy to hear what you have to say, but by referencing actual matters you are then transgressing standing order 211. If I can perhaps give you that guidance in terms of how you might present your position to the committee.

Mr Lindeberg: I will put it perhaps as the wording in my submission. I said if a whistleblower—without saying it is me—should approach the CCC on the basis of an allegation and the CCC understands that the allegations have substance and require the appointment of an interstate judge and the whistleblower gets it in writing and then he or she finds out later that that undertaking has been breached in a material way, then I believe that a whistleblower is entitled to believe that that is not unbecoming conduct but is official misconduct or reaches a view of being disgraceful, if you like. Certainly in my view, it also triggers section 329(4)(c) and (h). I think I am saying it correctly.

CHAIR: If I can say to you, then, in that sense: what you are saying to us here today is that, from the perspective that you look at it, the current definitions are not wide enough to cover some circumstances that may pertain to an investigation or actions by members of the commission?

Mr Lindeberg: With great respect, you have put a gag on me and I am trying to respect it. What I am saying to you is: when a whistleblower decides to blow the whistle, by looking at the words of legislation he puts trust in what those words mean and he expects that when one sits with a CCC head and you get something in writing under the letterhead which says it will do something, as an ordinary citizen you are entitled to expect that what they promise you to do they will do. Moreover, if they let you believe that they are doing what they promised but in fact they are doing something else and you are cooperating on that basis, I suggest that is not proper conduct. If the law is applied properly, I am suggesting, you would so find.

CHAIR: Again, you are straying back into the area the subject of a matter that has already been resolved and which is subject to standing order 211. You are not dealing with the issue that this public hearing is to do with, which is the operation of section 329 in that sense. I understand you have an issue in relation to another matter. That matter has been dealt with by a prior committee and the results of that are still subject to standing order 211.

Mr Lindeberg: I appreciate that, Mr Chairman. I am not trying—

CHAIR: Here today we are looking at section 329 and how it operates. If you can give us your concerns in relation to that—

Mr Lindeberg: Our concern is, as I said right at the beginning: you can put all the words you like in the act, but then when a case comes forward and the words that we understand to be so are not so interpreted, where do you go? I am saying to you that if a whistleblower gets a letter from the head of the CCC to do something which they have decided needed to be done and then they do the exact opposite and nothing happens as a consequence of that, where do you go? Why would you ever blow the whistle? In many ways, because I am gagged—

CHAIR: Let me just deal with that. You have said that twice now and I let it go the first time. I just want to be clear with you: I am not gagging you or restraining you in terms of the submissions for the purpose for which this inquiry is set. You have and have exercised other rights in relation to matters you have referred to here and you have received responses from the predecessor of this committee in respect to the exercise by you of those rights. I understand in respect of that—we cannot talk about it because it is covered by the standing orders—that there are other issues that you have from that, but I want to be clear: I am not gagging you from making submissions that are appropriate to section 329. I am trying to give you every opportunity to make a submission without breaching the standing orders. Perhaps one way to do that might be if you could perhaps expand on why you believe the term 'disgraceful or improper conduct' is insufficiently defined. That would certainly fit within what this committee is here to listen to and to investigate.

Mr Lindeberg: I mean, I listened to Mr MacSporran, who said we all generally know what the word 'disgraceful' means. We are educated people. You understand. When a whistleblower sees something, he does not necessarily go and talk to a QC to find out whether or not this is a breach of the law or whatever. They often act instinctively in terms of what they understand the right to be. One is caught a little bit in a cleft stick here. I hear what you are saying, Mr Chair, about 'what does the word disgraceful mean?' Then when I go to the next thing and say that in point of fact my understanding of the word 'disgrace' or 'dishonesty' is something which I have experienced at the CCC but I cannot talk about it because of standing orders—and I want to respect standing orders.

CHAIR: No, let me say to you: if you think there is a shortcoming in the words 'disgraceful or improper conduct' then today it is, but you just cannot refer to that matter.

