



PARLIAMENT OF NEW SOUTH WALES

# Committee on the Independent Commission Against Corruption

REPORT 2/56 – OCTOBER 2016

REVIEW OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION:  
CONSIDERATION OF THE INSPECTOR'S REPORTS





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COMMITTEE ON THE INDEPENDENT COMMISSION  
AGAINST CORRUPTION

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New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Committee on the Independent Commission Against Corruption.

Review of the Independent Commission Against Corruption: consideration of the Inspector's reports / Joint Committee on the Independent Commission Against Corruption. [Sydney, N.S.W.] : the Committee, 2016. [95] pages ; 30 cm. (Report ; no. 2/56)

Chair: Damien Tudehope MP.

"October 2016".

ISBN 9781921012389

New South Wales. Independent Commission Against Corruption.

Corruption investigation—New South Wales.

Title.

Tudehope, Damien.

Series: New South Wales. Parliament. Committee on the Independent Commission Against Corruption. Report ; no. 2/56.

364.13230994 (DDC22)

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

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# Membership

CHAIR	Mr Damien Tudehope MP
DEPUTY CHAIR	Mr Adam Marshall MP (until 25 August 2016) Mr Geoff Provest MP (since 15 September 2016)
MEMBERS	Mr Ron Hoenig MP The Hon Kevin Humphries MP Mr Paul Lynch MP (since 25 August 2016) Ms Tania Mihailuk MP Mr Chris Patterson MP Ms Kathy Smith MP (until 25 August 2016) Mr Mark Taylor MP The Hon Trevor Khan MLC Revd the Hon Fred Nile MLC The Hon Lynda Voltz MLC
CONTACT DETAILS	Committee on the Independent Commission Against Corruption Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2214
E-MAIL	<a href="mailto:icaccommittee@parliament.nsw.gov.au">icaccommittee@parliament.nsw.gov.au</a>
URL	<a href="http://www.parliament.nsw.gov.au/icac">www.parliament.nsw.gov.au/icac</a>

# Terms of Reference

## **Terms of Reference – Inquiry into the ICAC Inspector’s Report to the Premier: *The Inspector’s Review of the ICAC***

That the Committee on the Independent Commission Against Corruption (‘ICAC’) review and report on the ICAC Inspector’s *Report to the Premier: The Inspector’s Review of the ICAC* dated 12 May 2016; with particular regard to:

- 1) the extent, nature and exercise of the ICAC’s current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform;
- 2) the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform;
- 3) the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;
- 4) whether the outcome of legal action taken in response to the ICAC’s corrupt conduct findings is adequately reflected on the public record; and possible options for reform;
- 5) any other related matters.

In conducting its inquiry the Committee will take into account relevant reports and documents impacting on the terms of reference, in particular:

- a. the report of the Hon Murray Gleeson AC, QC and Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, dated 30 July 2015;
- b. the report of Mr Andrew Tink AM, *Review of Police Oversight*, dated 31 August 2015;
- c. any report of the ICAC Inspector recommending changes to the ICAC’s practice and procedure.



# Chair's Foreword

It is true to say that the last two years have been difficult years for the Independent Commission Against Corruption (ICAC), during which its decision-making and procedures have come under intense media scrutiny. Two matters in particular stand out, namely, the decision to pursue a public inquiry relating to the Deputy Senior Crown Prosecutor Margaret Cunneen SC, and the investigation of the Commissioner of the State Emergency Service, Murray Kear, which subsequently led to his unsuccessful prosecution.

There can be no doubt that the public administration of NSW is enhanced by a strong ICAC which is respected by the community. It has been the work of the Committee to examine the way that the ICAC operates and to make recommendations as to those changes which might be made to its operation which would restore optimal public confidence.

The work of the Committee was considerably assisted by the work which has been done by the former Chief Justice of the High Court of Australia, The Hon Murray Gleeson AC QC, and Mr Bruce McClintock SC. The report provided by them to the Premier in 2015 dealt with jurisdictional issues arising out of the decision of the High Court relating to the proposed public inquiry into allegations relating to Margaret Cunneen SC (Operation Hale).

Following that report, the Inspector of the ICAC handed down two reports. The first, furnished to the Parliament in December 2015, concerned Operation Hale. The second, which reviewed the functioning of the ICAC more generally, was provided to the Premier in May 2016. The recommendations of the Inspector have provided the starting point for the Terms of Reference for the Committee.

The Committee's report is largely in two parts, firstly the committee considered the structure of the ICAC and secondly considered issues surrounding the manner in which the ICAC operates particularly in respect of issues relating to procedural fairness which is afforded to persons of interest and witnesses.

While the recommendations contained in this report will not please everyone, some by virtue of the fact that they perceive that they do not go far enough, others by virtue of the fact that they are perceived to go too far, it is the view of the Committee that the recommendations go a significant way to achieving some substantive structural reform which will promote the public's confidence in the ICAC.

I am grateful to all those who have made submissions. The making of a submission to the Committee is often a painstaking task involving considerable thought and expertise. It is the case that that work is done and motivated by a desire to see the ICAC improved.

There is no doubt that this report could not be achieved without the enormous support which the Committee members receive from the Parliamentary Secretariat responsible for committees. I am thankful to the work done by Carly Maxwell, Elspeth Dyer, Tanja Zech and Jacqueline Linnane. They worked tirelessly to prepare this report and meet very tight timelines in relation to its preparation for consideration by the Committee.

Finally I would like to personally thank each of my fellow Committee members who were exceedingly diligent in participating in Committee meetings and for the delivery of this report to the Parliament.

A handwritten signature in black ink, reading "Damien Tudehope". The signature is written in a cursive style with a prominent flourish at the end.

**Damien Tudehope MP**

Chair

# Executive Summary

Established in 1989, the Independent Commission Against Corruption (ICAC) has been granted formidable covert and coercive powers to investigate, expose and prevent public sector corruption in NSW.

The ICAC's use of these extraordinary powers was a major theme running through two recent reports of the ICAC's independent Inspector, the Honourable David Levine AO RFD QC. The first, furnished to the Parliament in December 2015, made findings and recommendations about the ICAC's Operation Hale. The second, furnished to the Premier in May 2016 (and later referred to the Committee for its consideration), reviewed the ICAC more generally, making recommendations for its functioning into the future.

The Committee has conducted inquiries to review both reports. It adopted its own terms of reference, called for written submissions and took evidence at public hearings over five days. It has decided to report on the results of these inquiries together, in the current report.

The inquiries confirmed the Committee's strong support for a robust anti-corruption agency in NSW. Corruption has a corrosive effect on society, undermining people's trust in political and economic systems and public institutions and leaders. It is generally committed by powerful and educated people in secret, and the ICAC's extraordinary powers are necessary to address it.

However, if the public is to have confidence in the ICAC's vital work, its extraordinary powers must be exercised appropriately. For this reason, the Committee is recommending changes to the current functioning of the ICAC in the areas of structure and governance, procedural fairness, and the ICAC's dealings with the Director of Public Prosecutions (DPP). It has also recommended changes to the regime for the oversight of the ICAC.

**Chapter One** focusses on the structure and governance of the ICAC. Currently, the ICAC is established in a single person – the Commissioner – and he or she is solely responsible for making the many significant decisions necessary to fulfil the ICAC's functions. These decisions can have serious consequences for the individuals affected and the Committee has decided that more weight should be placed on the most significant ones.

For this reason, the Committee has recommended the re-structure of the ICAC, to replace the single Commissioner with a panel of three Commissioners, the 'three member Commission'. Under this proposal, the most significant decisions – those to proceed to a compulsory examination or public inquiry – could no longer be made by a single Commissioner. Instead, a decision to proceed to a compulsory examination or public inquiry would need majority approval of the three member Commission.

The Committee did consider the Inspector's proposal to abolish public inquiries altogether because they can unfairly damage reputations. However, public inquiries have many benefits, greatly assisting the ICAC to expose corruption, and increasing transparency by helping to hold

the ICAC itself accountable. The Committee has concluded that attaching more weight to the decision to commence a public inquiry would appropriately balance the Inspector's concerns with the benefits of public inquiries.

To further strengthen decision-making capacity, the Committee has also recommended the appointment of a Chief Executive Officer to manage the day to day operations of the ICAC, freeing up the Commissioners to focus on more high-level decision-making.

Chapter One finishes by rejecting a submission from the Department of Premier and Cabinet that the ICAC should be further re-structured to bring its staff under the Government Sector Employment Framework. This could compromise the actual or perceived independence of the ICAC. There must be a clear distinction between the ICAC and the NSW public service.

**Chapter Two** focusses on the ICAC's powers and procedures. It opens by recommending against increased judicial review of ICAC findings, commonly called 'merits review', as the ICAC does not make judicial decisions but reports findings and opinions. The Committee agrees with the 2015 Independent Panel report of the Hon Murray Gleeson AC QC and Mr Bruce McClintock SC that introducing merits review would increase misunderstandings about the ICAC's role.

A major focus of the remainder of the chapter is procedural fairness. The findings flowing from public inquiries can do enormous reputational damage to individuals. In circumstances where the Committee is recommending the retention of public inquiries and limited opportunity for the review of findings, it is vital that public inquiries are conducted in a procedurally fair way.

Therefore, the Committee has recommended the new three member Commission issue guidelines to ICAC staff and Counsel Assisting for the conduct of public inquiries. These guidelines would set out the requirements that must be followed in relation to procedural fairness including around the investigation of exculpatory evidence and the disclosure of relevant evidence to an affected person; the opportunity to cross-examine on credit; and access to documents and time to prepare for a public inquiry. In addition, people should be able to respond to proposed adverse findings, and the ICAC should generally have to publish a fair account of that response in its reports.

Chapter Two finishes with a finding that the ICAC should exercise its power to issue notices to produce with care. It also recommends legislative change to ensure that, where the ICAC refers a matter to the DPP to consider whether a person should be prosecuted for a criminal offence, it provides the DPP with all disclosable evidence. This is essential to ensure that the accused person is dealt with fairly.

**Chapter Three** focusses on oversight of the ICAC. In his report to the Premier, the Inspector raised concerns that there was a lack of proportion between the resources of the ICAC Inspectorate and the extraordinary powers of the ICAC which it oversees.

The Committee considers that the establishment of the new Law Enforcement Conduct Commission (LECC) to oversee Police and the Crime Commission in NSW provides a valuable

opportunity to address concerns about the Inspector's resourcing. It recommends that the ICAC and LECC Inspectorates be re-structured into a single body to be known as the 'Office of Inspectorates'. The Office would consist of a panel of two inspectors, responsible for the oversight of the ICAC and LECC respectively, and a single shared public service agency to provide administrative support to both inspectors, headed by a professional executive manager. This would increase the overall size of the Inspector's joint administrative support, thereby attaining a critical mass of staff and work.

To foster effective oversight, the Committee also recommends legislative change to clarify that people can complain to the Inspector regardless of any suppression order made by the ICAC. A productive working relationship between the ICAC and Inspector is also important for effective oversight. Therefore, the Committee further recommends the Inspector and the new three member Commission review their memorandum of understanding to ensure that it promotes a workable relationship between their respective offices.

# List of Findings and Recommendations

RECOMMENDATION 1	1
That the ICAC be re-structured so that there is a panel of three Commissioners (the ‘three member Commission’), one of whom would be the Chief Commissioner.	
RECOMMENDATION 2	1
That the use of the ICAC’s extraordinary powers be authorised by majority agreement of the three member Commission.	
RECOMMENDATION 3	5
That the Commissioners be appointed by the Governor.	
RECOMMENDATION 4	6
That the Chief Commissioner be appointed full time, and the other Commissioners part time.	
RECOMMENDATION 5	6
That the Chief Commissioner be appointed for a term of up to five years.	
RECOMMENDATION 6	6
That the other Commissioners be appointed for a term of up to three years with the option of extension for up to two years.	
RECOMMENDATION 7	6
That the remuneration of the Chief Commissioner and other Commissioners reflect their respective workloads.	
RECOMMENDATION 8	6
That the ICAC Act continue to make provision for the appointment of Assistant Commissioners to assist the Commissioners in their work, as required.	
RECOMMENDATION 9	7
That the Joint Committee on the ICAC have a power of veto over proposed appointments of people to the three member Commission.	
RECOMMENDATION 10	7
That to be appointed as a Commissioner, or to act in that role, a person must be qualified to be appointed as, or to have formerly been:	
<ul style="list-style-type: none"> <li>- a judge or other judicial officer of the Supreme Court of NSW or another state or territory;</li> <li>- a judge of the Federal Court of Australia; and/or</li> <li>- a Justice of the High Court of Australia.</li> </ul>	
RECOMMENDATION 11	8

That there should be a Chief Executive Officer to manage the day-to-day operations of the ICAC, appointed by the Chief Commissioner in consultation with the other Commissioners for a term of up to seven years.

RECOMMENDATION 12 \_\_\_\_\_ 9

That the ICAC staff should not be brought under the Government Sector Employment Framework.

RECOMMENDATION 13 \_\_\_\_\_ 11

That there should be no ‘exoneration protocol’ and no ‘merits review’ of ICAC findings.

RECOMMENDATION 14 \_\_\_\_\_ 14

That the ICAC must follow the rules of procedural fairness during a public inquiry and before publishing an adverse finding against a person.

RECOMMENDATION 15 \_\_\_\_\_ 14

That the three member Commission be required to issue guidelines to Commission staff and Counsel Assisting for the conduct of public inquiries. These guidelines should be tabled in Parliament and published on the ICAC’s website.

RECOMMENDATION 16 \_\_\_\_\_ 14

That the guidelines include requirements that ICAC staff and Counsel Assisting must follow in relation to procedural fairness.

RECOMMENDATION 17 \_\_\_\_\_ 15

That the guidelines cover the investigation of exculpatory evidence and the disclosure of relevant evidence to an affected person.

RECOMMENDATION 18 \_\_\_\_\_ 16

That the guidelines cover the opportunity to cross-examine regarding credit.

RECOMMENDATION 19 \_\_\_\_\_ 17

That the guidelines cover access to documents and time to prepare for a public inquiry.

RECOMMENDATION 20 \_\_\_\_\_ 19

That the ICAC Act be amended to provide that, before the ICAC or the ICAC Inspector makes an adverse comment about a person or body in a report:

- the person or body must be given the opportunity to respond; and
- where they elect, a fair account of their response must be included in the report.

RECOMMENDATION 21 \_\_\_\_\_ 19

That in including a response to an adverse finding, the ICAC must not identify any person who is not the subject of adverse comment or opinion unless the ICAC:

- is satisfied it is in the public interest;

- is satisfied it will not cause unreasonable damage to the person’s reputation, safety or wellbeing; and
- states in that the person is not the subject of any adverse comment or opinion.

FINDING 1 \_\_\_\_\_ 22

That Section 22 notices to produce should not be used by the ICAC to obtain evidence in cases where a search warrant should be used.

RECOMMENDATION 22 \_\_\_\_\_ 25

That ICAC officers investigating alleged summary offences should have a duty to provide all disclosable evidence to the Director of Public Prosecutions.

RECOMMENDATION 23 \_\_\_\_\_ 25

That any non-publication orders made by an ICAC Commissioner should not prevent the ICAC from providing disclosable evidence to the Director of Public Prosecutions.

RECOMMENDATION 24 \_\_\_\_\_ 27

That the ICAC have the power to gather and assemble admissible evidence after a matter has been referred to the Director of Public Prosecutions.

FINDING 2 \_\_\_\_\_ 29

That the ICAC’s role in gathering admissible evidence for prosecutions should be examined further by the Committee.

RECOMMENDATION 25 \_\_\_\_\_ 31

That following consultation with the new LECC Inspector, the office of the ICAC Inspector and the office of the LECC Inspector be re-structured into a single body (known as the ‘Office of the Inspectorates’). The Inspectors should be jointly supported by a separate operational organisation.

RECOMMENDATION 26 \_\_\_\_\_ 33

That the ICAC Inspector should continue to be appointed by the Governor.

RECOMMENDATION 27 \_\_\_\_\_ 33

That the ICAC Inspector should continue to be a part time position for a term of up to five years.

RECOMMENDATION 28 \_\_\_\_\_ 33

That the remuneration of the ICAC Inspector should reflect his or her workload.

RECOMMENDATION 29 \_\_\_\_\_ 33

That there should continue to be provision for the appointment of Assistant Inspectors to assist the ICAC Inspector in his or her work, as required.

RECOMMENDATION 30 \_\_\_\_\_ 34

That the Committee on the ICAC should continue to have a power of veto over the appointment of the ICAC Inspector.



RECOMMENDATION 31 \_\_\_\_\_ 34

That to be appointed ICAC Inspector, or to act in that role, a person must be qualified to be appointed as, or to have formerly been:

- a judge or other judicial officer of the Supreme Court of NSW or another state or territory;
- a judge of the Federal Court of Australia; and/or
- a Justice of the High Court of Australia.

RECOMMENDATION 32 \_\_\_\_\_ 35

That there should be a separation between the Inspectors and the operational organisation supporting them, which should be headed by a professional executive manager.

RECOMMENDATION 33 \_\_\_\_\_ 35

That the operational organisation should be a separate Public Service agency and operate within the *Government Sector Employment Act 2013*.

RECOMMENDATION 34 \_\_\_\_\_ 36

That the three member Commission and the ICAC Inspector review the Memorandum of Understanding between the ICAC and the Inspector to ensure that it promotes a workable relationship between their respective offices.

RECOMMENDATION 35 \_\_\_\_\_ 37

That section 112 of the ICAC Act be amended to enable persons to complain to the Inspector regardless of any suppression orders.

# Chapter One – Structure and Governance

## THREE MEMBER COMMISSION

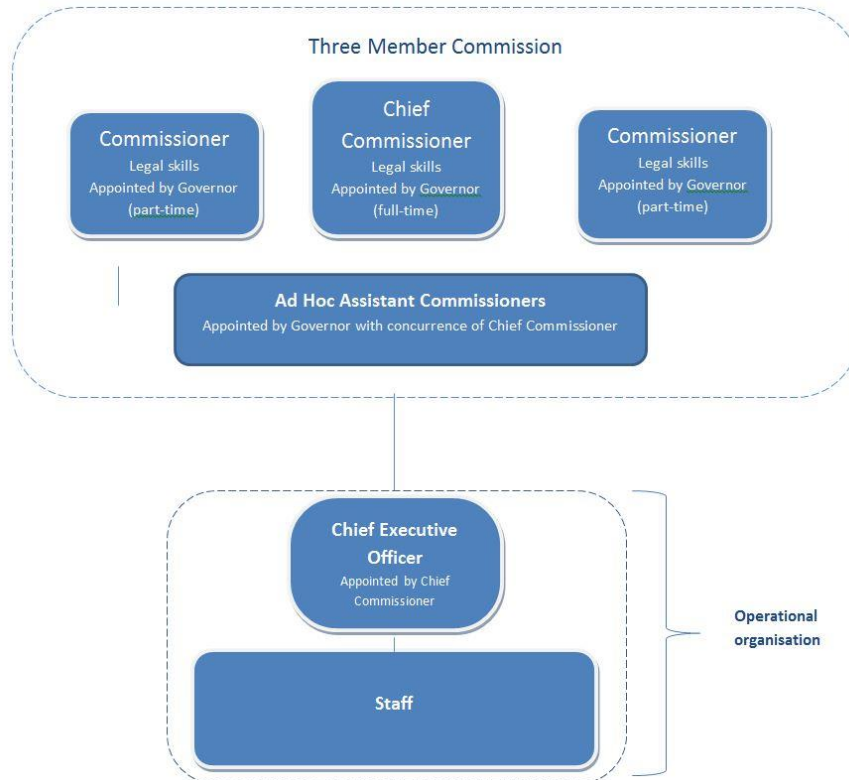
There should be a three member Commission

### RECOMMENDATION 1

**That the ICAC be re-structured so that there is a panel of three Commissioners (the ‘three member Commission’), one of whom would be the Chief Commissioner.**

### RECOMMENDATION 2

**That the use of the ICAC’s extraordinary powers be authorised by majority agreement of the three member Commission.**



**Figure 1 Proposed re-structure of the ICAC**

- 1.1 Re-structuring the ICAC to replace the single-Commissioner model with a panel of three Commissioners (a ‘three member Commission’) would improve the ICAC’s functioning and decision-making capacity. The Committee notes that the Department of Premier and Cabinet (DPC) suggested a three Commissioner model in its submission to the inquiry.<sup>1</sup> The Committee agrees with the following observations of Mr Bruce McClintock SC:

<sup>1</sup> Submission 25, DPC, pp14-16.

...generally ICAC has worked well over the years. That is not to say there could not be improvements in some areas. Obviously there could be – it is a human entity...one of the issues with an organisation such as ICAC that is so dependent upon having one commissioner is that its nature is determined by the personality of the Commissioner...if you bring a greater breadth of experience and a greater number of minds to the task it is highly likely that the functioning will be improved.<sup>2</sup>

1.2 Similar comments were made by former ICAC Commissioner, Dr Irene Moss AO:

The Commission must make many important and difficult decisions and a panel might increase public confidence in the quality of decision making while also reducing the considerable pressure which is placed on a single commissioner under the present structure.<sup>3</sup>

1.3 Currently, the ICAC is established in a single person – section 4(3) of the *Independent Commission Against Corruption Act 1988* (ICAC Act) provides that the functions of the ICAC are exercisable by the Commissioner. This structure means that the Commissioner is solely responsible for making the many significant decisions necessary to fulfil the ICAC's functions of investigating, exposing and preventing corruption in the NSW Public Sector. These include decisions to use the ICAC's extraordinary powers to progress to a private hearing ('compulsory examination') or to a public inquiry.

1.4 Decisions to progress to a compulsory examination or public inquiry have grave consequences for the individuals concerned and it is essential that they be given appropriate weight. For this reason, the Committee considers that these decisions should no longer be made by a sole Commissioner. Instead, a decision to conduct compulsory examinations or public inquiries should require the majority approval of the proposed three member Commission.

1.5 On the subject of public inquiries, the Committee notes the ICAC Inspector's recommendation that they be abolished because they unfairly damage reputations and allow political grandstanding by Counsel Assisting.<sup>4</sup> The Inspector also raised concerns that public inquiries may have been used for relatively trivial matters and that the concept of public interest is not clearly identified in the Act.<sup>5</sup>

1.6 The Committee considers that attaching more weight to the decision to commence a public inquiry by requiring the majority approval of the three member Commission will appropriately balance the Inspector's concerns with the benefits of public inquiries.

1.7 The benefits of public inquiries were outlined in many submissions to the inquiry. First, one of the ICAC's primary functions is to expose corruption, and public

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<sup>2</sup> Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, p26.

<sup>3</sup> Submission 9A, Dr Irene Moss AO, p1.

<sup>4</sup> Hon David Levine AO RFD QC, Inspector of the ICAC, *Report to the Premier: The Inspector's Review of the ICAC*, 12 May 2016, p28, para 78; and Transcript of Evidence, 8 September 2016, p5. See also submission 20, Police Association of NSW, pp8-9, paras 30-33; submission 3, Mr Robin Speed, Rule of Law Institute of Australia, pp5-6.

<sup>5</sup> Hon David Levine AO RFD QC, *Report to the Premier: The Inspector's Review of the ICAC*, p28, para 83; and Transcript of Evidence, 8 September 2016, p4.

inquiries are an important tool to achieve this.<sup>6</sup> Secondly, public inquiries promote transparency and help hold the ICAC accountable.<sup>7</sup> This leads to people having the confidence to report wrongdoing to the ICAC because they perceive it as a body that will act effectively.<sup>8</sup> Thirdly, public inquiries can raise further lines of inquiry because issues are discussed openly and can encourage further witnesses to come forward,<sup>9</sup> and can be used to clear the names of people wrongly accused and end speculation.<sup>10</sup>

1.8 In addition, the Acting Ombudsman, Professor John McMillan, outlined how private inquiries can create a higher administrative burden. To ensure that people are treated with procedural fairness during a private hearing, extra resources are necessary, as illustrated by the NSW Ombudsman's *Operation Prospect* inquiry.<sup>11</sup> The recent Independent Panel review, conducted by the Hon Murray Gleeson AC QC and Mr Bruce McClintock SC, has also considered and affirmed the use of public inquiries by the ICAC.<sup>12</sup>

1.9 Under the three member Commission model, it is envisaged that all three Commissioners would have the power to conduct inquiries. For example, while one Commissioner is conducting a public inquiry, another could be conducting a preliminary investigation, compulsory examinations or even a public inquiry in another matter. This is similar to the current arrangement where, at any given time, the Commissioner can be conducting an inquiry while the Deputy Commissioner (who is a standing Assistant Commissioner<sup>13</sup>) or an ad hoc Assistant Commissioner is conducting an inquiry in another matter.<sup>14</sup> At the Committee's hearing on 8 September the Commissioner stated:

There are occasions when we are running a public inquiry. The Commissioner is engaged full-time every day running a public inquiry and we might have another inquiry that is being worked up, and there might be some compulsory examinations that are being held in that inquiry. The existing structure which essentially has a standing assistant commissioner works quite well because that standing assistant commissioner can step in and do those smaller compulsory examinations while the Commissioner is engaged in the bigger public inquiry.<sup>15</sup>

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<sup>6</sup> See for example Hon Megan Latham, ICAC Commissioner, Transcript of Evidence, 9 September 2016, p29; submission 2, ICAC, p3; submission 16, Hon David Ipp AO QC, p4, para 18; Hon Harvey Cooper AM, Transcript of Evidence, 8 September 2016, p22; submission 1, Mr Graham Kelly, p3; and Mr Graham Kelly, Transcript of Evidence, 9 September 2016, p19.

<sup>7</sup> Submission 6, Mr Ian Temby AO QC, p5, paras 13-14; Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, pp29-30; Hon Megan Latham, Transcript of Evidence, 9 September 2016, p29.

<sup>8</sup> Submission 6, Mr Ian Temby AO QC, p4, para 11.

<sup>9</sup> Submission 14, Acting NSW Ombudsman, p3; Ms Linda Waugh, Deputy Ombudsman, Transcript of Evidence, 9 September 2016, p2; submission 2, ICAC, p2; Hon Megan Latham, Transcript of Evidence, 9 September 2016, p31.

<sup>10</sup> Submission 2, ICAC, p2; Mr Graham Kelly, Transcript of Evidence, 9 September 2016, p19.

<sup>11</sup> Submission 14, Acting NSW Ombudsman, pp1-3; Professor John McMillan, Acting NSW Ombudsman, Transcript of Evidence, 9 September 2016, pp1-2 and 5.

<sup>12</sup> Hon Murray Gleeson AC and Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, 30 July 2015, pp57-58, paras 9.4.3-10.

<sup>13</sup> See submission 2, ICAC, p18 for an explanation of how the Deputy Commissioner is currently appointed.

<sup>14</sup> See section 6 and schedule 1 of the ICAC Act for the provisions concerning the appointment of Assistant Commissioners.

<sup>15</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p30.

- 1.10 It has been argued that a three member Commission could unduly delay decisions, some of which may be urgent.<sup>16</sup> While this concern must be balanced against the significant nature of some decisions (that warrant consideration by three Commissioners), it is valid. The decision to commence an investigation would reside with the Chief Commissioner and decisions involving the day-to-day conduct of an investigation should continue to be made with the approval of the single Commissioner who has carriage of the matter.<sup>17</sup>
- 1.11 The three member Commission model is broadly consistent with Mr Andrew Tink AO's recent review of police oversight in NSW. Mr Tink recommended a move away from a single commissioner model for police oversight to a "Commissioners Council" of three commissioners. In comments that are also relevant to the ICAC, Mr Tink explained:
- It seemed to me that there was an opportunity for more weight to be given to deliberations around whether to take these really significant steps in relation to particular matters and complaints that were being considered by the body...we are dealing with exceptionally serious matters...that affect the rights of individuals in a royal commission context...<sup>18</sup>
- 1.12 Mr Tink's suggestions were taken up by the Government and the *Law Enforcement Conduct Commission Bill* which was introduced into Parliament on 13 September 2016 seeks to create the new Law Enforcement Conduct Commission (LECC), consisting of a panel of three Commissioners.<sup>19</sup> Further, all three Commissioners must agree before a public examination into suspected police misconduct can occur, and a majority of Commissioners must agree before a decision is made to proceed to a private examination.<sup>20</sup>
- 1.13 The three member Commission may also assist to resolve concerns that, by the time a complaint is made to the ICAC Inspector concerning a decision or decisions of the ICAC, the damage may already have been done. This is because it would place more weight on significant decisions at the time they are made, potentially improving the quality of those decisions.<sup>21</sup>
- 1.14 Similarly, as the DPC submission notes, a three member Commission may reduce any tensions between a single Commissioner and a single Inspector.<sup>22</sup> A panel lessens the extent to which the entire ICAC is identified with a particular individual. The Committee views this as a central concern, having heard evidence from former ICAC Inspector the Hon Harvey Cooper AM that a good working relationship between an ICAC Commissioner and Inspector is important to achieving effective oversight of the ICAC:

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<sup>16</sup> See for example submission 16A, Hon David Ipp AO QC, p4.

<sup>17</sup> See submission 25, DPC, p16 which discusses the possibility of different approval requirements for different decisions.

<sup>18</sup> Mr Andrew Tink AM, Transcript of Evidence, 9 September 2016, p9.

<sup>19</sup> Section 18(1) *Law Enforcement Conduct Commission Bill 2016*.

<sup>20</sup> See section 19(2) and (3) *Law Enforcement Conduct Commission Bill 2016*.

<sup>21</sup> For a discussion of this issue see Transcript of Evidence, 8 September 2016, pp33-34.

<sup>22</sup> Submission 25, DPC, p16.

**Mr Chris Patterson:** If...the relationship clearly had broken down...would you say that that would have an impact on the Commissioner and/or the Inspector to do their job?

**Mr Cooper:** ...in practice it has to. When you have a breakdown, you cannot ring up someone and say, "I am looking at this particular thing. Why did you do that?", or "Why did you not do something else?" You cannot do that with relationships breaking down. If you have got a good relationship, you can. What appears to be a problem may well not be a problem.<sup>23</sup>

- 1.15 The Committee acknowledges concerns that a move from one to three Commissioners could cause disagreements and dissension.<sup>24</sup> However, it considers that the benefits of such a change, discussed above, outweigh these concerns. In any human entity there is the potential for disagreement, both within the entity and in its dealings with others. This is the case no matter how that entity is structured, and the ICAC is no exception.

### Thresholds for public hearings

- 1.16 The Committee also considered a proposal put by His Honour Justice Peter Hall to further raise the threshold for the decision to conduct a public inquiry, that is, to confine the ICAC's power to conduct a public inquiry to cases involving serious corrupt conduct or systemic corrupt conduct.<sup>25</sup>
- 1.17 The Committee was attracted to this idea and agrees that the royal-commission style power to conduct a public inquiry would generally only be suitable in cases involving serious or systemic corrupt conduct. However, the Committee decided not to recommend confining the power to such cases because it could result in a significant increase in litigation in the Supreme Court about whether the ICAC had satisfied the threshold requirement before proceeding to a public inquiry.
- 1.18 The Committee notes that under section 31(2) of the ICAC Act, the ICAC is already required to take the seriousness of an allegation into account in deciding whether to proceed to a public inquiry. The Committee further notes evidence from the ICAC that it sometimes elects to proceed to a public inquiry where there is no likelihood of corruption but where the ICAC considers it is in public interest to "clear the air" of unfounded allegations of corrupt conduct<sup>26</sup> and this is a justified use of the power. In short, requiring the majority approval of the three member Commission before proceeding to a public inquiry is a sufficient safeguard and it is not necessary to confine the power further.

### The Chief Commissioner should be full time and the other Commissioners part time

#### RECOMMENDATION 3

**That the Commissioners be appointed by the Governor.**

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<sup>23</sup> Transcript of Evidence, 8 September 2016, p24.

<sup>24</sup> See submission 16A, Hon David Ipp AO, QC, p4; and Hon Megan Latham, Transcript of Evidence, 9 September 2016, p25.

<sup>25</sup> Submission 24, Hon Justice Peter Hall, pp5-6.

<sup>26</sup> Submission 2, ICAC, p5.

#### RECOMMENDATION 4

**That the Chief Commissioner be appointed full time, and the other Commissioners part time.**

#### RECOMMENDATION 5

**That the Chief Commissioner be appointed for a term of up to five years.**

#### RECOMMENDATION 6

**That the other Commissioners be appointed for a term of up to three years with the option of extension for up to two years.**

#### RECOMMENDATION 7

**That the remuneration of the Chief Commissioner and other Commissioners reflect their respective workloads.**

#### RECOMMENDATION 8

**That the ICAC Act continue to make provision for the appointment of Assistant Commissioners to assist the Commissioners in their work, as required.**

- 1.19 The Committee considers that it is essential that all three Commissioners are appointed by the Governor and are not in any direct employment relationship with each other. This will promote frank and fearless decision-making.
- 1.20 The Committee also agrees with the ICAC Inspector's comments that 'there should be a level of fluidity and vitality in the staffing of such powerful bodies as the ICAC'.<sup>27</sup> Therefore, the term of the Chief Commissioner should run for five years, consistent with current legislative requirements for the ICAC Commissioner.<sup>28</sup> To minimise the chances of all three Commissioners departing at once, with a consequent loss of 'corporate knowledge', the Committee also considers that the other Commissioners should be appointed for a different term, that is, a term of three years. There should, however, be an option of extension for these Commissioners, for up to two years, to accommodate the possibility that they will be involved in the conduct of a lengthier investigation or investigations.
- 1.21 Another criticism of the three Commissioner model that the Committee has heard is that it may create unnecessary expense, and that Commissioners may not be fully occupied.<sup>29</sup> However, Mr Paul Miller, Deputy Secretary, Cabinet and Legal, DPC, gave evidence that one or more Commissioner could be employed part time if the workload did not justify full time employment.<sup>30</sup> Similarly, in supporting a three Commissioner model Dr Moss submitted that two of the Commissioners should be employed part time.<sup>31</sup> In the circumstances, the

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<sup>27</sup> Hon David Levine, AO RFD QC, *Report to the Premier: the Inspector's Review of the ICAC*, p36, para 122.

<sup>28</sup> See Schedule 1, item 4, ICAC Act.

<sup>29</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, pp 25&30; and submission 16A, Hon David Ipp AO, QC p4.

<sup>30</sup> Mr Paul Miller, Deputy Secretary, Cabinet and Legal, DPC, Transcript of Evidence, 8 September 2016, p40.

<sup>31</sup> Submission 9A, Dr Irene Moss AO, p1.

Committee considers the three member Commission should consist of one full time Chief Commissioner and another two part time Commissioners, with remuneration set to reflect their respective workloads.

- 1.22 Under section 6 of the ICAC Act, the Governor may, with the Commissioner's concurrence, appoint one or more Assistant Commissioners for the ICAC, to assist the Commissioner as he or she requires. The Committee considers that, under the proposed new arrangements, this provision for the appointment of Assistant Commissioners should remain to assist the continued smooth functioning of the ICAC and to accommodate peaks in workload. The appointment could continue to be made by the Governor and should have the concurrence of the Chief Commissioner, in consultation with the other Commissioners.

The Joint Committee on the ICAC should have a power of veto over all three commissioners

#### RECOMMENDATION 9

**That the Joint Committee on the ICAC have a power of veto over proposed appointments of people to the three member Commission.**

- 1.23 Under section 64A of the ICAC Act, the Committee can veto the proposed appointment of an ICAC Commissioner. The Committee considers this veto process to be an important safeguard that ensures suitable appointments to the position of Commissioner and appropriate Parliamentary scrutiny, and notes DPC's support for its continuation.<sup>32</sup> For this reason, the veto process should continue to apply in respect of appointments to the three member Commission.

The three Commissioners should have certain legal qualifications

#### RECOMMENDATION 10

**That to be appointed as a Commissioner, or to act in that role, a person must be qualified to be appointed as, or to have formerly been:**

- a judge or other judicial officer of the Supreme Court of NSW or another state or territory;
- a judge of the Federal Court of Australia; and/or
- a Justice of the High Court of Australia.

- 1.24 Given the nature of the ICAC's work, and the fact that it is envisaged that all three Commissioners would have the power to conduct investigations, it is essential that each Commissioner have certain legal qualifications. The Committee finds the evidence of the ICAC Commissioner compelling in this regard:

...what any commissioner does in the ICAC is essentially a quasi judicial hearing role. That is what the Commissioner is there to do. They are there to preside over inquiries and they are there to exercise powers which are akin to powers that are exercised all the time by Supreme Court judges, such as applications for search warrants and decisions to use compulsory processes. They are all practices that are

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<sup>32</sup> Mr Paul Miller, Transcript of Evidence, 8 September 2016, p40.



familiar to judicial officers and therefore it makes sense you use someone of that skill set.<sup>33</sup>

- 1.25 Clause 1(1) of Schedule 1 of the ICAC Act currently provides that a person is not eligible to be appointed Commissioner or Assistant Commissioner or to act in either of these offices unless the person is qualified to be appointed as, or has been, a judge of a superior court. The Committee considers that a similar provision is appropriate in respect of each of the three Commissioners and any Assistant Commissioners who are appointed going forward.

## CHIEF EXECUTIVE OFFICER

The ICAC should have a Chief Executive Officer

### RECOMMENDATION 11

**That there should be a Chief Executive Officer to manage the day-to-day operations of the ICAC, appointed by the Chief Commissioner in consultation with the other Commissioners for a term of up to seven years.**

- 1.26 The Committee considers that there should be a Chief Executive Officer (CEO) to manage the day-to-day operations of the ICAC. This too would have benefits for the ICAC's governance and decision-making capacity. Day-to-day decision making could be taken care of by a person with specialist management and administrative skills, freeing the three member Commission to focus on higher level decision-making.<sup>34</sup>
- 1.27 It is becoming increasingly common for integrity agencies in Australia to have a separate organisational manager, distinct from the Commissioner/s. The Queensland Crime and Corruption Commission and the Victorian Independent Broad-based Anti Corruption Commission (IBAC) both have a separate organisational manager distinct from their Commissioner/s, as does the proposed new NSW LECC.<sup>35</sup> In addition, in South Australia a CEO is responsible for staff units that fall under the Independent Commissioner Against Corruption.<sup>36</sup>
- 1.28 The Committee also considers that the new ICAC CEO should be appointed by the Chief Commissioner, in consultation with the other Commissioners, to avoid the possibility of a disconnect emerging between the decision-making body and the operational organisation.<sup>37</sup> Similarly, as incoming Commissioners would place reliance on the 'corporate knowledge' of a CEO, the CEO's term of appointment should be seven years to the Chief Commissioner's five and the other

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<sup>33</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p30.