Mr Lindeberg: No, but arguably there is not. The question is that when they are applied you cannot trust they will be applied. As I say, if a whistleblower went to see the CCC—it is almost reaching absurd levels in a sense. I do not know whether any of you people have ever blown a whistle, but of course in some senses whistleblowers try to seek guidance and so forth. There is an instinctive aspect of it, to understand that when something is done it is wrong and then your morality or whatever it is tells you to do something.

CHAIR: Perhaps I can assist you a bit more so that you do not feel so constrained. You can discuss your dealings with the CCC other than the subject matter of your complaint with the CCC.

Mr Lindeberg: I greatly respect the institution of parliament and your committees. Do not let anybody doubt that. This is the people's house. When you draft legislation, it is best if it is not necessarily drafted on theoretical things but on a case study. Previously when you have come in and talked about the Fitzgerald amendment to this particular act you are talking about an incident when people at the CCC inadvertently or mistakenly started to shred Fitzgerald's records, which generated an inquiry by the PCCC and so forth. You have used that example. I have an example—but you have been imposing standing order 211 on me—which I suggest is highly relevant, because on the face of it, when I sit here and watch your discussions, everything seems to be running quite smoothly. I am saying to you that it is not. What I am trying to do is put the example of it.

You have heard what I have said and now I will qualify and say that 'if a whistleblower'—you can make connections if you like—sat across the table, put the evidence to them and they understood it, examined it and said, 'Yes, Mr Whistleblower, we will appoint a retired interstate judge,' because they knew the nature of the allegations warranted that and they put it in writing to you, why ought not the whistleblower be able to have confidence that what they are telling you is the truth? If it turns out that they are not, what then if the whistleblower says, 'Look, if it is unbecoming, naughty. Should have told you,' as if to suggest that, had he told the whistleblower, the whistleblower would have accepted. Plainly, the whistleblower would not have accepted because the whistleblower knew what the law and the agreement were.

I do not know whether many people here necessarily know my history. Some do. I want to protect future whistleblowers because they put faith in these words, and these words have been found out to be empty when it comes to a case which I cannot talk about. That is the concern. That is the concern of whistleblowers, because we want to protect the integrity of future prospects of whistleblowing.

CHAIR: Indeed. If that is the case, in terms of the submission that you wish to make, to go back to my earlier question, can you expand on why you believe the term 'disgraceful or improper conduct' is insufficiently defined which is, in that sense, the nub of the action group's submission? Putting aside your history in that respect, can you say, 'Here is an ongoing reason why legislatively this change would be worthwhile making,' and expand on that?

Mr Lindeberg: I heard Mr MacSporran comment and say that if you start to codify words you can limit them in some cases. I am aware that under the act 'unbecoming' is a word which is used against a police officer. If a police officer acts in an unbecoming manner, he can be disciplined and indeed lose his job, but it appears that when 'unbecoming' is a word which can be used for other conduct under the act it means nothing. Insofar as the difference between 'unbecoming' and 'disgraceful', I am not sure there is any difference except to say that under the act when it applies to people other than a police officer it means nothing. I can just say to you that, when a whistleblower gets a letter which he believes is true and it turns out to be untrue, it is far from unbecoming because a whistleblower would look at that and say, 'That is not honest.'

Perhaps my final comment in some sense is a warning to whistleblowers that all is not what it seems because, as I said from the start, we look at legislation and we think we understand what words like 'improper conduct' mean and so forth, but beware because it may not mean that. Therefore, if you are not certain on that, why would you go and risk your whole future by doing that? If a whistleblower can go to the CCC and get this type of undertaking in writing—not just from the chairman but from the board—and is led to believe it is going on when it is not and nothing is done about it, why would you do it?

CHAIR: To go back to that question, can you suggest how the definition might be changed in order to provide the protection or provide the reassurance that you say a whistleblower in the future may need? Putting aside your experience, you say—

Mr Lindeberg: I hear what you say, Mr Chairman. I appreciate what you are saying. The point is that what one is confronted with is that this particular provision, 329, came out of a case in relation to the shredding of Fitzgerald inquiry documents, which was not a happy thing, but I suggest to you that when you know the nature of the case I cannot talk about it is chalk and cheese. Therefore, I am not sure to include the word 'becoming'. That would be a nonsense situation because there are adequate words there, we would suggest to you, which already capture it. The warning is, as I said from the start, that we expect people like the CCC, the PCCC and the parliamentary commissioner to act honestly and impartially. We say that is in crisis.

CHAIR: On a number of occasions I have asked how you think the definition and the operation of section 329 can be changed or improved to address the concerns you have identified. In a number of the submissions that the Whistleblowers Action Group has made—which are very similar to your own personal submissions—you have made some recommendations. I will distil them and see whether this is what you mean.

What you have basically said is that if this committee decides that the words 'disgraceful or improper conduct' are adequate then you recommend that a description of what those words mean should be inserted in schedule 2 of the Crime and Corruption Act. That is, in essence, what you would say? How would you expand on that in terms of recommending a description of what those words mean? We go back to the situation where both Commissioner Carmody and the chairman of the commission have said quite clearly to this committee, 'We think the words "disgraceful or improper conduct" are well understood and are subject to guidance by established case law, including High Court case law.'

Mr Lindeberg: If a hypothetical whistleblower got this letter et cetera, do you think the words that are currently in the act do not capture that?

CHAIR: The question is not for me. This is an opportunity for you to tell us, in light of what we have heard from both Commissioner Carmody, who is independent of the CCC and holds an independent role, and the chairman of the commission—they have both identified issues around the definition of 'disgraceful or improper conduct' and identified the High Court's guidance around a fairly well-used term. If it is to change or be improved, how do you see this committee making a recommendation in respect to that legislation to improve it?

Mr Lindeberg: I suppose I would answer that in two ways. We are a civilised society. We have words in legislation which we think the common person can understand, notwithstanding that you do not draft legislation without going to the parliamentary draftsmen. Nevertheless, they are words which the ordinary person should understand. It is for the ordinary person to understand. When I said in my submission that those words should be further defined, in one sense you reach a position when I

suggest that the issue is so fundamentally clear that a serious breach of trust occurs when an undertaking is given by this premier body to do something on the basis of the evidence and it does the exact opposite in secret, and when it comes to this committee you see nothing wrong. In that sense, it is a total breakdown where nobody knows what words mean anymore. We can say, 'Mr Chairman, I would like you within that to also put a definition of the word "unbecoming".' Arguably they are all the same, but there is a sting in that the word 'unbecoming' as it applies to a police officer can have a sting but apparently not so with CCC officers.

CHAIR: The word 'unbecoming' is not used in this section of the legislation, is it?

Mr Lindeberg: The other thing I am trying to say to you—and I am trying to get through, if you know what I mean—is that it has been applied. I say that the word is inappropriate because it has a higher level to it, but there are many stings that follow from that. I make the point that, because I hold parliament to be such a precious thing, it would be immoral to pass legislation to allow would-be whistleblowers in the future to believe that these words really mean something, and I do not want that to happen.

CHAIR: Thank you, Mr Lindeberg, for your submission, your time here this afternoon and your appearance before the committee. Thank you for taking the time to do that.

FAVELL, Mr Paul, Private capacity

CHAIR: Mr Favell, I do not believe you were here when we commenced at two o'clock, but I am sure you are aware that these are proceedings of the parliament subject to the standing orders, as I have explained to Mr Lindeberg. I understand that the deputy chair will join us directly, but she has indicated that we can proceed in her absence for a short period of time.

As a former parliamentary crime and corruption commissioner, I thank you for your submission, which we have received. The committee has resolved to accept that submission. We invite you here today to give us your experiences from your term as the parliamentary commissioner. I invite you to make a brief opening statement. Should the committee have any questions, they will put them to you.

Mr Favell: Thank you, Mr Chairman and members of the committee, for the invitation. I intend to be very brief. I will disclose at the outset, as you already have, that I was parliamentary commissioner for some time. I should disclose that I am also a sessional commissioner of the CCC and, of course, I am a member of the Bar Association—all of whom are represented today.

The aspects of section 329 that I intend to concentrate on are simply these: the last sentence in the first numbered paragraph of section 329 and the first and second sentence of the third numbered paragraph in section 329. Perhaps I will deal with the first numbered paragraph in section 329 now.