<sup>34</sup> The Committee notes that Submission 25, DPC, p16, lists these as the advantages of employing a Chief Executive Officer.

<sup>35</sup> See submission 25, DPC, pp13-14, and s21 *Law Enforcement Conduct Commission Bill 2016* and Schedule 1, Part 3 *Government Sector Employment Act 2013*.

<sup>36</sup> See organisational chart, South Australian Independent Commissioner Against Corruption and Office for Public Integrity, *Annual Report 2014-15*, p11, South Australian ICAC website: [http://icac.sa.gov.au/sites/default/files/2014-2015\\_ICAC\\_OPI\\_Annual\\_Report.pdf#overlay-context=content/annual-reports](http://icac.sa.gov.au/sites/default/files/2014-2015_ICAC_OPI_Annual_Report.pdf#overlay-context=content/annual-reports), viewed 12 October 2016.

<sup>37</sup> See submission 25, DPC, p15 which noted that allowing the Commissioners to appoint the CEO would promote organisational alignment.

Commissioners' three. This would lessen the possibility of Commissioners and CEOs commencing or ending their terms simultaneously.

## ICAC STAFF

### ICAC staff should not be brought under the Government Sector Employment Framework

#### RECOMMENDATION 12

**That the ICAC staff should not be brought under the Government Sector Employment Framework.**

- 1.29 The Committee has decided not to support the DPC submission to bring the staff of the ICAC within the Government Sector Employment Framework. The Committee has given this careful consideration and has decided it could compromise the actual or perceived independence of the ICAC. The Committee believes that there needs to be a clear distinction between the ICAC and the public service.
- 1.30 Bringing the ICAC staff within the Government Sector Employment Framework would mean that matters such as executive structures, recruitment and selection processes, staff mobility and performance would be governed by centralised public sector employment law, regulations and rules.<sup>38</sup> This contrasts with the current situation where ICAC staff are employed by the ICAC Commissioner under section 104 of the ICAC Act. This section provides the Commissioner a broad discretion to appoint 'such persons...as may be necessary to enable the Commission to exercise its functions.'
- 1.31 The Public Service Commission has a lead role in the implementation of the Government Sector Employment Framework. The Committee asked the Public Service Commissioner, Mr Graeme Head, for advice on the implications and any benefits of transferring ICAC employees to the Framework. Mr Head outlined a number of modifications or exemptions which would be necessary to deal with concerns about the ICAC's independence.<sup>39</sup> For example, the Public Service Commissioner can inquire into and report on an agency's performance and progress against the Framework and direct the work of an agency. Mr Head advised that care would need to be taken to prevent actual or perceived interference in ICAC investigations or operational decisions. The Committee has concluded that the number and scale of exemptions required to protect the ICAC's independence would create unnecessarily complex laws and rules.
- 1.32 DPC outlined the following benefits of bringing the ICAC staff under the framework:

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<sup>38</sup> Public Service Commission, *Key Features of the Government Sector Employment Act 2013*, at Public Service Commission website, <http://www.psc.nsw.gov.au/policy---legislation/government-sector-employment-act-gse-2013>, viewed 20 October 2016.

<sup>39</sup> These included modifications to or exemptions from sections 13, 14, 15, 16, 30,31, 32, 36, 38, 46, 48, 54, 69, 70, 82, 83 of the *Government Sector Employment Act 2013* and Part 8 of the *Government Sector Employment Rules 2014*, see Letter from the Public Service Commissioner, received 19 September 2016, pp2-5, ICAC Committee webpage, <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/10281/Response%20from%20Public%20Service%20Commissioner%20regarding%20GSE%20Act.pdf>.

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- Increased efficiency, by having a ready-made structure which regulates employment arrangements, executive structures and workforce management.
- Workforce mobility, through transfer and secondment within the ICAC and the broader public sector.
- Increased reliability and validity of recruitment and selection processes.
- Workforce performance processes and resources.<sup>40</sup>

1.33 The Committee expects that the ICAC CEO, as recommended above, in conjunction with the Commissioners, would review current ICAC staffing practices and focus on these areas.

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<sup>40</sup>Submission 25A, DPC, pp6-7.

## Chapter Two – Powers and Procedures

### REVIEW OF ICAC FINDINGS

There should be no ‘exoneration protocol’ and no ‘merits review’ of ICAC findings

#### RECOMMENDATION 13

**That there should be no ‘exoneration protocol’ and no ‘merits review’ of ICAC findings.**

- 2.1 The Committee considers that ICAC findings should not be subject to any form of merits review including the ‘exoneration protocol’ proposed by the Inspector. The Inspector stated:

[The exoneration protocol] should provide that in circumstances where there is an absence of a criminal conviction arising from any prosecution based upon the same or similar cognate facts as warranted the making by the ICAC of a finding of corrupt conduct, the person against whom the finding was made may make an application to the Supreme Court for an expunging of the records of the ICAC or to have the findings set aside. The ICAC would of necessity be a party to such proceedings.<sup>41</sup>

- 2.2 A majority of stakeholders who made submissions to the inquiry about the proposed exoneration protocol did not support it, and the Committee agrees that such a protocol would not be appropriate. A person who has been acquitted by a court of a criminal offence is not necessarily exonerated from a previous ICAC finding.

- 2.3 The ICAC has a very different role from the Director of Public Prosecutions (DPP) and the Courts.<sup>42</sup> At the Committee’s public hearings, the ICAC Commissioner outlined the difference between an ICAC finding of corrupt conduct and the DPP prosecutorial process. Speaking of people who are found corrupt by the ICAC but later acquitted of criminal wrongdoing she stated:

The first thing is that they are not acquitted of the corrupt conduct finding; what they are acquitted of is the relevant criminal offence that the DPP has decided to prosecute, and that is a decision for the DPP, not for the Commission. What we do is we refer to the DPP material which may be or may not be in an admissible form. We refer it on the basis that the DPP may consider it appropriate to lay a criminal charge. Sometimes the DPP declines to do so, and that is an acceptable position from our point of view.<sup>43</sup>

- 2.4 The ICAC makes findings based on a different standard of proof from the criminal courts. Its findings are based on evidence that is not admissible in court, such as

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<sup>41</sup> Hon David Levine AO RFD QC, *Report to the Premier: The Inspector’s Review of the ICAC*, pp4-5.

<sup>42</sup> The following submissions made this argument: submission 2, ICAC, p21; submission 4, Professor Nicholas Cowdery AM QC, p2; submission 12, Mr Geoffrey Watson SC, p3; submission 16, Hon David Ipp AO QC, pp 5-6; submission 18, Mr Bruce McClintock SC, pp3-4.

<sup>43</sup> Hon Megan Latham, Transcript of Evidence, 18 March 2016, p37.

evidence given under coercion.<sup>44</sup> Speaking of the different standards of proof, the Commissioner stated:

...corrupt conduct findings, as I said, go well beyond the notion of just whether or not someone has been able to be found guilty of a criminal offence based on a beyond reasonable doubt standard. We make corrupt conduct findings on a standard of balance of probabilities to what is called the Briginshaw standard. Criminal prosecutions often fail because the elements of the offence are not proved beyond reasonable doubt. They are two quite separate processes with two quite separate outcomes.<sup>45</sup>

2.5 The following point made by Mr Bruce McClintock SC regarding the different rules of evidence is also illustrative:

...there have been examples (in disciplinary proceedings at least) where, at a compulsory examination, the person in question has admitted corrupt conduct but because that admission is not admissible, the subsequent proceedings failed. It would be ludicrous to assert that such a person has been exonerated by an acquittal or by a decision by the DPP not to prosecute because of awareness that the evidence is not admissible.<sup>46</sup>

2.6 Other submitters made similar points, observing that the elements of 'corrupt conduct' as defined in the ICAC Act do not correspond with any particular crime<sup>47</sup> and that findings of corrupt conduct do not necessarily lead to prosecutions not only because there may not be enough admissible evidence but because the offence may be out of time.<sup>48</sup> The exoneration protocol would also lead to considerable, expensive litigation and may detract from the proper functioning of the ICAC.<sup>49</sup>

2.7 In addition, the ICAC has taken steps to ensure that information about its findings is published together with information about any resulting legal action so that the 'full story' about findings against a person is reflected on the public record. Currently, the ICAC publishes information about the prosecution briefs that are with the DPP, and the outcome of DPP advice and prosecutions in relation to ICAC investigations over the past five years.<sup>50</sup> As a result, where people are found not guilty of charges laid against them, or where the DPP decides there is insufficient evidence to prosecute, this information is published on the ICAC's website. Status and outcome updates are also included in the ICAC's annual reports.<sup>51</sup>

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<sup>44</sup> Submission 1, Mr Graham Kelly, p4; submission 2, ICAC, p21; submission 4, Professor Nicholas Cowdery AM QC, p2; submission 13, Hon Graham Barr QC, p2; submission 16, Hon David Ipp AO QC, p5, para 26; submission 18, Mr Bruce McClintock SC, pp3-4; submission 26, Acting DPP, p3.

<sup>45</sup> Hon Megan Latham, ICAC Commissioner, Transcript of Evidence, 18 March 2016, p37.

<sup>46</sup> Submission 18, Mr Bruce McClintock SC, p4.

<sup>47</sup> Submission 1, Mr Graham Kelly, p4.

<sup>48</sup> Submission 2, ICAC, pp21-22.

<sup>49</sup> Submission 18, Mr Bruce McClintock SC, p3.

<sup>50</sup> See ICAC website: <https://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>, viewed 14 October 2016.

<sup>51</sup> See for example ICAC, *Annual Report 2014-15*, appendix 4, pp96-109, ICAC website: <https://www.icac.nsw.gov.au/publications-annual-reports>, viewed 21 October 2016.

- 2.8 In arguing against the exoneration protocol, former ICAC Inspector Mr Graham Kelly, also noted that there are already avenues open to aggrieved persons for complaint and review including complaining to the Inspector and judicial review.<sup>52</sup>
- 2.9 Indeed, there currently is a limited right to judicial review of ICAC findings but there is no right of appeal nor any procedure for review of the *merits* of an ICAC finding, commonly referred to as ‘merits review’. A merits review (of which the Inspector’s exoneration protocol is a form) occurs when an appeal body reconsiders the evidence that was before the original decision-maker to determine whether it was affected by a mistake of fact.<sup>53</sup>
- 2.10 In recommending against the exoneration protocol, the Committee has also decided against any other form of merits review of ICAC findings. In 2015, the Independent Panel Review of the Jurisdiction of the ICAC considered the question of merits review of ICAC findings and dismissed it.<sup>54</sup> The Hon Murray Gleeson AC, QC and Mr Bruce McClintock SC based this view on the fact that the ICAC does not make judicial decisions but reports findings and opinions at the conclusion of an investigation. They found that introducing merits review would confuse judicial and administrative functions and would increase misunderstandings as to the ICAC’s role.
- 2.11 The Supreme Court of NSW has jurisdiction to review findings made by the ICAC on the following limited grounds:
- material error of law on the face of the record (which includes the reasons given for the decision)
  - the reasoning is not objectively reasonable and the decision could not have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences
  - a finding is not supported by any evidence whatsoever
  - relevant matters have not been taken into account, or irrelevant matters have been taken into account
  - a material denial of natural justice.<sup>55</sup>
- 2.12 A finding that the ICAC has made a legal or procedural error can render a report and its recommendations amenable to declaratory relief or a declaration that an ICAC finding is a nullity.<sup>56</sup>

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<sup>52</sup> Submission 1, Mr Graham Kelly, p4.

<sup>53</sup> See Hon Murray Gleeson AC & Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, 30 July 2015, p19, para 3.4.3.

<sup>54</sup> Hon Murray Gleeson AC & Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, 30 July 2015, pp19-20, paras 3.4.1-8.

<sup>55</sup> *Duncan v ICAC* [2014] NSWSC 1018 (29 July 2014) [35].

## PROCEDURAL FAIRNESS

The ICAC should comply with procedural fairness during public inquiries and before publishing adverse findings

### RECOMMENDATION 14

**That the ICAC must follow the rules of procedural fairness during a public inquiry and before publishing an adverse finding against a person.**

### RECOMMENDATION 15

**That the three member Commission be required to issue guidelines to Commission staff and Counsel Assisting for the conduct of public inquiries. These guidelines should be tabled in Parliament and published on the ICAC's website.**

### RECOMMENDATION 16

**That the guidelines include requirements that ICAC staff and Counsel Assisting must follow in relation to procedural fairness.**

- 2.13 As outlined in chapter one, the Committee is recommending the retention of the ICAC's power to conduct public inquiries. In doing so, it recognises that the power to make public findings can have serious consequences for individuals, including reputational damage. There is also limited opportunity for judicial review of these findings and, as above, the Committee is not recommending increased judicial review ('merits review'). In these circumstances, it is vital that public inquiries are conducted in accordance with procedural fairness and ethical conventions.
- 2.14 The Committee considers that the ICAC should be required to comply with the rules of procedural fairness during a public inquiry and before publishing an adverse finding against a person. This requirement would have the added benefit of promoting public confidence in the ICAC and its vital work, confidence that cannot exist unless the public knows that the ICAC is required to treat people fairly.
- 2.15 Procedural fairness is an important concept, deeply embedded in the history of the common law. It has two main parts. The first is the fair hearing rule which generally requires a decision-maker to inform a person of the case against him or her, to provide a person with an opportunity to be heard, and to provide a person with prior notice of a decision that affects his or her interests. The second is the rule against bias, that is, that a decision-maker must not be biased or be seen by an informed observer to be biased in any way.<sup>57</sup>
- 2.16 The Committee is not attracted by arguments that the ICAC should not be bound by any formal set of procedural fairness principles because it is an investigative body. On this argument, there should be no clear-cut requirement, for example,

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<sup>56</sup> *Duncan v ICAC* [2014] NSWSC 1018 (29 July 2014) [30-35 and 244].

<sup>57</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment by Commonwealth Laws*, 2015, p396.

to inform a person of the case against him or her so s/he can respond, as would apply in judicial proceedings. The police are not required to provide all relevant evidence to a person of interest during their investigations, after all.<sup>58</sup>

2.17 While the ICAC *is* an investigative body, it also has a determinative function. Its power to make public findings can have serious implications for individuals. For this reason, once an investigation has progressed to the public stage, the ICAC should be required to comply with procedural fairness in conducting its proceedings.

2.18 Indeed, the ICAC is already required to conduct its public inquiries in a procedurally fair way, as affirmed by Gleeson CJ in the case of *Independent Commission Against Corruption v Chaffey* in which His Honour stated:

I have no doubt that the Commission is obliged to observe the rules of natural justice, or, as they are now more commonly called, the requirements of procedural fairness under Div 3 of Pt 4 of the Act, and in making decisions concerning the procedures to be followed at such hearings...The Commission's obligation in this regard follows, amongst other things, from the possibility that the hearing may result in adverse report and consequent harm to the reputation of persons...<sup>59</sup>

2.19 There would be greater certainty around the content of this requirement if specific procedural fairness obligations were set out in guidelines. The ICAC already has Standard Directions for the conduct of public inquiries covering a range of matters including legal representation, calling of witnesses, examination and cross-examination of witnesses and the calling of mitigatory evidence.<sup>60</sup> The new three member Commission should review these Standard Directions, paying particular regard to procedural fairness concerns, and issue new guidelines to Commission staff and Counsel Assisting for the conduct of public inquiries.

2.20 To foster appropriate Parliamentary oversight, these guidelines should be tabled in Parliament. They should also be published on the ICAC's website. Specific areas of procedural fairness that the guidelines should include (which are not necessarily exhaustive) are outlined below.

## RECOMMENDATION 17

**That the guidelines cover the investigation of exculpatory evidence and the disclosure of relevant evidence to an affected person.**

2.21 As the ICAC's findings can have serious consequences for individuals, it is essential that before it makes those findings it considers all relevant evidence that it is aware of. It must also provide persons of interest with the opportunity to respond to any evidence that it bases its findings on. The Acting Ombudsman provided evidence to the Committee about these important requirements. Speaking of general common law procedural fairness obligations he stated:

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<sup>58</sup> See for example evidence given by Mr Bruce McClintock SC, Transcript of Evidence, 28 September 2016, p28.

<sup>59</sup> *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21.

<sup>60</sup> ICAC, *Standard Directions for Public Inquiries*, October 2014, ICAC website: <https://www.icac.nsw.gov.au/documents/investigations/general-information-1/4525-public-inquiry-directions/file>, viewed 13 October 2016.



...natural justice imposes a quite demanding obligation that any party who is adversely affected by [a final decision]...has been given a proper opportunity to make submissions based upon adequate knowledge of the evidence that has gone into that decision... the guiding common law principle is that parties are given the opportunity to examine material that is 'credible, relevant and significant'...Something can be relevant and significant if it is exculpatory evidence. Another way it is sometimes put is that parties are entitled to know the case to be met...<sup>61</sup>

- 2.22 The ICAC Commissioner provided evidence that, in conducting an investigation the task of the ICAC is to establish the truth of what happened, and it does this by making findings of relevant facts on the balance of probabilities. The Commissioner stated that the ICAC ensures all cogent, reliable, relevant and significant evidence of which it has knowledge that will assist the fact-finding process is made available during the course of a public inquiry.<sup>62</sup>
- 2.23 In addition, at the Committee's public hearings, the Commissioner stated that the ICAC does not deliberately ignore or conceal exculpatory evidence and that:
- It is invariably the case that Counsel representing a person of interest in an inquiry will be afforded the opportunity to re-examine his or her client after all other questions have been asked, and that re-examination also allows the person of interest to place on the record his or her response to the allegations.<sup>63</sup>
- 2.24 Further, the Commissioner told the Committee that if the ICAC failed to take into account relevant evidence in coming to an ICAC finding, judicial review is available and that such a finding could be overturned by the Supreme Court.<sup>64</sup>
- 2.25 While the Committee acknowledges the Commissioner's evidence concerning judicial review of ICAC findings, it notes that challenging a finding in the Supreme Court is expensive and may be difficult if a person of interest did not know the full extent of credible, relevant and significant evidence in his or her case. For this reason, the guidelines issued by the three member Commission should include an obligation on the ICAC, during public inquiries, to disclose all credible, relevant and significant evidence to a person of interest, including exculpatory evidence. This should happen before it makes findings and at such time as to allow an early and full response.

## RECOMMENDATION 18

### **That the guidelines cover the opportunity to cross-examine regarding credit.**

- 2.26 The Committee also considers that before making an adverse finding against an individual, it is essential that the ICAC has provided that person, or their legal representative, with reasonable opportunity to test the evidence upon which

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<sup>61</sup> Professor John McMillan, Transcript of Evidence, 9 September 2016, p3.

<sup>62</sup> Hon Megan Latham, Answers to Further Questions, 19 September 2016, p4.

<sup>63</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p26.

<sup>64</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p26.

that finding is based. This is particularly the case where the adverse finding is based on the evidence of a witness of questionable credibility.<sup>65</sup>

2.27 Allowing witness credibility to be tested, where it is in issue, would assist the ICAC in its task of establishing the truth of what happened and making findings of relevant facts on the balance of probabilities.

2.28 The Committee notes, however, evidence from the Acting Ombudsman that allowing evidence to be tested can affect the efficiency of a public hearing:

**Professor McMillan:** ...In a public hearing, the major constraints on allowing any one witness to test the evidence of another witness probably arises more for considerations of efficiency in conducting the process.

**The Hon Trevor Khan:** Indeed, one of the difficulties is if you have multiple persons of interest it becomes very hard to determine who is going to go on the attack with a particular witness.