CHAIR: Perhaps you could read that out to us to ensure that we are looking at the right one.

Mr Favell: It deals with 'a person mentioned opposite the notifier in column 2 of the table that the notifier suspects involves, or may involve, improper conduct.'

CHAIR: That is basically that whole section.

Mr Favell: It is the last line that I have just read out.

CHAIR: That 'the notifier suspects involves, or may involve, improper conduct'?

Mr Favell: The words 'or may involve' seem to me to contemplate two different matters, but arguably you would cover one of the matters before you got to the second matter—that is, you would have a suspicion that there was an involvement in that there was improper conduct. Once you have that suspicion you would go one step further and you would satisfy yourself—and this is part of the difficulty that our office, as it was then, encountered in trying to determine what we were looking at. You have a suspicion that there is something wrong. Then you would satisfy yourself that, indeed, there may well be. Then you come into the first portion of the sentence—that you have a suspicion that involves improper conduct. I may not be making that as clear as I should.

CHAIR: If you work slowly with us, we will work with you. I do not think it is on your part.

Mr Favell: It is probably the use of the word 'involve'. To my mind, if you have a suspicion that it may involve something improper, you would then go to the next step and have the suspicion that there was improper conduct. It may be—and this is what I am pointing to—that that portion may be unnecessary because you would have to follow that step in any event.

I say that because—it may well be that Mr Kunde would have said this; I am not sure whether he gave evidence—we experienced, I think it is fair to say, the CCC referring matters which seemed to be trivial and might have been them covering their own back, if I could put it that way. In the end, we found it to be trivial and when we referred it to the committee we gave reasons. I cannot think of any situation where someone disagreed with us on that basis. From my point of view at that time, I would have liked to see a little more clarity and a little less argument available in the referral.

If you have a suspicion that there is improper conduct, you have covered the first base in any event. The transparency aspect and all of the other matters that are the very reason section 329 is there would be covered. That brings me then to the definition of 'improper conduct' as it is used in that line. You would see that that appears in subsection (4) of section 329. It brings in, in my submission, a little more uncertainty in that the definition of 'improper conduct' involves the notion of 'disgraceful or improper conduct'. That is a repetition of the very thing it is defining—'improper conduct'. Some persons might think that 'or' means that disgraceful is something different to improper conduct when, in fact, it is part of the definition of 'improper conduct'.

I certainly know what Mr MacSporran had to say and what the parliamentary commissioner had to say. To my mind, it does bring in some uncertainty. Why is it there? Why not just have the definition of 'improper conduct' being as it is—improper conduct—rather than bringing in something

else which leaves open an argument about it and brings in some uncertainty? To my mind, that may have been something that weighed on various officers of the CCC in their reporting procedure.

The word 'disgraceful' is subjective. It might be disgraceful to someone but not disgraceful to another. I heard some examples referred to. I am not going to comment on that. I hope I am making the point clear that it brings in another aspect that makes it a little uncertain. Anyone who is dealing with this section, I would have thought, would want to make it as clear as possible and as transparent as possible and easy to administer.

A lot of the time of the parliamentary commissioner's office was taken up in dealing with these referrals. As you would probably be aware, I know quite a few people in the CCC and we inspected down there all the time. A lot of their time was taken up in making referrals, a lot of which, in my view, were unnecessary, and that money could have been better applied in chasing down the real reason for the CCC being there—major crime and, of course, corruption. As I said, I wanted to be brief. That is all I wanted to say, unless there is something I can help you with but I doubt it.

CHAIR: Based on what you have said to us, in your view, then, does improper conduct already contemplate disgraceful conduct?

Mr Favell: That is what it seems to say there, but that leaves it open for argument. The act is mainly concerned with corrupt conduct. If there were an argument to be pursued around the purpose behind the act, you would certainly say that corrupt conduct would be improper conduct but not necessarily disgraceful. To my mind, that is an argument that is open. That is why I say the use of the word 'disgraceful' in the sense of 'disgraceful or improper conduct' in the definition of 'improper conduct' brings in some uncertainty.