**Professor McMillan:** Yes, and if you do allow multiple testing then what you get is criticism of a different kind: that there is a phalanx of lawyers sitting at the bar table to investigate what may be a matter that could be conducted more efficiently in another way.<sup>66</sup>

2.29 However, the testing of credibility is already permitted by the ICAC during public inquiries, as demonstrated by the following evidence of the ICAC Commissioner:

If the credit of any witness who makes spurious allegations against another is in issue, it is tested by Counsel Assisting and again by other Counsel at a public inquiry.<sup>67</sup>

2.30 Including a requirement in the guidelines to allow testing of credibility would make it clear that this procedure, vital for procedural fairness and the integrity of ICAC findings, must be followed.

## RECOMMENDATION 19

**That the guidelines cover access to documents and time to prepare for a public inquiry.**

2.31 In the Committee's view, given the serious consequences that can flow from an adverse ICAC finding, all witnesses and legal representatives should be given reasonable time to prepare for a public inquiry. This is a particular concern where the ICAC has decided to provide witnesses and/or legal representatives with access to relevant material prior to a public inquiry. In such cases, persons must be given reasonable time before the inquiry to examine the material. If this does not occur, witnesses are less able to assist the ICAC with its task of establishing the truth of what happened.

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<sup>65</sup> For a discussion of these issues see Hon David Levine AO RFD QC, Transcript of Evidence, 8 September 2016 p12; and Professor John McMillan, Transcript of Evidence, pp4-5.

<sup>66</sup> Professor McMillan, Transcript of Evidence, p5.

<sup>67</sup> Hon Megan Latham, Transcript of Evidence, p26.

2.32 The Committee is concerned at an excerpt from the submission of the President of the Rule of Law Institute of Australia, Mr Robin Speed, to its inquiry. It indicates that during the ICAC's Operation Dewar, the ICAC provided 1,200 pages of material to Mr Murray Kear's legal representative, Mr Oates, on Friday 29 November 2013, for a public inquiry that commenced two working days later, on Tuesday 3 December 2013. The submission quotes from the transcript of the public inquiry:

**Mr Oates:** Can I just say something on that point, Commissioner? The Commission has myriad resources. This matter has been under investigation for months. The Commission has Senior Counsel, Counsel, there are investigators, lawyers et cetera, months to consider these issues and months to consider the material. Not so with my client. He has one person representing him and on Friday of last week I received 1,200 pages of material, not indexed, and I was expected to then get on top of that and index it and come along ready to run a case in the same way that they have been prepared, that is simply not equitable.<sup>68</sup>

2.33 In response to written questions from the Committee, the ICAC Commissioner confirmed that Mr Oates was provided with the material on a DVD on Friday 29 November for a public inquiry that commenced two working days later, on 3 December. The Commissioner indicated the DVD 'included material created by Mr Kear and other material within his knowledge as Commissioner of the SES'.<sup>69</sup> The Commissioner further stated:

The Commission would expect that if Mr Oates, an experienced advocate, considered that he was unable to adequately prepare for the public inquiry he would have raised this at the commencement of the public inquiry on Tuesday 3 December. He did not do so.<sup>70</sup>

2.34 In addition, the Commissioner's response sets out the current legislative and other arrangements affecting witnesses' and legal representatives' time to prepare for a public inquiry:

Commission policy requires that a person required to appear at a...public inquiry be given reasonable notice...Persons required to attend a public inquiry should be served with a summons at least ten working days prior to the date of their attendance...

The Commission maintains a "restricted" website by which parties involved in an investigation and their legal representatives may be granted access to approved material prior to the commencement of a public inquiry. The restricted website is used when a decision has been made to disclose material prior to the commencement of a public inquiry. Access to this information prior to the commencement of the public inquiry assists those appearing at the public inquiry to prepare for the public inquiry...

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<sup>68</sup> Submission 3, Mr Robin Speed, President, Rule of Law Institute, p5.

<sup>69</sup> Hon Megan Latham, Answers to Further Questions, 19 September 2016, p2.

<sup>70</sup> Hon Megan Latham, Answers to Further Questions, 19 September 2016, p2.

It is always open to any party who considers that there has been insufficient time to prepare for a compulsory examination or public inquiry to make an application for an adjournment.<sup>71</sup>

- 2.35 In the Committee's view it is inequitable to provide a legal representative who is appearing before a public inquiry with 1,200 pages of material two working days prior to the commencement of the public inquiry. This is particularly so where the lawyer is representing a person of interest, who could be subject to adverse findings at the end of the inquiry.
- 2.36 The Committee notes the Commissioner's advice that a party can apply for an adjournment if he or she has had inadequate time to prepare. As a matter of equity and efficiency, however, the ICAC should also have an upfront obligation to allot reasonable time.
- 2.37 The guidelines issued by the three member Commission should continue the requirement for the ICAC to give a person reasonable notice of a public inquiry (as currently provided for by ICAC policy). In addition, in cases where the ICAC has decided to provide witnesses and/or legal representatives with access to relevant material prior to a public inquiry, the guidelines should specifically require that those persons be given reasonable time to examine the material in preparation for the public inquiry. What is reasonable would differ from case to case, but this would send another strong message to the public that the ICAC has an obligation to treat people fairly and that proceedings are being conducted in an appropriate manner.

People should be able to respond to adverse findings and their response should generally be published

#### RECOMMENDATION 20

**That the ICAC Act be amended to provide that, before the ICAC or the ICAC Inspector makes an adverse comment about a person or body in a report:**

- **the person or body must be given the opportunity to respond; and**
- **where they elect, a fair account of their response must be included in the report.**

#### RECOMMENDATION 21

**That in including a response to an adverse finding, the ICAC must not identify any person who is not the subject of adverse comment or opinion unless the ICAC:**

- **is satisfied it is in the public interest;**
- **is satisfied it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and**

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<sup>71</sup> Hon Megan Latham, Answers to Further Questions, 19 September 2016, p3.

- **states in that the person is not the subject of any adverse comment or opinion.**

2.38 The ICAC Act should be amended to require the ICAC to allow a person or body to respond before including an adverse comment about that person or body in one of its reports. In addition, the ICAC should generally have to include a fair account of that response in its report. All investigations involving a public inquiry are reported to Parliament<sup>72</sup> and the proposal would give affected persons a chance to have their response to adverse findings placed on the public record in circumstances where there will continue to be limited opportunity to challenge those findings in court.

2.39 The Committee understands that under the ICAC's current policies and procedures, there is already a consultation requirement. At the end of an investigation, submissions from Counsel Assisting are provided to all relevant parties and they are given an opportunity to respond.<sup>73</sup> The proposed amendment would elevate this requirement to legislation.

2.40 In addition, where the person or body adversely mentioned elects, the ICAC should be required to fairly set that response out in its report. There is no current requirement for this to occur. The Committee notes the evidence of the President of the Rule of Law Institute of Australia:

I would expect that procedural fairness would require any adverse submissions or any adverse likely findings to be made available to the person and they be given an opportunity to address it publicly. I see no reason why those submissions should be kept in private. I think you cannot have this idea of the Commission dictating what will be dealt with in private and what will be dealt with in public because it leads to obvious great unfairness because it just leaves evidence which is favourable to the Commission and you never hear the evidence which is to the contrary.<sup>74</sup>

2.41 The ICAC Commissioner has objected to the idea of publishing the actual submissions of a person adversely mentioned in an ICAC report because it would mean the publication of voluminous material and could result in the publication of serious allegations against people who would have no opportunity to defend themselves. The Commissioner stated:

...we go through an exhaustive process when we are writing the reports to make the reports accessible to ordinary members of the public and to tell, if you like, the progress and outcome of the inquiry in an intelligible way. I would be very reluctant to weigh down what is largely an efficient report process by volumes of submissions. When I say "volumes" I mean this: it would be wholly unrealistic to publish just one set of submissions without publishing them all. The reason I say that is because publishing any one set of submission is unintelligible, because the submissions will refer to other submissions...<sup>75</sup>

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<sup>72</sup> Section 74 of the ICAC Act provides that the ICAC is required to prepare a report where it has conducted a public inquiry, unless the Houses of Parliament have given different directions, and to furnish that report to the Presiding Officer of each House of Parliament.

<sup>73</sup> Hon Megan Latham, Transcript of Evidence, 18 March 2016, p37.

<sup>74</sup> Mr Robin Speed, Transcript of Evidence, 8 September 2016, p17.

<sup>75</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p31.

2.42 The Commissioner continued:

...it is very common for submissions at the end of a public inquiry, by one interested party, to make very damning allegations against someone else who has appeared because there is...a tendency to confess and avoid...so you have multiple parties who, in effect, are making cross-allegations against each other...If ultimately what we have done by way of distilling all of that information into a report is not made adverse factual or corrupt conduct findings against some of those people, then publication of those submissions will, for the first time, air those allegations in a public forum without that person having the opportunity to once again defend themselves.<sup>76</sup>

2.43 The Committee agrees it may be impractical to require the ICAC to publish voluminous submissions. For this reason, the ICAC should be required to fairly set out the person or body's response in its report, not to publish their actual submission. This is similar to a requirement that exists for reports of the Victorian IBAC under section 162 of the *Independent Broad-based Anti-Corruption Commission Act 2011*. However, publication should only occur where the person or body elects as, in some cases, the decision to publish may have the potential to prejudice a person if criminal proceedings follow the ICAC investigation.

2.44 Like the Commissioner, the Committee is also concerned that publication of the response to an adverse ICAC finding may involve the publication of allegations against a third party who could not defend themselves. For this reason, the Committee notes section 162(7) of the *Independent Broad-based Anti-Corruption Commission Act 2011* which provides that the IBAC must not include in a report any information that would identify any person who is not the subject of any adverse comment or opinion unless it:

- is satisfied it is necessary to do so in the public interest;
- is satisfied it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
- states in the report that the person is not the subject of any adverse comment or opinion.

2.45 In the Committee's view, a similar provision should be considered for the ICAC Act to protect any third parties named in an ICAC report as a result of the new publication requirement.

2.46 The Committee also considers that the Inspector should be required to allow a person or body to respond before including an adverse comment about them in his or her report. Section 143 of the *Law Enforcement Conduct Commission Bill 2016* contains a requirement for the proposed new LECC and its Inspector to give a person the opportunity to make a submission before including an adverse comment about him or her in a report.

2.47 The Commissioner has complained that the Inspector did not consult the ICAC before bringing down his report concerning Operation Hale in December 2015, or

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<sup>76</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, pp31-32.

his Report to the Premier reviewing the ICAC in May 2016.<sup>77</sup> Extending the proposed amendment to the Inspector would ensure that the ICAC is consulted before the Inspector publishes any report making adverse findings against it.

- 2.48 In addition, former ICAC Inspector, the Hon Harvey Cooper AM, has recommended that the Inspector be required to publish any response of the ICAC to the Inspector's adverse findings where the ICAC does not agree with those findings.<sup>78</sup> In the circumstances, the Committee considers that (like the ICAC), where the Inspector makes adverse findings against any person or body, he or she should be required to publish a fair account of that response.

The ICAC should exercise its power to issue notices to produce with care

### FINDING 1

**That Section 22 notices to produce should not be used by the ICAC to obtain evidence in cases where a search warrant should be used.**

- 2.49 The Committee considers that the ICAC should not use notices to produce to obtain evidence against persons suspected of wrongdoing at the outset of an ICAC investigation, when evidence collection is in its infancy and there may be little solid evidence against anyone. In such cases, to ensure appropriate oversight and protections for persons of interest, and thereby protect citizens against arbitrary interference, a search warrant should be used. Notices to produce are generally for use once an ICAC investigation has progressed sufficiently to reach the hearing stage (compulsory examinations or public inquiries).
- 2.50 In his December 2015 report concerning Operation Hale, the Inspector raised concerns about notices to produce forthwith issued by the ICAC Commissioner during that Operation. The Inspector stated that:
- On 23 July 2014, the Commissioner issued 'purportedly pursuant to section 22', notices to produce forthwith to Ms Margaret Cunneen SC, and Mr Stephen Willey (and others), requiring the production of their mobile phones.
  - On 30 July 2014, ICAC investigators served those notices to produce forthwith at two addresses, including Ms Cunneen's home address, and Ms Cunneen and Mr Willey produced the mobile phones.
  - On 6 August 2014, an ICAC Senior Investigator applied for two search warrants, one to enter the premises of Ms Cunneen to obtain possession of her mobile phone, and the other to enter the premises of Mr Willey to obtain his mobile phone – the phones that were already in the possession of the ICAC.<sup>79</sup>

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<sup>77</sup> See submission of the ICAC to the Committee's Review of the Inspector's Report regarding Operation Hale, 9 February 2015 pp5-9; and Submission 2, ICAC, p1.

<sup>78</sup> Submission 11, Hon Harvey Cooper AM, p2.

<sup>79</sup> Hon David Levine AO RFD QC, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988, Operation Hale, ICAC re Margaret Cunneen SC & Ors*, December 2015, pp15-17.

- 2.51 This course of events raised questions about why the ICAC had not used a search warrant to obtain the phones in the first place and prompted the Inspector to make the following finding:

There seems no doubt that Search Warrants for the seizure of all phones should be issued in the first instance. This would have avoided the farce that followed...<sup>80</sup>

- 2.52 The Inspector also made the following recommendation:

...the ICAC should take exquisite care in the exercise of its powers to issue and serve 'Notices to Produce'. It is the view of this Inspectorate that a 'Notice to Produce' forthwith is contrary to law. If something is required immediately the mechanism is a Search Warrant lawfully issued and lawfully executed. The resulting offence to privacy considerations is obvious.<sup>81</sup>

- 2.53 The ICAC stated in response that notices to produce forthwith are legal, pointing to the case of *Eglishaw v Australian Crime Commission* [2010] FCAFC 82, a decision of the Full Court of the Federal Court that upheld the validity of a notice to produce forthwith 'issued under a relevantly identical provision to section 22 of the ICAC Act'.<sup>82</sup>

- 2.54 In addition, in explaining why the ICAC proceeded by way of notice to produce in the first instance, and not search warrant, the ICAC Commissioner highlighted that notices to produce are useful to obtain mobile phones which travel with the person. She also indicated that, as they travel with the person, when ICAC officers execute search warrants for mobile phones, they have to attend premises very early in the morning to make sure that those phones are actually there, and the occupants have not left with them for the day. The officers also have to wear ICAC vests so that neighbours do not assume the relevant premises are being burgled.<sup>83</sup> The Commissioner stated:

...mobile phones travel with the person...You are not going to necessarily be able to find a mobile phone if you execute a search warrant on premises. Search warrants cannot be executed on a person, they have to be executed on premises. What that search warrant does...is that it allows you to enter and seize without consent. So, the whole basis of the search warrant is that it assumes non-consent. On the other hand, a notice to produce is simply a notice that is served on a person for production of an item...we made an operational decision that the notice to produce ...was the correct way to go, because the alternative was that if we sought a search warrant members of the community and neighbours of Ms Cunneen would have had the unedifying sight of five or six ICAC officers wearing ICAC vests at her premises at six o' clock in the morning, issuing a search warrant for the purposes of going through and effectively searching every room...it would have been incredibly more disruptive

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<sup>80</sup> Hon David Levine AO RFD QC, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988, Operation Hale, ICAC re Margaret Cunneen SC &Ors*, p18.

<sup>81</sup> Hon David Levine AO RFD QC, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988, Operation Hale, ICAC re Margaret Cunneen SC &Ors*, p64.

<sup>82</sup> Tab 5 to the Submission of the ICAC to the Committee's Review of the Inspector's Report regarding Operation Hale, 9 February 2016, p4.

<sup>83</sup> Hon Megan Latham, Transcript of Evidence, 18 March 2016, pp15-16.



and more embarrassing and frankly from our point of view a complete overkill in the circumstances.<sup>84</sup>

- 2.55 The Committee is not in a position to comment on the legality of the notices to produce forthwith issued during Operation Hale. There is, however, a separate public policy question about whether notices to produce should be used to obtain evidence against a person suspected of wrongdoing at the outset of an ICAC investigation where evidence collection is in its infancy and there may be little solid evidence against anyone.
- 2.56 The Commissioner has argued that notices to produce forthwith are a useful tool for obtaining mobile phones and, in the case of Operation Hale, they were a less intrusive and embarrassing option than a warrant. The converse of this argument is that search warrants can be used to successfully obtain mobile phones from premises – the ICAC has powers of surveillance that can be used to ascertain people’s activity patterns and where their mobile phone is likely to be at any given time.<sup>85</sup> In addition, it is irrelevant whether the execution of a warrant would cause greater embarrassment or intrusion than a notice to produce. The requirement for the authorities to obtain a warrant protects citizens against arbitrary interference, and a notice to produce forthwith should not be used to circumvent this requirement.
- 2.57 Oversight and other protections are built into the regime for obtaining a search warrant, and these protections are absent from the regime for the issue and execution of section 22 notices to produce. While the ICAC Commissioner does have power to issue his or her own warrants, it is ICAC policy that warrants be sought from authorised officers and not the Commissioner.<sup>86</sup> Therefore, the ICAC can only obtain a warrant where it can satisfy an independent third party that there are reasonable grounds for issuing it. In addition, the further oversight and procedural fairness requirements set down in Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* apply in respect of warrants.<sup>87</sup>
- 2.58 The Committee also heard evidence that, at least on the face of it, section 22 notices to produce were never intended to be used to obtain evidence against a person at the outset of an ICAC investigation. Rather, they were intended to be used to allow the production of evidence once an investigation had progressed to

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<sup>84</sup> Hon Megan Latham, Transcript of Evidence, 18 March 2016, p15.

<sup>85</sup> See ICAC website regarding ICAC’s statutory powers: <https://www.icac.nsw.gov.au/investigations/investigation-process/statutory-powers>, viewed 21 October 2016, and *Surveillance Devices Act 2007*. Indeed, in the context of Operation Hale, the ICAC conducted surveillance on the persons of interest to ascertain their activity patterns and note the description of any mobile telephone they possessed, see Hon David Levine AO RFD QC, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988, Operation Hale, ICAC re Margaret Cunneen SC & Ors*, p15.

<sup>86</sup> See section 40(2) ICAC Act which allows the Commissioner to issue a search warrant; and ICAC Answers to Questions, 2 February 2016, Tab 5, *Operations Manual, Procedure No. 9, Procedures for Obtaining and Executing Search Warrants*, p1, ICAC Committee webpage: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/8729/ICAC%20Response%20to%20Questions%20on%20Notice.PDF>, which provides that warrants are to be sought from an authorised officer, not the Commissioner.

<sup>87</sup> See s59 and schedule 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

the hearing stage.<sup>88</sup> Speaking of the notices to produce issued in Operation Hale, Mr Bruce McClintock SC told the Committee:

...you can make a reasonable argument that the notice to produce forthwith was not intended for use in a situation like that and that it should have been a search warrant that was obtained. The ICAC, under the legislation, has powers to issue its own search warrants but it has never done so; it has always gone to a magistrate or judge to get the search warrant.<sup>89</sup>

2.59 Mr McClintock further indicated that this is an area that would be suitable for audit by the Inspector:

I would have thought it would be right to audit that and to pull in any other examples of the use of the [notice to produce] procedure outside producing evidence for hearings – which is what it is prima facie intended for – to see whether it is being done properly.<sup>90</sup>

## PROSECUTIONS AND THE ICAC'S RELATIONSHIP WITH THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The ICAC should provide all disclosable evidence to the Director of Public Prosecutions

### RECOMMENDATION 22

**That ICAC officers investigating alleged summary offences should have a duty to provide all disclosable evidence to the Director of Public Prosecutions.**

### RECOMMENDATION 23

**That any non-publication orders made by an ICAC Commissioner should not prevent the ICAC from providing disclosable evidence to the Director of Public Prosecutions.**

2.60 In cases where the ICAC has referred a matter to the DPP to consider whether a person should be prosecuted for a criminal offence, it is essential that the ICAC provides the DPP with all disclosable evidence about the matter, to ensure that the person is dealt with fairly.

2.61 Under the Memorandum of Understanding (MoU) that exists between the Office of the DPP (ODPP) and the ICAC, the ICAC is not required to provide the ODPP with all evidence that it has collected in a matter. Rather, it is to provide admissible evidence (that is, evidence that could be used to prosecute a person) and disclosable material for the ODPP to consider.<sup>91</sup> The DPP, Mr Lloyd Babb SC, explained to the Committee the difference between admissible evidence and disclosable material:

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<sup>88</sup> Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, p37.

<sup>89</sup> Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, p35.

<sup>90</sup> Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, p37.

<sup>91</sup> Mr Lloyd Babb SC, DPP, Transcript of Evidence, 8 September 2016, pp7-8.

They are not necessarily the same thing because there is a need to disclose material that may assist an accused person or lead to a line of inquiry that may assist an accused person.<sup>92</sup>

2.62 Further, under section 15A of the *Director of Public Prosecutions Act 1986*, in indictable matters, the ICAC must complete a Disclosure Certificate certifying that it has disclosed to the DPP all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person. This requirement holds for summary matters too, though it is not a statutory requirement, and is instead covered by a recent amendment to the MoU.<sup>93</sup>

2.63 The Committee heard that in some cases, after the ICAC has served a brief of evidence on the DPP, the DPP forms the view that further admissible or disclosable material is required or may exist. In such cases, the DPP raises requisitions to obtain the material from the ICAC.<sup>94</sup> However, problems can arise where the material sought is the subject of a non-publication order, made by the ICAC:

**Mr Babb:** There is one instance that I am aware of where [the ICAC] declined to comply with a request that was made...In relation to this particular case there was compulsory examination material subject to a non-disclosure order which in its form applied to disclosing it to anyone else.

**The Chair:** That includes you?

**Mr Babb:** Yes, as I understand it. There would need to be a variation of that order for it to come to me because in the normal course anything that I get that is disclosable I will pass straight on to the defence.<sup>95</sup>

2.64 Further, Mr Babb told the Committee that, to ensure fairness to an accused person, it is essential that a non-publication order is lifted where it relates to disclosable material:

It is important that I have any relevant material for a number of reasons. Full disclosure has to take place to any accused person. In some instances, even if the material is privileged because of a public interest such as national security or some other public interest...it is important that I know about the existence of the material because in fairness to an accused person it may dictate that the prosecution not proceed even though there is otherwise a reasonable prospect of conviction. If we cannot disclose important disclosable material then I need to consider it and assess the unfairness that is visited on an accused person by not being able to access that material.<sup>96</sup>

2.65 The ICAC Commissioner gave evidence that if the DPP requests evidence that is covered by a non-publication order, and the ICAC accepts that the evidence is relevant for the purposes of a prosecution, she will vary the non-publication

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<sup>92</sup> Mr Lloyd Babb SC, Transcript of Evidence, p8.

<sup>93</sup> Mr Lloyd Babb SC, Answers to Questions Taken on Notice, 8 September 2016, pp1-2.

<sup>94</sup> Mr Lloyd Babb SC, Transcript of Evidence, p8.

<sup>95</sup> Mr Lloyd Babb SC, Transcript of Evidence, p9.

<sup>96</sup> Mr Lloyd Babb SC, Transcript of Evidence, pp10-11.

order and provide it to the DPP.<sup>97</sup> Further, the DPP gave evidence to the effect that he is generally confident that the ICAC discloses relevant material though he conceded that there will always be ‘an element of “you do not know what you do not know”’.<sup>98</sup>

2.66 While the Committee acknowledges the DPP’s evidence that discussions are ongoing, it is concerned about the case where the ICAC declined to provide compulsory examination material to the DPP that was subject to a non-disclosure order. It is also concerned by the recent Local Court proceedings involving Mr Murray Kear during which the Magistrate raised concerns that the ICAC had not provided the DPP with certain records of interview taken by the ICAC that contained relevant exculpatory material.

2.67 The Committee is pleased that amendments have been made to the MoU between the ODPP and the ICAC to extend the requirement for Disclosure Certificates to summary matters. The Committee notes the DPP’s advice that these amendments were made following the judgment in the Kear matter, which was a summary matter:

[after the Kear judgment] the [DPP] solicitor... suggested [to the Solicitor for Public Prosecutions] that the Memorandum of Understanding (MOU) between the ODPP and the ICAC be amended to provide for a Disclosure Certificate to be completed by the ICAC in summary hearings (as section 15A of the *Director of Public Prosecutions Act 1986* applies only to indictable offences). On 8 July 2016 the Solicitor for Public Prosecution proposed this change to the MOU with the ICAC. On 2 September 2016 the Solicitor for the ICAC agreed to provide disclosure certificates in relation to summary offence prosecutions.<sup>99</sup>

2.68 However, given the importance of disclosable material to the fair treatment of accused persons, the Committee considers that further action should be taken. First, the requirement for Disclosure Certificates in summary matters should be elevated from the MoU to legislation. Secondly, legislative amendments should be made to ensure that non-publication orders made by the ICAC cannot operate to prevent the provision of disclosable evidence to the ODPP.

2.69 The Committee accepts that there may be cases, for example those that touch on national security, where disclosable material that is subject to a non-publication order cannot be provided to an accused person. However, there is no such reason for failing to provide disclosable material to the DPP. Indeed, it is essential that the DPP is made aware of the material to allow assessment of whether it is fair to continue with a prosecution.

The ICAC should continue to have investigative powers after a matter is referred to the Director of Public Prosecutions

#### RECOMMENDATION 24

**That the ICAC have the power to gather and assemble admissible evidence after a matter has been referred to the Director of Public Prosecutions.**

<sup>97</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p33.

<sup>98</sup> Mr Lloyd Babb SC, Transcript of Evidence, p10.

<sup>99</sup> Mr Lloyd Babb SC, Answers to Questions Taken on Notice, 8 September 2016, pp1-2.

- 2.70 The Committee considers that the ICAC should continue to have investigative powers after it refers a matter to the DPP. These post-referral powers would be used in the context of criminal proceedings and would have to be different from the ICAC's initial investigation powers. They should not allow the ICAC to compel evidence under objection. The ICAC should also be given additional funding to exercise these new powers.
- 2.71 It is usually not until an ICAC investigation has concluded that the ICAC seeks advice from the DPP about possible criminal prosecutions. At this time, the ICAC no longer has any power to gather evidence.<sup>100</sup>
- 2.72 In contrast, during an ICAC investigation, the ICAC has power to obtain information from a public authority or public official; to require a person to produce documents or things; to enter premises of a public authority or public officer to inspect or copy documents; and to issue and execute search warrants.<sup>101</sup> Section 26 of the ICAC Act also provides that, for the purposes of an ICAC investigation, the ICAC can compel information from a public authority or public official, or compel a person to produce documents or things in cases where the person objects to doing so because it may incriminate him or her.
- 2.73 In his submission to the inquiry, the then Acting DPP, Mr Keith Alder, indicated that the ICAC's lack of investigative powers at the conclusion of an ICAC investigation can cause problems for a prosecution:
- [The ICAC's lack of investigative powers] causes a problem when the ODPP issues requisitions that might require the use of one of these powers. For example, if the ODPP requested bank documents or telephone call charge records the ICAC would be unable to obtain these requisitions as they would involve a breach of privacy in the absence of a search warrant or notice to produce.<sup>102</sup>
- 2.74 In recommending continued investigative powers for the ICAC, however, Mr Alder cautioned that such powers would need to be 'slightly different from the ICAC's initial investigation powers as they should not contain an option for a person to produce items under objection'.<sup>103</sup>
- 2.75 In her evidence to the Committee, the Hon Megan Latham, ICAC Commissioner, did not object to the proposal for the continuing investigative powers.<sup>104</sup> The Commissioner did note, however, that the ICAC would need extra resourcing to carry out these additional powers:

**Ms Latham:**...can I just say in relation to these other proposals by the DPP...you are looking at some significant resources that we do not have...the more you want to tie the so-called outcomes from a Commission inquiry to the number of successful prosecutions...then the more you are going to require resources in the Commission itself to deal with that function which will necessarily detract from its statutory function.

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<sup>100</sup> Submission 26, Acting DPP, p2.

<sup>101</sup> See sections 21, 22, 23, 40 and 41 ICAC Act.

<sup>102</sup> Submission 26, Acting DPP, p2.

<sup>103</sup> Submission 26, Acting DPP, p2.

<sup>104</sup> Hon Megan Latham, ICAC Commissioner, Transcript of Evidence, 9 September 2016, p33.

**Ms Voltz:** It is the old chestnut of criminal charges investigated by Police and the exposure of corruption.

**Ms Latham:** It is an intractable problem.<sup>105</sup>

There is considerable public interest in the successful prosecution of persons investigated by the ICAC who have committed criminal offences

## FINDING 2

**That the ICAC's role in gathering admissible evidence for prosecutions should be examined further by the Committee.**

2.76 In the Committee's view, there is considerable public interest in the successful prosecution of persons investigated by the ICAC who have committed criminal offences. However, the principal functions of the ICAC are to investigate, expose and prevent corrupt conduct in the NSW public sector.<sup>106</sup> Gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence and furnishing it to the DPP (or other appropriate body) is only a secondary function of the ICAC.<sup>107</sup>

2.77 The Commissioner expanded on this point at the Committee's hearings on 9 September 2016:

**Ms Latham:**...the ICAC was never meant to have any expectation that the matters it investigated would ultimately result in criminal charges...So what you have is a disconnect – a structural and policy disconnect – because the policy underlying the ICAC is that you investigate and expose corruption and the notion of corrupt conduct is defined in such a way that it does not necessarily neatly fit into what might be a prosecutable criminal offence...

**Mr Humphries:** Under the current arrangement are you inadvertently contaminating what should really be in all essence a prosecution case down the track for corruption or criminal investigation?

**Ms Latham:** I do not think that we are contaminating anything. I think the problem is that we have a given remit – that is, our remit – and we are doing what we are supposed to do under our statute, the remit of the DPP is entirely different...<sup>108</sup>

2.78 If sufficient admissible evidence has emerged to successfully prosecute a person for a criminal offence, there is an argument that the ICAC should discontinue its investigation and refer that evidence to the DPP. The Committee heard evidence that this does occur, though not as a matter of policy:

**Mr Hoenig:** ... in my view public interest is that if someone commits a criminal offence, they should be charged, brought before the court, and brought to justice. Why should not the organisation [the ICAC], when it embarks upon its investigation of corrupt conduct, which is invariably criminal, stop when they reach a point where

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<sup>105</sup> Hon Megan Latham, Transcript of Evidence, pp33-34.

<sup>106</sup> See ss2A and 13 ICAC Act.

<sup>107</sup> Section 14 ICAC Act.

<sup>108</sup> Transcript of Evidence, 9 September 2016, p33.

there is evidence that someone has committed an offence and get the DPP to charge them? I mean, they can always come back to it later.

**Mr McClintock:** In many cases, they do. There have been situations to my knowledge where ICAC has discovered unassailable evidence of the commission of a criminal offence. On occasions they simply pass the information straight onto the DPP or to the police.

**Mr Ron Hoenig:** Okay. So that happens.

**The Chair:** But should they, as a matter of policy, do that? There are cases where they do have that information and continue the hearing anyway, potentially prejudicing a criminal hearing. I am thinking of some of the university cases or even some of the fraud cases involving councils and those sorts of things.

**Mr McClintock:** Sure.

**The Chair:** Where it proceeds to completion by way of report whereas it must have been eminently perceptible that at some point a criminal offence had been committed, so they are referring it to the police or to the DPP.

**Mr McClintock:** Yes, but the difficulty is that, Mr Tudehope, ICAC was never established to get criminal convictions.<sup>109</sup>

2.79 Given its primary functions, the ICAC does not focus on the collection of admissible evidence. If the ICAC were to refer sufficient admissible evidence to the DPP as a matter of policy, this would most likely require a change to its primary functions. In the previous Parliament, the then Committee on the ICAC conducted an inquiry into prosecutions arising from ICAC investigations.<sup>110</sup> However, the Committee did not report owing to the intervention of the 2015 State election. Given the important public interest considerations around this matter, the Committee considers it an appropriate one to conduct further work on in the future.

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<sup>109</sup> Transcript of Evidence, 8 September 2016, p34.

<sup>110</sup> See in particular Committee on the ICAC, *Discussion Paper: Prosecutions arising from Independent Commission Against Corruption Investigations*, ICAC Committee webpage: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/9024/Discussion%20paper%20-%20prosecutions%20arising%20from%20ICAC%20investigations.pdf>.

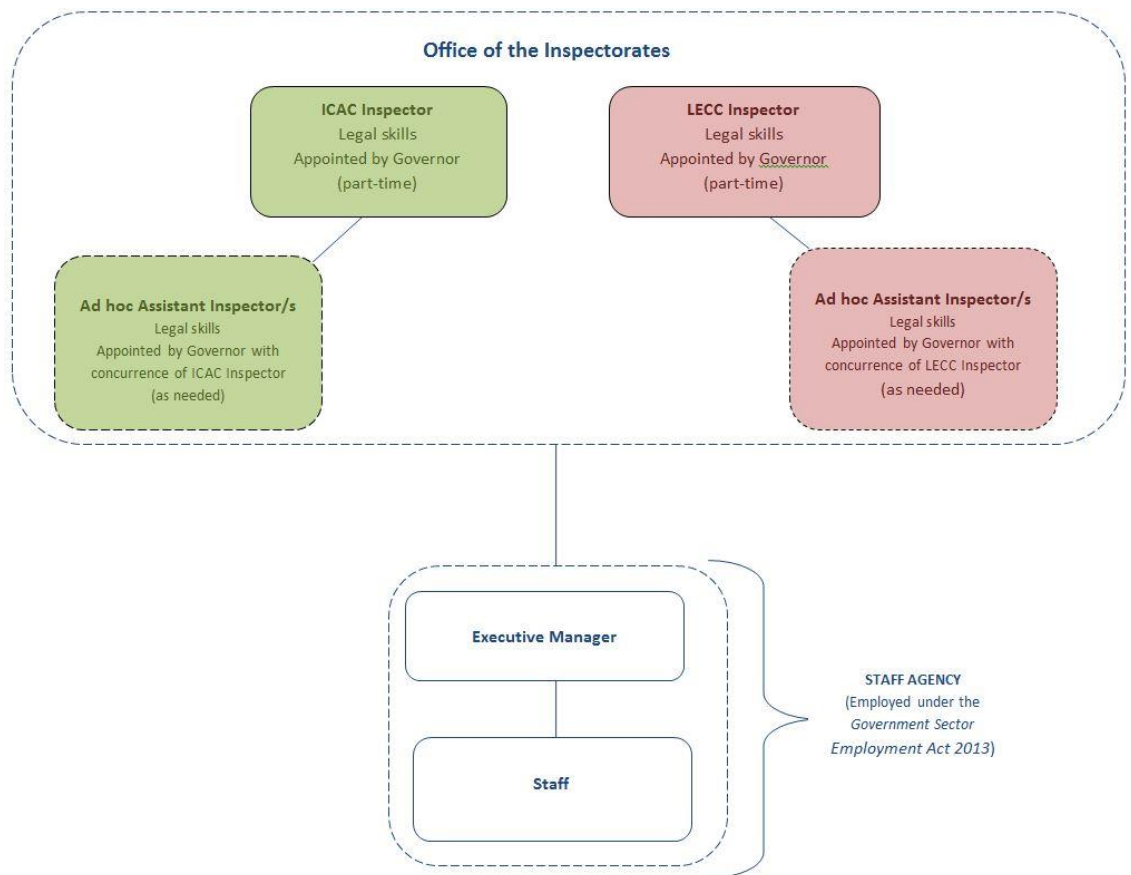
# Chapter Three – Oversight

## OFFICE OF THE INSPECTORATES

There should be an ‘Office of the Inspectorates’

### RECOMMENDATION 25

**That following consultation with the new LECC Inspector, the office of the ICAC Inspector and the office of the LECC Inspector be re-structured into a single body (known as the ‘Office of the Inspectorates’). The Inspectors should be jointly supported by a separate operational organisation.**



**Figure 2 Proposed 'Office of the Inspectorates' model**

- 3.1 The Committee’s functions apply solely to the ICAC and the ICAC Inspector. The Committee understands that any changes to support arrangements for the LECC Inspector would need to be made in consultation with the LECC and its Parliamentary Committee.
- 3.2 The Committee recommends that the Office of the Inspectorates consist of two core features: first, a panel of two Inspectors, responsible for the oversight of the LECC and the ICAC respectively. And secondly, a single shared public service



agency, providing administrative support to both inspectors, headed by a professional executive manager.

- 3.3 The Committee's model departs from the model proposed by DPC in its submission to the inquiry, which included a panel of three Inspectors sharing oversight responsibilities across the ICAC and the LECC.<sup>111</sup> The Committee agrees with Mr Andrew Tink AM, that it is important to maintain the respective functions of the ICAC and the LECC Inspectors:

... one should not be subsumed into the other. They both have legitimate roles and the structure should reflect that and protect those two roles... There will be separate Inspectors for each body, which to me is quite important to maintain that distinction, but they might share resources or they might, from time to time, have informal discussions about things. In principle, I do not have an objection to that, providing the legal responsibilities for each role are clear and they are not muddled and it is seen as one Inspector for ICAC and one Inspector for the police oversight.<sup>112</sup>

- 3.4 In line with DPC, the Committee also believes a re-structured Office of the Inspectorates would increase the overall size of the joint administrative support, thereby attaining a critical mass of staff and work. The Inspector is currently supported by one full-time and two part time staff members.<sup>113</sup> The increase in support would improve administrative workflow and resources, while allowing each Inspector to focus on his or her oversight responsibilities.<sup>114</sup> The structure the Committee has proposed would also allow the ICAC and LECC Inspectors to focus on their respective commissions.<sup>115</sup>

- 3.5 The structure of the staff agency would be subject to the same employment arrangements, executive structures and workforce management as all public service agencies under the Government Sector Employment framework.

- 3.6 The Committee agrees with DPC that the Inspector needs more resources. It submitted:

...the small absolute size of the Inspector's office does raise potential issues in terms of its governance, capacity to obtain effective administrative support, the exercise of work health and safety responsibilities and the ability to respond to surges in workload (as has happened in recent times).<sup>116</sup>

- 3.7 Similar comments were made by the then Acting DPP in his submission to the inquiry.<sup>117</sup> However, the Acting DPP also warned that any changes 'should not impact on the ability of ICAC to perform its current functions nor its ability to do so independently.'<sup>118</sup>

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<sup>111</sup> Submission 25, DPC, pp25-26.

<sup>112</sup> Mr Andrew Tink AM, Transcript of Evidence, 9 September 2016, pp 9-10.

<sup>113</sup> Submission 25, DPC, p24.

<sup>114</sup> Submission 25, DPC, p26.

<sup>115</sup> Submission 25, DPC, pp25-26.