CHAIR: To remove the words 'disgraceful or'—

Mr Favell: That would be my submission.

CHAIR: Improper conduct would then contemplate disgraceful conduct, in your view. It is already covered by that definition.

Mr Favell: Improper conduct can stand on its own.

CHAIR: You were talking about the operation of section 329(1) and the steps set out there.

Mr Favell: Yes, that is right—'or may involve' is, in my view, unnecessary.

CHAIR: Without reference to a particular issue, are you able to give us an example of how that works practically?

Mr Favell: You may get to the step where you think there may be improper conduct. You investigate it and you find there is no improper conduct. Then it is an unnecessary reporting in my view. Lots of things may be the case, but they might not be wrong. You want to get to the stage where you have a suspicion that improper conduct occurred, not that it may occur.

CHAIR: You say that the words 'or may involve' could be removed from that section without imperilling the operation of the act or the intent of the act in order to be able to do that. You have that notification.

Mr Favell: That is right.

CHAIR: Because necessarily if you get to one you would have gone through the other.

Mr Favell: Exactly.

CHAIR: It follows as night follows day.

Mr Favell: Yes.

Mr CRANDON: Under section 329(1), would removing the words 'involves, or' after the word 'suspects' so that it reads 'suspects may involve' be a better solution? The last line you have been referring to would then read 'the notifier suspects may involve improper conduct'.

Mr Favell: Yes.

Mr CRANDON: Drop out the words 'involves, or'.

Mr Favell: You may wish to keep 'involves' so it reads 'the notifier suspects involves' and then drop out 'or may involve' and then pick up 'improper' again.

Mr CRANDON: I am just worrying about whether the word 'may' needs to be in there or not. My own view is that it would be better to read 'the notifier suspects may involve improper conduct' and drop out those other two words.

Mr Favell: I see what you are saying. You are saying drop out the words 'involves, or'.

Mr CRANDON: Correct. It seems to be more complete by dropping those two words out rather than dropping the word 'may'.

Mr Favell: Now that I see what you are saying, with respect, I agree.

Mr CRANDON: What you are saying in relation to 'disgraceful or improper conduct in an official capacity' or 'disgraceful or improper conduct in a private capacity' is that the term 'disgraceful' over time, depending on the mood of society, has changed and continues to evolve?

Mr Favell: Yes and that is what I said. It is a subjective term.

Mr CRANDON: If you were to drop out the word 'disgraceful', would we find ourselves in the courts arguing that a disgraceful act was in fact not an improper conduct act at some time in the future? I cannot think of an example.

Mr Favell: I see what you say. You are saying that part of 'improper' involves the concept of 'disgraceful' in any event.

Mr CRANDON: No. I am saying that it may not involve disgraceful.

CHAIR: 'Disgraceful' may be its own category, as opposed to improper conduct.

Mr Favell: Is the act trying to get at what is disgraceful conduct?

Mr CRANDON: If it is disgraceful to you and me, is it improper conduct?

Mr Favell: I heard the chairman give an example earlier. I myself would not have thought that the act was trying to get at that, but there you go.

CHAIR: Are there any other questions? No. Thank you, Mr Favell, for coming. Thank you for taking the time to make a late submission. We appreciate your ongoing interest in the operation of section 329.

Mr Favell: I am sorry about the lateness of my written submission. I got a bit involved with some other things.

CHAIR: It was admirably brief and to the point, so thank you for that.

Mr CRANDON: It was appreciated in that regard.

CHAIR: Yes and appreciated in that regard—very much so. Thank you for your attendance at the hearing this afternoon.

Mr Favell: My pleasure. Thank you for having me.

CHAIR: Ladies and gentlemen, that concludes today's hearings. I thank all witnesses for appearing today. Thank you to Hansard. The transcript of proceedings will be available on the committee's web page in due course, once we have had an opportunity to review it. Any questions that have been taken on notice—and I do not think there were any—would normally be required to be answered by Friday, 22 June. I now declare this public hearing for the committee's inquiry into the review of the operation of section 329 of the Crime and Corruption Act 2001 closed.

The committee adjourned at 2.45 pm.