<sup>116</sup> Submission 25, DPC, p25.

<sup>117</sup> Submission 26, Acting DPP, p3.

<sup>118</sup> Submission 26, Acting DPP, p3.

- 3.8 Dr Moss also stated that ‘the Inspector should be adequately resourced to carry out the oversight role,’ however cautioned that ‘the Inspector should not become a sort of ‘shadow’ ICAC.’<sup>119</sup>
- 3.9 In his May 2016 report to the Premier, the Inspector recommended expanding the ICAC Inspectorate’s resources. Mr Levine noted ‘an extraordinary lack of proportion between the resources of the Inspector and the power of the ICAC over which the Inspector seeks to exercise oversight.’<sup>120</sup>

### The ICAC Inspector role should remain part time

#### RECOMMENDATION 26

**That the ICAC Inspector should continue to be appointed by the Governor.**

#### RECOMMENDATION 27

**That the ICAC Inspector should continue to be a part time position for a term of up to five years.**

#### RECOMMENDATION 28

**That the remuneration of the ICAC Inspector should reflect his or her workload.**

#### RECOMMENDATION 29

**That there should continue to be provision for the appointment of Assistant Inspectors to assist the ICAC Inspector in his or her work, as required.**

- 3.10 Under section 57A of the ICAC Act, the Governor appoints the ICAC Inspector. The Committee recommends that the Governor retain this authority under the proposed model, to maintain the independence of the role, which is essential to the effective oversight of the ICAC.
- 3.11 There is evidence of peaks and troughs in the workload of the ICAC Inspector<sup>121</sup> and while many stakeholders agreed that he or she should be adequately resourced<sup>122</sup>, the Committee considers that the position does not require a full-time Inspector.
- 3.12 According to Mr Bruce McClintock SC, ‘...there is something incongruous in appointing a full time watchdog to a watchdog!’<sup>123</sup> Mr McClintock went further to say that the workload does not warrant a full-time Inspector:

I said in my original submission to the Committee that if it stays—in fact, it was premised on the premise that the Inspector's role stays as it is—it should not be a

<sup>119</sup> Submission 9, Dr Irene Moss AO, p2.

<sup>120</sup> Hon David Levine AO RFD QC, *Report to the Premier: The Inspector’s Review of the ICAC*, p4 and p7, para 6.

<sup>121</sup> See for example the variety of work conducted by ICAC Inspectors since 2007: Hon David Levine AO RFD QC, *Report to the Premier: The Inspector’s Review of the ICAC*, pp15-16, paras 32-36.

<sup>122</sup> See for example submission 25, DPC, p25; and submission 26, Acting DPP, p3.

<sup>123</sup> Submission 18, Mr Bruce McClintock SC, p2.

full-time position because I do not think it is necessary. I think it can be done on an average of between 90 and 100 days a year.<sup>124</sup>

- 3.13 The Committee also notes former ICAC Inspector Mr Kelly's view that the Inspector role should be part time.<sup>125</sup> It further notes the view of former ICAC Commissioner the Hon David Ipp AO QC that it is not appropriate, when considering budgetary constraints, for the role to be full-time.<sup>126</sup>
- 3.14 The Committee therefore recommends that the ICAC Inspector be appointed to a part time position for a term of up to five years, with remuneration set to reflect his or her workload.
- 3.15 Under section 57AA of the ICAC Act, the Governor may, with the Inspector's concurrence, appoint an Assistant Inspector for the ICAC, to assist the Inspector as he or she requires. An Assistant Inspector can help the Inspector to carry out his or her functions at times when the workload exceeds the Inspector's capacity.
- 3.16 The Committee considers that, under the proposed new arrangements, this provision for the appointment of Assistant Inspectors should be retained to assist the smooth functioning of the Office of the Inspectorates and to accommodate peaks in workload. The appointment should continue to be made by the Governor with the concurrence of the ICAC Inspector.

The Committee on the ICAC should continue to have a power of veto over the appointment of the ICAC Inspector

#### RECOMMENDATION 30

**That the Committee on the ICAC should continue to have a power of veto over the appointment of the ICAC Inspector.**

- 3.17 Under section 64A of the ICAC Act, the Committee can veto the proposed appointment of an ICAC Inspector. The Committee considers this veto process an important safeguard that ensures suitable appointments to the position of Inspector and appropriate Parliamentary scrutiny, in line with the observations made in chapter one concerning the veto of proposed appointments of Commissioners. For this reason, the veto process should continue to apply in respect of appointments to the position of ICAC Inspector.

The ICAC Inspector should have certain legal qualifications

#### RECOMMENDATION 31

**That to be appointed ICAC Inspector, or to act in that role, a person must be qualified to be appointed as, or to have formerly been:**

- **a judge or other judicial officer of the Supreme Court of NSW or another state or territory;**
- **a judge of the Federal Court of Australia; and/or**

<sup>124</sup> Mr Bruce McClintock SC, Transcript of Evidence, 8 September 2016, p33.

<sup>125</sup> Submission 1, Mr Graham Kelly, pp1-2.

<sup>126</sup> Submission 16, Hon David Ipp AO, QC, p7.

- **a Justice of the High Court of Australia.**

- 3.18 Given the Committee's recommendation in chapter one that all three Commissioners must have special legal qualifications owing to the nature of the ICAC's powers (which are similar to the powers of Supreme Court Judges), the Committee believes it is essential that the ICAC Inspector also have special legal qualifications to provide effective oversight of the ICAC.

There should be a separation between the Inspectors and the operational organisation supporting them

**RECOMMENDATION 32**

**That there should be a separation between the Inspectors and the operational organisation supporting them, which should be headed by a professional executive manager.**

**RECOMMENDATION 33**

**That the operational organisation should be a separate Public Service agency and operate within the *Government Sector Employment Act 2013*.**

- 3.19 As suggested by DPC in its submission to the inquiry, the Committee supports a separation between the Inspectors and the operational organisation (staff) of the Office of the Inspectorates, which would be headed by a professional executive manager overseeing day-to-day running of the organisation.<sup>127</sup> According to DPC:

The model frees the Inspectors from the day-to-day function of running the administrative management of the office, which instead becomes the responsibility of a qualified executive manager.<sup>128</sup>

- 3.20 In addition to the previously mentioned benefit of increased resources available to the Inspectors, DPC also notes the following potential benefits:

- by combining the two offices (and noting the increased functions associated with the LECC), the Office may be able to develop the scale needed to engage a critical mass of its own staff and supporting infrastructure
- human resources, including work health and safety responsibilities for office staff will be more clearly defined than at present.<sup>129</sup>

- 3.21 In line with the DPC submission, the Committee recommends establishing the staff agency as a separate Public Service agency to ensure its independence, while maintaining the benefits of working within the GSE framework.<sup>130</sup> Currently, the Inspector is assisted by a part time Principal Legal Adviser and a full time Executive Support Officer, both of whom are employed by DPC, which is a government agency and subject to the Government Sector Employment Framework.<sup>131</sup> The Committee considers that extending the Government Sector

<sup>127</sup> Submission 25, DPC, p25.

<sup>128</sup> Submission 25, DPC, p26.

<sup>129</sup> Submission 25, DPC, p26.

<sup>130</sup> Submission 25, DPC, p25.

<sup>131</sup> Submission 25, DPC, p24.

Employment Framework to the joint staff would not depart significantly from the current arrangements in place for staff assisting the ICAC Inspector.

- 3.22 A key benefit of bringing the staff agency in line with the Government Sector Employment Framework is improved workplace arrangements, including flexibility for staff and career development opportunities. Under the NSW Public Sector Capability Framework, Office of the Inspectorates staff would be recruited and reviewed under systems that have already been tested across the public sector. They would also benefit from workplace mobility across a range of public service agencies, provided there is no conflict of interest.<sup>132</sup>
- 3.23 Currently, the ICAC Inspector is able to arrange for assistance, as needed,<sup>133</sup> and as mentioned above, he receives such assistance from DPC.<sup>134</sup>

## MEMORANDUM OF UNDERSTANDING BETWEEN THE ICAC AND INSPECTOR

A productive working relationship between the Commissioner and Inspector is important for effective oversight of the ICAC

### RECOMMENDATION 34

**That the three member Commission and the ICAC Inspector review the Memorandum of Understanding between the ICAC and the Inspector to ensure that it promotes a workable relationship between their respective offices.**

- 3.24 The Committee supports a productive working relationship between the Commissioner and the Inspector, and believes that a review of the Memorandum of Understanding (MoU) by the Commissioner and the Inspector will assist in achieving effective oversight of the ICAC.<sup>135</sup>
- 3.25 The MoU specifies that the Inspector and the Commissioner 'agree to meet periodically to discuss relevant issues and raise any matters touching on the Inspector's functions and the conduct of the Commission.'<sup>136</sup>
- 3.26 The Inspector advised the Committee in March 2016 that no meetings with the Commissioner had taken place since the signing of the MoU on 29 May 2015.<sup>137</sup> The Commissioner confirmed at the Committee's hearings on 9 September 2016 that no meetings had taken place.<sup>138</sup>
- 3.27 As referenced in chapter one, former Inspector Mr Cooper submitted that a good working relationship between the Commissioner and Inspector is essential:

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<sup>132</sup> Submission 25A, DPC, pp6-7.

<sup>133</sup> ICAC Act, s57E(4).

<sup>134</sup> Submission 25, DPC, p25.

<sup>135</sup> See ICAC and the Inspector of the ICAC, *Memorandum of Understanding*, signed 29 May 2015, published on ICAC Committee webpage:

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/8155/Answers%20to%20further%20questions%20-%20ICAC%20Inspector.pdf>.

<sup>136</sup> ICAC and the Inspector of the ICAC, *Memorandum of Understanding*, signed 29 May 2015, paragraph 4.2, p3.

<sup>137</sup> Hon David Levine AO RFD QC, Answers to Questions Taken on Notice, 14 March 2016, p2.

<sup>138</sup> Hon Megan Latham, Transcript of Evidence, 9 September 2016, p35.

**Mr Chris Patterson:** If...the relationship clearly had broken down...would you say that that would have an impact on the Commissioner and/or the Inspector to do their job?

**Mr Cooper:** ...in practice it has to. When you have a breakdown, you cannot ring up someone and say, "I am looking at this particular thing. Why did you do that?", or "Why did you not do something else?" You cannot do that with relationships breaking down. If you have got a good relationship, you can. What appears to be a problem may well not be a problem.<sup>139</sup>

3.28 Mr Kelly also spoke about his experience as Inspector, and the importance of regular communication between the Commissioner and Inspector:

**Mr Kelly:**...Our meetings were always productive even if we did not necessarily agree. He clearly respected what I said to him and if he had an explanation or some such things I took it seriously.<sup>140</sup>

3.29 In its 2013-2014 review of the annual reports of the ICAC and the Inspector, the Committee undertook to monitor liaison between the offices, and 'whether the level of communication prescribed by the current MoU is taking place.'<sup>141</sup> In the report, the Committee noted that the MoU 'provides an efficient basis for communications between the Commission and the Office of the Inspector.'<sup>142</sup>

## COMPLAINTS TO THE INSPECTOR

People should be able to complain to Inspector regardless of suppression orders

### RECOMMENDATION 35

**That section 112 of the ICAC Act be amended to enable persons to complain to the Inspector regardless of any suppression orders.**

3.30 The Committee believes that people should be able to register complaints with the Inspector without fear of reprisal or punishment for breaching sections within the ICAC Act or any other suppression order. Further, the Committee agrees with the Inspector's recommendation that, any such amendment 'would not compromise, in my view, in any way, matters of confidentiality or secrecy.'<sup>143</sup>

3.31 The ICAC expressed no objection to the proposal, however did note that 'on every occasion that a person has sought a variation to a s 112 direction to allow transmission of information to the Inspector, the direction has been varied to permit such a transmission.'<sup>144</sup>

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<sup>139</sup> Transcript of Evidence, 8 September 2016, p24.

<sup>140</sup> Mr Graham Kelly, Transcript of Evidence, 9 September 2016, p20.

<sup>141</sup> ICAC Committee, *Review of the 2013-2014 Annual Reports of the Independent Commission Against Corruption and the Inspector of the Independent Commission Against Corruption*, March 2016, p21.

<sup>142</sup> ICAC Committee, *Review of the 2013-2014 Annual Reports of the Independent Commission Against Corruption and the Inspector of the Independent Commission Against Corruption*, March 2016, p21.

<sup>143</sup> Hon David Levine AO RFD QC, *Report to the Premier: The Inspector's Review of the ICAC*, p31, p97.

<sup>144</sup> Submission 2, ICAC, p11.

3.32 The Hon Michael McMurray AM QC, Inspector of the Corruption and Crime Commission of Western Australia agreed that people had a right to complain about the Corruption and Crime Commission to the Inspector without fear of reprisal:

....I do not believe that to complain or report a grievance in respect of any aspect of the procedure under discussion to me, or to raise a matter with me would constitute disclosure within the meaning of the Act. If that were so, it would set at nought the person's right to seek the exercise of my functions to investigate, assess, to report upon, and to make recommendations to the CCC in respect of the appropriateness of its procedures in this regard, generally or in respect of a particular case.<sup>145</sup>

3.33 The Committee notes broad support for this amendment amongst a range of stakeholders,<sup>146</sup> the ICAC and the other jurisdictions and believes it is beneficial to provide the amendment so that what is practised is clarified through legislation.

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<sup>145</sup> Submission 8, Hon Michael Murray AM QC, p4.

<sup>146</sup> Submission 4, Professor Nicholas Cowdery AM QC, p1; submission 16, Mr Bruce McClintock SC, p1; submission 20, Police Association of NSW, pp 11-12; submission 2, ICAC, pp 10-11.

# Appendix One – Conduct of the Inquiries

## INQUIRY INTO THE ICAC INSPECTOR'S *REPORT TO THE PREMIER: THE INSPECTOR'S REVIEW OF THE ICAC*

### Terms of Reference

By letter dated 20 May 2016, the Premier referred the ICAC Inspector's *Report to the Premier: The Inspector's Review of the ICAC*, dated 12 May 2016, to the Committee for its consideration and response.

On 1 June 2016, the Committee resolved to conduct an inquiry regarding the report, in accordance with the Premier's referral letter and its own terms of reference which required it to consider the report paying particular regard to:

- i the extent, nature and exercise of the ICAC's current powers and procedures including the rationale for an conduct of investigations and public hearings, and possible options for reform;
- ii the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform;
- iii the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;
- iv whether the outcome of legal action taken in response to the ICAC's corrupt conduct findings is adequately reflected on the public record; and possible options for reform;
- v any other related matters.

### Submissions

The Committee called for public submissions by issuing a media release and writing to key stakeholders, inviting them to make a submission. The closing date for submissions was 22 July 2016.

The Committee received 29 submissions from a range of stakeholders including the ICAC; other NSW bodies with public oversight and/or prosecutorial functions such as the Ombudsman, the Electoral Commission and the NSW Office of the Director of Public Prosecutions; former ICAC Commissioners; former ICAC Inspectors; the Inspector of the NSW Crime Commission; public interest groups; unions; expert individuals; private individuals; and integrity agencies and inspectorates in other jurisdictions.

A complete list of submission makers can be found at Appendix Two.

### Public Hearings

The Committee held public hearings for the inquiry on 8 and 9 September 2016 at Parliament House, Sydney. 20 witnesses appeared to give evidence to the



inquiry. They included representatives from the ICAC, the ICAC Inspectorate, the NSW Department of Premier and Cabinet, the Office of the Director of Public Prosecutions, NSW, the NSW Ombudsman, and the Rule of Law Institute of Australia, as well as two individuals with expertise concerning anti-corruption and integrity agencies, and the two former Inspectors of the ICAC. A complete list of the witnesses who appeared before the Committee can be found at Appendix Three.

The transcripts of evidence from the hearings can be found on the Committee's webpage: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2397>.

## INQUIRY TO REVIEW THE INSPECTOR'S REPORT REGARDING OPERATION HALE

### Resolution to Conduct the Inquiry

On 11 February 2016, the Committee resolved to conduct an inquiry to review the ICAC Inspector's *Report Pursuant to the Section 77A Independent Commission Against Corruption Act 1988 Operation "Hale"*, dated 4 December 2015. The Committee did not adopt terms of reference for this inquiry, deciding instead that the Inspector's report would provide the parameters for the inquiry.

### Submissions

The Committee did not call for public submissions to the inquiry, however, it published two submissions that it received, one from the ICAC dated 9 February 2016 and the other from Ms Margaret Cunneen SC dated 18 April 2016.

### Public Hearings

The Committee held public hearings for the inquiry on 11 February 2016, and on 14 and 18 March 2016. Seven witnesses appeared to give evidence to the Committee, from the ICAC and the ICAC Inspectorate. This included the ICAC Commissioner and the Inspector themselves. A list of witnesses who appeared before the Committee can be found at Appendix Three.

The transcripts of evidence from the hearings can be found on the Committee's webpage: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1958>.

### Documents and Material Presented to the Committee

The ICAC Commissioner presented the Committee with the following further documents and material during the course of the inquiry:

- 'Tabs 1-8' to the ICAC's submission dated 9 February 2016, which included correspondence between the ICAC Commissioner and Inspector; statements of ICAC officers who served a notice to produce during Operation Hale; and extracts of a report concerning iPhone records created during Operation Hale. Tabs 1-8 were lodged with the Committee on 9 February 2016.

- All the material provided by the ICAC to the Inspector regarding Operation Hale, that is, the material the Inspector had available to him in coming to the conclusions contained in his report ('the Inspector material'). This included correspondence to the ICAC from the Australian Crime Commission concerning Operation Hale; and DVDs containing Operation Hale statements, exhibits, authority sources, compulsory examinations, journalist disclosures and search warrant video footage. The Inspector material was lodged with Committee staff on 9 February 2016.
- Telephone intercept product and transcript of telephone intercept product disseminated to the ICAC by the Australian Crime Commission on 30 June 2014; and legal advice the ICAC received from Counsel about the availability of the telephone intercept product for the purposes of the Committee's proceedings. This material was provided to the Committee by the ICAC Commissioner at a public hearing on 11 February 2016.

On 11 February 2016, the Committee resolved to defer its decision about whether to publish the material contained in tabs 1-8; the Inspector material; and the telephone intercept product, telephone intercept transcript and legal advice. The Committee also resolved on that day to seek legal advice concerning the telephone intercept product.

On 14 March 2016, following the receipt of legal advice from the Crown Solicitor, the Committee resolved not to publish the material contained in tabs 1-8; the Inspector material; or the telephone intercept product, transcript of telephone intercept product or legal advice the ICAC received about the telephone intercept product.

## Unauthorised Disclosure of Confidential Material

At a deliberative meeting on 23 February 2016, the Committee discussed media reports of 17 February 2016 indicating the public disclosure of material.

In view of the seriousness of the public disclosure, the Committee resolved that all Committee members and staff with access to the confidential material were to provide a written assurance that they had at no time disclosed its contents to any external third parties. The written assurances were distributed at the deliberative meeting for the signature of Committee members and staff.

The Committee considers that, while the unauthorised disclosure is a serious matter, it did not obstruct or impede the Committee's work, including the conduct of its inquiry to review the Inspector's report regarding Operation Hale. Similarly, the unauthorised disclosure did not obstruct or impede the Committee in the exercise of its powers or the performance of its functions.

## Appendix Two – List of Submissions

1	Mr Graham Kelly
1a	Mr Graham Kelly
2	NSW Independent Commission Against Corruption
2a	NSW Independent Commission Against Corruption
3	Rule of Law Institute of Australia
4	Professor Nicholas Cowdery AM QC
5	Australian Commission for Law Enforcement Integrity
6	Mr Ian Temby AO QC
7	<i>Confidential submission</i>
8	Parliamentary Inspector of the Corruption and Crime Commission of Western Australia
9	Dr Irene Moss AO
9a	Dr Irene Moss AO
10	Accountability Round Table
11	The Hon Harvey Cooper AM
12	Mr Geoffrey Watson SC
13	Office of the Inspector of the Crime Commission
14	NSW Ombudsman
15	NSW Electoral Commission
16	The Hon David Ipp AO QC
16a	The Hon David Ipp AO QC
17	Victorian Inspectorate
18	Mr Bruce McClintock SC
19	<i>Confidential submission</i>
20	Police Association of NSW
21	<i>Confidential submission</i>
22	The Law Society of NSW
23	<i>Confidential submission</i>
23a	<i>Confidential submission</i>
24	The Hon Peter Hall
24a	The Hon Peter Hall
25	Department of Premier and Cabinet
25a	Department of Premier and Cabinet
26	Office of the Director of Public Prosecutions
27	Mr Stephen Murray
28	Crime and Corruption Commission Queensland
29	<i>Confidential submission</i>

## Appendix Three – List of Witnesses

THURSDAY, 11 FEBRUARY 2016, MACQUARIE ROOM, PARLIAMENT HOUSE

<b>Witness</b>	<b>Organisation</b>
The Hon Megan Latham Commissioner	Independent Commission Against Corruption
Dr Robert Waldersee Executive Director, Corruption Prevention Division	Independent Commission Against Corruption
Mr Roy Waldon Executive Director, Legal Division and Solicitor to the Commission	Independent Commission Against Corruption
Ms Sharon Loder Executive Director, Investigation Division	Independent Commission Against Corruption
Mr Andrew Koureas Executive Director, Corporate Services Division	Independent Commission Against Corruption
The Hon David Levine AO RFD QC Inspector of the ICAC	Office of the Inspector of the ICAC
Ms Susan Raice Principal Legal Advisor	Office of the Inspector of the ICAC

MONDAY, 14 MARCH 2016, MACQUARIE ROOM, PARLIAMENT HOUSE

<b>Witness</b>	<b>Organisation</b>
The Hon David Levine AO RFD QC Inspector of the ICAC	Office of the Inspector of the ICAC
Ms Susan Raice Principal Legal Advisor	Office of the Inspector of the ICAC

FRIDAY, 18 MARCH 2016, MACQUARIE ROOM, PARLIAMENT HOUSE

<b>Witness</b>	<b>Organisation</b>
The Hon Megan Latham Commissioner	Independent Commission Against Corruption
Dr Robert Waldersee Executive Director, Corruption Prevention Division	Independent Commission Against Corruption
Mr Roy Waldon Executive Director, Legal Division and Solicitor to the Commission	Independent Commission Against Corruption
Ms Sharon Loder Executive Director, Investigation Division	Independent Commission Against Corruption
Mr Andrew Koureas Executive Director, Corporate Services Division	Independent Commission Against Corruption

THURSDAY, 8 SEPTEMBER 2016, MACQUARIE ROOM, PARLIAMENT  
HOUSE

<b>Witness</b>	<b>Organisation</b>
The Hon David Levine AO RFD QC Inspector of the ICAC	Office of the Inspector of the ICAC
Mr John Nicholson SC Assistant Inspector of the ICAC	Office of the Inspector of the ICAC
Ms Susan Raice Principal Legal Advisor	Office of the Inspector of the ICAC
Mr Lloyd Babb SC Director of Public Prosecutions	Office of the Director of Public Prosecutions
Ms Johanna Pheils Deputy Solicitor, Legal	Office of the Director of Public Prosecutions
The Hon Harvey Cooper AM	Former Inspector of the ICAC
Mr Robin Speed President	Rule of Law Institute of Australia
Mr Bruce McClintock SC	
Mr Paul Miller Deputy Secretary, Cabinet and Legal	Department of Premier and Cabinet

FRIDAY, 9 SEPTEMBER 2016, MACQUARIE ROOM, PARLIAMENT  
HOUSE

<b>Witness</b>	<b>Organisation</b>
Professor John McMillan	New South Wales Ombudsman

Acting NSW Ombudsman	
Mr Chris Wheeler Deputy Ombudsman	New South Wales Ombudsman
Ms Linda Waugh Deputy Ombudsman	New South Wales Ombudsman
Ms Megan Smith Legal Counsel	New South Wales Ombudsman
Mr Andrew Tink AM	
Mr Graham Kelly	Former Inspector of the ICAC
The Hon Megan Latham Commissioner	Independent Commission Against Corruption
Dr Robert Waldersee Executive Director, Corruption Prevention Division	Independent Commission Against Corruption
Mr Roy Waldon Executive Director, Legal Division and Solicitor to the Commission	Independent Commission Against Corruption
Ms Sharon Loder Executive Director, Investigation Division	Independent Commission Against Corruption
Mr Andrew Koureas Executive Director, Corporate Services Division	Independent Commission Against Corruption

# Appendix Four – Extracts from Minutes

## MINUTES OF MEETING NO 8

9:30am, Thursday 11 February 2016  
Macquarie Room, Parliament House

### Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Ms Smith, Mr Patterson, Mr Taylor, Ms Voltz.

### Officers in Attendance

Helen Minnican (for resumption of deliberative meeting in Parliamentary Library only), Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech

#### 1. Apologies

The Committee noted an apology from Mr Humphries.

#### 2. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded by Mr Patterson:  
That the draft minutes of meeting no 7, held on 21 October 2015, be confirmed.

#### 3. Correspondence

The Committee noted the following items of correspondence sent:

- \*\*\*
- The ICAC Commissioner, dated 15 January, requesting information prior to public hearing on 11 February to consider ICAC Inspector's report in Operation Hale.

Ms Voltz raised concerns about the letter to the ICAC Commissioner from the Chair dated 15 January, requesting information prior to the public hearing on 11 February.

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#### 4. Inquiry to review the report of the ICAC Inspector regarding Operation Hale

##### **4.1 Consideration of whether to conduct inquiry**

The Committee considered whether to conduct an inquiry to review the ICAC Inspector's report regarding Operation Hale, tabled with the Presiding Officers on 4 December 2015.

Resolved, on the motion of Ms Smith, seconded by Mr Patterson that the Committee conduct an inquiry to review the ICAC Inspector's report regarding Operation Hale, tabled with the Presiding Officers on 4 December 2015.

##### **4.2 Standard resolutions – public hearing**

The Committee considered standard resolutions for the conduct of a public hearing for the inquiry.

Resolved, on the motion of Mr Marshall, seconded by Mr Khan:

- That the Committee conduct a public hearing for the inquiry on 11 February 2016 and take evidence from the Inspector of the ICAC; representative/s from the Office

of the Inspector of the ICAC; representatives of the ICAC; and the Director of Public Prosecutions;

- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 11 February 2016;
- That the Chair send questions on notice to witnesses following the public hearing on 11 February 2016 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 11 February 2016 on the Committee's webpage;
- That the Committee secretariat publish the transcript of evidence taken at the public hearing on 11 February 2016, after making corrections for recording inaccuracy, on the Committee's webpage.

#### **4.3 Consideration of indicative inquiry timeline**

The Committee considered a proposed timeline for the conduct of the inquiry.

Resolved, on the motion of Revd Nile, seconded by Mr Patterson, that the Committee reserve judgment on a finalised timetable for the inquiry.

#### **4.4 Written material provided by the ICAC Commissioner to the Inquiry**

The Committee considered a publication order for the material provided by the ICAC Commissioner on 2 February 2016 in response to the request for information prior to the hearing dated 15 January 2016.

Resolved, on the motion of Ms Voltz, seconded by Mr Khan, that the material provided by the ICAC Commissioner on 2 February 2016 be accepted by the Committee and published in full.

The Committee also considered a publication order for the following material lodged by the ICAC with the Committee secretariat on 9 February 2016:

- ICAC submission to the Committee's review of the Inspector's report regarding Operation Hale and tabs 1-8 which include correspondence between the ICAC Commissioner and ICAC Inspector; statements of ICAC officers who served a notice to produce during Operation Hale; and extracts of a report concerning iPhone records created during Operation Hale;
- Material provided by the ICAC to the Inspector regarding Operation Hale on 14 November 2014 and subsequently provided to the Inspector at his request ("the Inspector Material"). This includes correspondence to the ICAC from the Australian Crime Commission concerning Operation Hale; DVDs containing Operation Hale statements, exhibits, authority sources, compulsory examinations, journalist disclosures and search warrant video footage.

Resolved, on the motion of Mr Khan, seconded by Ms Voltz, that the ICAC's submission to the Committee's review of the Inspector's report regarding Operation Hale be accepted by the Committee and published in full.

Resolved, on the motion of Revd Nile, seconded by Mr Patterson, that consideration of a publication order for tabs 1-8 to the ICAC submission be deferred to a later date.



Resolved, on the motion of Ms Voltz, seconded by Revd Nile, that consideration of a publication order for material provided by the ICAC to the Inspector regarding Operation Hale (“the Inspector Material”) be deferred to a later date.

Resolved, on the motion of Mr Patterson, seconded by Revd Nile, that any evidence given at the hearing on 11 February 2016 that relates to material provided to the Committee by the ICAC but that has not been approved for publication be heard *in camera*.

5. \*\*\*

#### **6. General Business**

The Committee discussed the format for questioning witnesses at the public hearing to review the ICAC Inspector’s report regarding Operation Hale.

Resolved, on the motion of Mr Patterson, seconded by Revd Nile that, for efficiency, questions to witnesses be grouped according to themes at the public hearing to review the ICAC Inspector’s report regarding Operation Hale, with time limits to be enforced by the Chair.

The Committee agreed that the Commissioner be given the opportunity to make an opening statement.

#### **7. Public Hearing – Review of the ICAC Inspector’s Report regarding Operation Hale**

At 10:15am, the Chair declared the public hearing open and witnesses and the public were admitted.

##### *Independent Commission Against Corruption*

The Honourable Megan Latham, Commissioner, was sworn and examined

Mr Roy Waldon, Solicitor to the Commission, was sworn and examined

Mr Andrew Koureas, Executive Director, Corporate Services Division, was sworn and examined

Ms Sharon Loder, Executive Director, Investigation Division, was affirmed and examined

Dr Robert Waldersee, Executive Director, Corruption Prevention Division, was affirmed and examined.

The Commissioner made an opening statement.

The Commissioner presented telephone intercept product, a transcript of telephone intercept product and 11 copies of legal advice regarding the availability of telephone intercept product to the Committee for the purposes of its proceedings.

The Chair temporarily adjourned the hearing at 10:46am and witnesses and the public withdrew.

#### **8. Resumption of Deliberative Meeting**

The Committee reconvened in the Parliamentary Library meeting room to deliberate upon the conduct of proceedings and the material presented by the Commissioner. Discussion ensued.

The Committee reviewed the telephone intercept recordings presented by the Commissioner. Discussion ensued.

Resolved, on the motion of Mr Patterson, seconded by Ms Mihailuk, that the Committee would return to the Macquarie Room and the Chair would advise the witnesses and the public that:

- The hearing would conclude for the day, to allow the Committee to obtain and consider legal advice;
- The Committee would reconvene on Friday 19 February to continue the hearing subject to the availability of witnesses.

#### **9. Resumption of Public Hearing**

At 11:50am the Chair re-opened the public hearing and witnesses and the public were admitted.

The Chair made a short statement to the witnesses and public gallery concerning the postponement of proceedings.

At 11:53am the hearing concluded and the witnesses and the public withdrew.

#### **10. Resumption of Deliberative Meeting**

The Committee discussed tabs 5 and 8 of the ICAC's submission to the Committee's inquiry to review the report of the ICAC Inspector regarding Operation Hale. Tab 5 is correspondence from the Commissioner to the ICAC Inspector and tab 8 is extracts of a report concerning iPhone records created during Operation Hale.

The Committee agreed to write to people mentioned in tabs 5 and 8 of the ICAC's submission:

- Notifying them that they are mentioned in material provided to the Committee by the ICAC;
- Advising them that they can attend Parliament to view material that mentions them;
- Inviting them to make a submission about its possible publication.

(N.B. The Committee later agreed not to write to any person mentioned in the material for the time being – see minutes of meeting no. 9).

The Committee also discussed the telephone intercept product, transcript of telephone intercept product and the legal advice regarding the telephone intercept product presented at the public hearing by the ICAC Commissioner.

Resolved, on the motion of Ms Voltz, seconded by Revd Nile, that the Committee seek legal advice concerning the telephone intercept product and transcript of telephone intercept product presented by the ICAC Commissioner at the Committee's public hearing on 11 February 2016.

#### **11. Next meeting**

The Committee adjourned at 12:08pm until 15 February 2016.

## **MINUTES OF MEETING NO 9**

2:07 pm, 15 February 2016  
Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

**Officers in Attendance**

Helen Minnican, Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight.

**1. Apologies**

The Committee noted an apology from Mr Humphries.

**2. Confirmation of Minutes**

Resolved, on the motion of Revd Nile, seconded by Mr Marshall:

That the draft minutes of meeting no 8, held on 11 February 2016, be confirmed.

**3. Correspondence**

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The Committee considered the following items of correspondence received:

- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors dated 12 February 2016 on behalf of Ms Margaret Cunneen SC objecting to the release of information presented to the Committee by the ICAC Commissioner.
- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors email dated 15 February 2016 on behalf of Ms Margaret Cunneen SC reiterating the objection to release of information presented to the Committee by the ICAC Commissioner.

The Acting Deputy Clerk addressed the Committee regarding preliminary advice from the NSW Crown Solicitor concerning use and publication of material presented to the Committee by the ICAC Commissioner. Owing to the complexity of this matter, final advice will not be available for approximately two weeks.

Discussion ensued.

Mr Khan moved, seconded by Revd Nile that:

- a. The Committee's public hearing, set down for 19 February 2016, be vacated; and
- b. A further public hearing to review the report of the ICAC Inspector regarding Operation Hale await the receipt and consideration of advice from the Crown Solicitor.

Discussion ensued.

Question put.

The Committee divided.

Ayes: Mr Tudehope, Mr Marshall, Mr Khan, Revd Nile, Mr Patterson and Mr Taylor.

Noes: Mr Hoenig, Ms Mihailuk, Ms Smith and Ms Voltz.

Question resolved in the affirmative.

Revd Nile moved, seconded by Mr Khan that until such time as the Committee has had an opportunity to receive and consider the legal advice, it will not publish the telephone intercept material, as per preliminary advice from the Crown Solicitor.

Discussion ensued.

Question put.

The Committee divided.

Ayes: Mr Tudehope, Mr Marshall, Mr Khan, Revd Nile, Mr Patterson and Mr Taylor.

Noes: Mr Hoenig, Ms Smith, Ms Voltz and Ms Mihailuk.

Question resolved in the affirmative.

Resolved, on the motion of Mr Patterson, seconded by Ms Voltz:

- a. That the Chair publish a media release advising that the Committee has sought legal advice concerning the ICAC Commissioner's request that the Committee publish material presented by the ICAC; and that the hearing scheduled for 19 February 2016 will be deferred to a later date.
- b. That the Chair respond to Ms Cunneen's solicitors advising that the Committee has sought legal advice concerning the ICAC Commissioner's request that the Committee publish material presented by the ICAC; and that it does not intend to comment on media reports relating to the content of telephone intercept product or any other matter.

The Committee agreed not to write to any other person mentioned in material presented to the Committee by the ICAC concerning its possible publication at this stage.

**4. \*\*\***

#### **5. General Business**

Ms Mihailuk raised concerns about communication between the Committee and Ms Cunneen and cautioned against direct contact by members.

Discussion ensued.

#### **6. Next Meeting**

The Committee adjourned at 3:07pm until 25 February 2016.

## MINUTES OF MEETING NO 10

1:02 pm, 23 February 2016  
Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

**Officers in Attendance**

Helen Minnican, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

**1. Confirmation of Minutes**

Resolved, on the motion of Mr Khan, seconded by Mr Patterson:

That the draft minutes of meeting no 9, held on 15 February 2016, be confirmed.

**2. Correspondence**

The Committee noted the following items of correspondence sent:

- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors dated 15 February 2016 responding to letter dated 12 February 2016.
- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors email dated 18 February 2016 responding to email dated 17 February 2016.

The Committee noted the following items of correspondence received:

- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors, email dated 15 February 2016, acknowledging receipt of Chair's letter of the same date.
- Mr David Levine AO RFD QC, ICAC Inspector, dated 16 February 2016 regarding dates for resumption of public hearing to review the Inspector's report regarding Operation Hale.
- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors, email dated 17 February 2016 regarding material presented to the Committee by the ICAC.
- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors, email dated 22 February 2016, attaching email to and articles by Mr Sean Nicholls.

**3. Confidential material presented to the Committee by the ICAC**

The Committee discussed media reports of 17 February 2016 indicating the disclosure of confidential material presented to the Committee by the ICAC as part of the Committee's inquiry to review the Inspector's report regarding Operation Hale.

Resolved, on the motion of Mr Khan, seconded by Ms Voltz:

That:

- a. in view of the seriousness of the public disclosure of material contained in the Inspector Material (Volume 2) of the ICAC's submission, which the Commissioner sought not to have published and which has been retained under security by the Secretariat, all Members and committee staff with access to the confidential material provide a written assurance that they have at no time disclosed its contents to any external third parties. The written response is to be provided to the Committee Secretariat by 5.00pm on 23 February;
- b. subject to receipt of the written responses, the Chair prepare an interim report to both Houses on this matter for the Committee's consideration. The interim report will contain the Committee's determination as to whether the Committee has

been obstructed or impeded in its work and the exercise of its powers and the performance of its functions.

The written assurances were distributed at the meeting, signed and returned.

#### **4. General Business**

The Committee discussed the resumption of a public hearing to consider the ICAC Inspector's report regarding Operation Hale.

Resolved, on the motion of Revd Nile, seconded by Mr Patterson:

That:

- a. the Committee conduct a public hearing on 14 March 2016 to consider the ICAC Inspector's report regarding Operation Hale; and take evidence from the ICAC Inspector;
- b. the Australian Crime Commission be invited to give evidence at the public hearing on 14 March 2016.

The Committee agreed to consider the Chair's draft interim report regarding public disclosure of the Inspector material at the deliberative meeting to take place prior to the public hearing on 14 March 2016.

The Committee also discussed the need for further information prior the March public hearing.

Resolved, on the motion of Mr Hoenig, seconded by Revd Nile:

That the Committee write to the ICAC Commissioner seeking, by 4 March 2016, copies of:

- a. all legal advice provided to the ICAC in connection with Operation Hale;
- b. the affidavit in support of the search warrant executed on Ms Margaret Cunneen's premises on 7 August 2014.

#### **5. Next Meeting**

The Committee adjourned at 1:48pm until 25 February 2016.

## **MINUTES OF MEETING NO 11**

1:09 pm, 25 February 2016

Room 1254, Parliament House

#### **Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Khan, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

#### **Officers in Attendance**

Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

#### **1. Apologies**

The Committee noted apologies from Mr Hoenig and Ms Mihailuk.

#### **2. Confirmation of Minutes**

Resolved, on the motion of Mr Patterson, seconded by Mr Taylor:

That the draft minutes of meeting no 10, held on 23 February 2016, be confirmed.

### **3. Correspondence**

The Committee noted the following items of correspondence sent:

- The Hon Megan Latham, ICAC Commissioner, dated 24 February 2016, seeking documents relating to Operation Hale;
- Mr Chris Dawson APM, Chief Executive Officer, Australian Crime Commission, dated 24 February 2016, inviting representatives of the Australian Crime Commission to appear at a Committee hearing on 14 March 2016.

### **4. Inquiry to review the report of the ICAC Inspector regarding Operation Hale**

The Committee considered conducting a public hearing on 18 March 2016, in addition to the public hearing already being held on 14 March 2016, to review the ICAC Inspector's report regarding Operation Hale. This would be instead of reviewing the 2014-15 annual reports of the ICAC and Inspector on 18 March as the Committee originally resolved at its meeting on 11 February 2016.

Resolved, on the motion of Mr Patterson, seconded by Ms Voltz:

- a. That the Committee hold a public hearing on 18 March 2016, in addition to the public hearing the Committee already resolved to hold on 14 March 2016, to review the Inspector's report regarding Operation Hale.
- b. That the Committee take evidence from representatives of the ICAC and the Director of Public Prosecutions at the hearing on 18 March 2016.
- c. That the public hearing to consider the review of the 2014-15 annual reports of the ICAC and the ICAC Inspector, originally scheduled for 18 March 2016, be deferred to a later date.
- d. That the Chair issue a media release announcing public hearings on 14 and 18 March 2016 to review the Inspector's report regarding Operation Hale.

The Committee also considered whether to write to Ms Margaret Cunneen's solicitors inviting them to make a submission to the Committee regarding its inquiry to review the report of the ICAC Inspector regarding Operation Hale.

Resolved, on the motion of Ms Voltz, seconded by Mr Patterson:

That the Chair write to Ms Margaret Cunneen's solicitors inviting them to make a submission on behalf of Ms Cunneen regarding the Committee's inquiry to review the report of the ICAC Inspector regarding Operation Hale.

5. \*\*\*

6. \*\*\*

### **7. Next Meeting**

The Committee adjourned at 1:28pm until a date and time to be determined.

## **MINUTES OF MEETING NO 12**

1:22 pm, 9 March 2016

Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

**Officers in Attendance**

Ronda Miller, Helen Minnican, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

**1. Confirmation of Minutes**

Resolved, on the motion of Revd Nile, seconded by Mr Marshall:

That the draft minutes of meeting no 11, held on 25 February 2016, be confirmed.

**2. Correspondence**

The Committee noted the following items of correspondence sent:

- Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors, dated 25 February 2016 inviting a written submission, on behalf of Ms Margaret Cunneen SC, to the Committee's inquiry to review the Inspector's report regarding Operation Hale.
- The Hon Megan Latham, ICAC Commissioner, email dated 1 March 2016 regarding legal advice provided to the ICAC in connection with Operation Hale.

The Committee noted the following items of correspondence received. These items of correspondence were not circulated with the meeting papers but were made available for members to view in the Legislative Assembly Committees Office.

- The Hon Megan Latham, ICAC Commissioner, dated 25 February 2016 attaching a copy of legal advice provided to the ICAC in connection with Operation Hale; and a copy of the application for a search warrant executed on Ms Margaret Cunneen SC's premises on 7 August 2014;
- The Hon David Levine AO RFD QC, ICAC Inspector, dated 26 February 2016, regarding material obtained from the Australian Crime Commission and attaching copies of:
  - Letter dated 31 August 2015 from Inspector to Mr Chris Dawson APM, CEO Australian Crime Commission;
  - Email from Inspectorate to the Australian Crime Commission dated 9 September 2015 attaching another copy of the Inspector's letter dated 31 August 2015;
  - Email from Australian Crime Commission dated 9 September 2015 to the Inspectorate;
  - Dispatch advice and accompanying material provided to the Inspectorate by the Australian Crime Commission on 29 September 2015;
  - Letter dated 1 October 2015 from the Inspector to the CEO Australian Crime Commission;
  - Letter dated 2 October 2016 from the Acting CEO of the Australian Crime Commission, Mr Paul E Williams, and accompanying material;
  - Letter dated 12 February 2016 from the Inspector to the Honourable Megan Latham, ICAC Commissioner and attachment;



- Letter dated 17 February 2016 from the ICAC Commissioner to the Inspector.
- The Hon Megan Latham, ICAC Commissioner, dated 1 March 2016, regarding legal advice provided to the ICAC in connection with Operation Hale;
- The Hon David Levine AO RFD QC dated 1 March 2016 to Mr Chris Dawson APM, CEO Australian Crime Commission (cc'd to the ICAC Committee Chair) regarding telephone intercept material and attaching a letter dated 1 March 2016 from Mr Dawson to the Inspector.

Resolved, on the motion of Mr Hoenig, seconded by Revd Nile:

That the Chair write a letter returning the ICAC Inspector's correspondence dated 26 February 2016, which was provided electronically, and request that the Inspector provide a hard copy of the correspondence redacting extraneous material not directly related to the Committee's review of the Inspector's report regarding Operation Hale.

### **3. Inquiry to review the report of the ICAC Inspector regarding Operation Hale**

#### ***3.1 NSW Crown Solicitor's Advice***

The Clerk circulated copies of legal advice provided by the NSW Crown Solicitor concerning the use and publication of material presented to the Committee by the ICAC Commissioner. A separate summary of the advice, prepared by the Clerk, was also circulated. The Clerk indicated that members could retain copies of the summary. However, in relation to the legal advice, the Clerk indicated that members could take copies away from the meeting to consider, to be returned at a later date.

The Committee agreed that the names of members who retained copies of the legal advice be recorded.

The Chair, Mr Hoenig, Mr Humphries and Revd Nile retained copies of the legal advice. All other members of the Committee returned the copies of the legal advice to the Clerk at the meeting.

#### ***3.2 Publication of material***

In light of the Crown Solicitor's advice, the Committee considered the treatment of telephone intercept material presented by the ICAC Commissioner at the public hearing on 11 February 2016.

The Committee also considered the treatment of material lodged with the secretariat on 9 February 2016 that accompanied the ICAC's submission to the Committee's Hale inquiry, namely:

- Tabs 1-8 of the ICAC's submission to the Committee's Hale inquiry which include correspondence between the ICAC and Inspector, statements of ICAC officers who served a notice to produce during Operation Hale and extracts of a report concerning iPhone records created during Operation Hale;
- Material provided by the ICAC to the Inspector regarding Operation Hale ("the Inspector material").

Mr Khan moved, seconded by Revd Nile:

That consideration of a publication order for the telephone intercept product, transcript of telephone intercept product, legal advice regarding telephone intercept product, tabs 1-8 of the ICAC's submission, and the Inspector Material be deferred until 14 March 2016.

Discussion ensued.

Question put.

The Committee divided.

Ayes: Mr Tudehope, Mr Marshall, Mr Hoenig, Mr Humphries, Mr Patterson, Ms Smith, Mr Taylor, Mr Khan, Revd Nile.

Noes: Ms Mihailuk, Ms Voltz.

Question resolved in the affirmative.

### ***3.3 Appearance by the Australian Crime Commission***

The Committee considered a letter from Mr Chris Dawson APM, CEO Australian Crime Commission, regarding the invitation for representatives of the Australian Crime Commission to give evidence at the Committee's hearing on 14 March 2016.

Resolved, on the motion of Mr Khan, seconded by Revd Nile:

That a letter be sent to the CEO of the Australian Crime Commission, after review by the Chair and Mr Hoenig, requesting information about (a) the decision to refer ACC material relating to Operation Hale to the ICAC in preference to the NSW Police (b) the way in which the ACC refers matters to other agencies; and (c) the way in which the ACC provides telephone intercept material to other agencies.

### ***3.4 Submissions on behalf of Ms Margaret Cunneen SC***

The Committee noted submissions lodged by the solicitors of Ms Margaret Cunneen SC regarding the Committee's inquiry.

Resolved, on the motion of Mr Khan, seconded by Revd Nile:

That the Chair write to Ms Cunneen's solicitors asking them to indicate by 14 March 2016 whether their client has any objection to the publication of her submissions to the Committee's review of the Inspector's report regarding Operation Hale, on the Committee's webpage.

## **4. Interim report concerning disclosure of confidential material presented to the Committee by the ICAC**

The Committee noted that the Chair's draft interim report would be emailed to members shortly for consideration at the Committee's pre-hearing deliberative meeting on 14 March 2016.

## **5. General Business**

Mr Marshall requested that the minutes record his concerns regarding media reports about the legal advice obtained in relation to the use and publication of material presented to the Committee by the ICAC Commissioner. Mr Marshall noted the reports related to the period during which he was Acting Chair of the Committee and that he had not disclosed the contents

of the advice to the media and that he understood only one other Committee member was aware of the nature of the advice at that stage. Mr Marshall expressed his disappointment that the information was disclosed and reiterated the importance of maintaining confidentiality with respect to Committee documents and deliberations.

#### **6. Next Meeting**

The Committee adjourned at 2:00pm until 14 March 2016.

### **MINUTES OF MEETING NO 13**

9:34 am, 14 March 2016

Macquarie Room, Parliament House

#### **Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

#### **Officers in Attendance**

Helen Minnican, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

#### **1. Confirmation of Minutes**

Resolved, on the motion of Mr Marshall, seconded by Mr Patterson:

That the draft minutes of meeting no 12, held on 9 March 2016, be confirmed.

#### **2. Correspondence**

The Committee noted the following items of correspondence sent:

- i. Mr Chris Dawson APM, Chief Executive Officer Australian Crime Commission (ACC), dated 9 March 2016, further letter regarding invitation for ACC representatives to attend to give evidence at a hearing on 14 March 2016.
- ii. The Hon David Levine AO RFD QC, Inspector of the Independent Commission Against Corruption (ICAC), dated 9 March 2016, regarding electronic correspondence dated 26 February 2016.
- iii. Mr Hamish Cockburn, Principal, Cockburn and Co Solicitors, dated 9 March 2016, regarding submissions on behalf of Ms Margaret Cunneen SC to the Committee's review of the Inspector's report regarding Operation Hale.

The Committee noted the following items of correspondence received and draft responses to items:

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- ii. The Hon David Levine AO RFD QC, Inspector of the ICAC, dated 10 March 2016, withdrawing electronic correspondence dated 26 February 2016.
- iii. Mr Chris Dawson APM, Chief Executive Officer, ACC, dated 10 March 2016, response to Chair's letter dated 9 March 2016 and draft response.

Resolved, on the motion of Mr Taylor, seconded by Mr Patterson:

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- b. That the Chair write to Mr Chris Dawson, Chief Executive Officer, ACC asking for further information about ACC referral of lawfully intercepted information to other agencies.

**3. Inquiry to review the report of the ICAC Inspector regarding Operation Hale**

**3.1 Draft report concerning disclosure of confidential material presented to the Committee by the ICAC**

The Committee deferred consideration of the draft report.

**3.2 Publication of material presented by the ICAC**

In light of the Crown Solicitor's recent advice concerning the use and publication of material presented to the Committee by the ICAC Commissioner, the Committee considered the treatment of telephone intercept material presented by the ICAC Commissioner at the public hearing on 11 February 2016.

The Committee also considered the treatment of material lodged with the secretariat on 9 February 2016 that accompanied the ICAC's submission to the Committee's Operation Hale inquiry, namely:

- Tabs 1-8 of the ICAC's submission to the Committee's Operation Hale inquiry. Tabs 1-8 include correspondence between the ICAC and Inspector, statements of ICAC officers who served a notice to produce during Operation Hale and extracts of a report concerning iPhone records created during Operation Hale;
- Material provided by the ICAC to the Inspector regarding Operation Hale ("the Inspector material").

Discussion ensued.

Revd Nile moved, seconded by Mr Patterson that:

- a. The Committee not publish the telephone intercept product, transcript of telephone intercept product and legal advice regarding telephone intercept product received at the public hearing on 11 February 2016;
- b. The Committee not publish tabs 1-8 of the ICAC's submission to the Committee's review of the Inspector's report regarding Operation Hale;
- c. The Committee not publish material provided by the ICAC to the Inspector regarding Operation Hale ("the Inspector Material") which was also lodged with the ICAC's submission to the Committee's review of the Inspector's report regarding Operation Hale;
- d. The Chair issue a media release noting the Committee has received the Crown Solicitor's advice and that the telephone intercept product will not be published.

Upon which, Mr Hoenig moved that the motion be amended by inserting the words "At this stage" before the words "The Committee not publish" wherever they occur in resolutions (a) to (c); and by inserting the words "at this stage" in resolution (d) after the words "that the telephone intercept product will not be published".

Discussion ensued.

Question put, that the amendment be agreed to.

The Committee divided.

Ayes: Mr Hoenig, Ms Mihailuk, Ms Voltz and Ms Smith.

Noes: Mr Tudehope, Mr Marshall, Mr Humphries, Mr Patterson, Mr Taylor, Mr Khan and Revd Nile.

Question resolved in the negative.

Question put on the original motion.

The Committee divided:

Ayes: Mr Tudehope, Mr Marshall, Mr Humphries, Mr Patterson, Mr Taylor, Mr Khan and Revd Nile.

Noes: Mr Hoenig, Ms Mihailuk, Ms Voltz and Ms Smith.

Question resolved in the affirmative.

### **3.3 Public Hearing 14 March 2016**

The Committee considered standard resolutions for the conduct of a public hearing for the inquiry.

Resolved, on the motion of Mr Khan, seconded by Mr Taylor:

- a. That the Committee take evidence from the Inspector of the ICAC and a representative of the office of the Inspector of the ICAC at a public hearing on 14 March 2016;
- b. That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 14 March 2016;
- c. That the Chair send questions on notice to witnesses following the public hearing on 14 March 2016 as required;
- d. That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 14 March 2016 on the Committee's webpage;
- e. That the Committee secretariat publish the transcript of evidence taken at the public hearing on 14 March 2016, after making corrections for recording inaccuracy, on the Committee's webpage.

#### **4. \*\*\***

#### **5. Public Hearing – Review of the ICAC Inspector's Report regarding Operation Hale**

At 10:00am the Chair declared the public hearing open and witnesses and the public were admitted.

The Honourable David Levine AO RFD QC, Inspector of the ICAC was affirmed and examined. Ms Susan Raice, Principal Legal Advisor, Office of the Inspector of the ICAC was sworn and examined.

The Inspector made an opening statement.

At 10:45am the Committee took a short adjournment. The public hearing resumed at 10:57am.

At 12:30pm evidence concluded and the witnesses and the public withdrew.

#### **6. Resumption of Deliberative Meeting**

The Committee considered the Chair's draft media release stating that the Committee has received Crown Solicitor's advice, and that the telephone intercept material will not be published.

Ms Voltz moved, seconded by Ms Mihailuk, that:

The words "put by the ICAC Commissioner" be deleted from the second sentence of the second paragraph of the Chair's draft media release.

Discussion ensued.

Question put, that the amendment be agreed to.

The Committee divided.

Ayes: Mr Hoenig, Ms Voltz, Ms Mihailuk and Ms Smith.

Noes: Mr Tudehope, Mr Marshall, Mr Humphries, Mr Patterson, Mr Taylor, Mr Khan and Revd Nile.

Question resolved in the negative.

Mr Khan moved, seconded by Revd Nile, that:

The Chair's draft media release be published without amendment.

Discussion ensued.

Question put.

The Committee divided.

Ayes: Mr Tudehope, Mr Marshall, Mr Humphries, Mr Patterson, Ms Smith, Mr Taylor, Mr Khan and Revd Nile.

Noes: Mr Hoenig, Ms Voltz and Ms Mihailuk.

Question resolved in the affirmative.

#### **7. Next Meeting**

The Committee adjourned at 12:36pm until 18 March 2016.

## MINUTES OF MEETING NO 14

9:32 am, 18 March 2016

Macquarie Room, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

**Officers in Attendance**

Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

**1. Confirmation of Minutes**

Resolved, on the motion of Revd Nile, seconded by Mr Taylor:

That the draft minutes of meeting no 13, held on 14 March 2016, be confirmed.

**2. Correspondence**

The Committee noted the following items of correspondence sent:

\*\*\*

- ii. Mr Chris Dawson APM, Chief Executive Officer Australian Crime Commission (ACC), dated 14 March 2016, asking for further information about ACC referral of lawfully intercepted information to other agencies.

The Committee noted the following items of correspondence and the draft response to item iv:

- i. Mr Hamish Cockburn, email to Committee Manager dated 14 March 2016, advising that his client, Ms Margaret Cunneen SC, has no objection to submissions lodged on her behalf (regarding the Committee's Operation Hale Inquiry), being published on the Committee's webpage.
- ii. The Hon Megan Latham, ICAC Commissioner, dated 15 March 2016 regarding public hearing to examine the report of the ICAC Inspector regarding Operation Hale.
- iii. Mr Chris Dawson APM, Chief Executive Officer ACC, dated 15 March 2016, providing further information about ACC referral of lawfully intercepted information to other agencies and declining to comment on the specifics of matters relating to Operation Hale.
- iv. \*\*\*
- v. The Hon David Levine QC, ICAC Inspector, letter to Committee Manager dated 16 March 2016 containing corrections to transcript of proceedings and answers to questions taken on notice at public hearing 14 March 2016.

Resolved, on the motion of Ms Voltz, seconded by Mr Patterson:

That the submissions to the Committee's Operation Hale inquiry, lodged on behalf of Ms Margaret Cunneen SC, not be published.

\*\*\*

**3. Inquiry to review the report of the ICAC Inspector regarding Operation Hale – Public Hearing, 18 March 2016**

The Committee agreed to give the ICAC Commissioner the opportunity to make an opening statement at the 18 March public hearing for the inquiry, as requested.

The Committee considered standard resolutions for the conduct of the public hearing.

Resolved, on the motion of Mr Patterson, seconded by Revd Nile:

- a. That the Committee take evidence from the Commissioner of the ICAC and representatives of the ICAC at a public hearing on 18 March 2016;
- b. That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 18 March 2016;
- c. That the Chair send questions on notice to witnesses following the public hearing on 18 March 2016 as required;
- d. That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 18 March 2016 on the Committee's webpage;
- e. That the Committee secretariat publish the transcript of evidence taken at the public hearing on 18 March 2016, after making corrections for recording inaccuracy, on the Committee's webpage.

Mr Khan noted that the Director of Public Prosecutions, Mr Lloyd Babb SC, was scheduled to give evidence at the public hearing and questioned whether this was still necessary.

The Committee agreed to re-consider whether to cancel Mr Babb's appearance during the morning tea adjournment of the public hearing.

**4. \*\*\***

**5. Public Hearing – Review of the ICAC Inspector's Report regarding Operation Hale**

At 10:01am the Chair declared the public hearing open and witnesses and the public were admitted.

The Honourable Megan Latham, Commissioner of the ICAC was sworn and examined.

Mr Roy Waldon, Solicitor to the Commission and Executive Director Legal Division was sworn and examined.

Ms Sharon Loder, Executive Director, Investigation Division was affirmed and examined.

Dr Robert Waldersee, Executive Director, Corruption Prevention Division was affirmed and examined.

Mr Andrew Koureas, Executive Director, Corporate Services Division was sworn and examined.

The Commissioner made an opening statement.

At 11:28am the Committee took a short adjournment. The public hearing resumed at 11:41am.

When evidence concluded the Chair made a short statement to the witnesses and the public gallery advising that the Committee had agreed, during the adjournment, to cancel the appearance of the Director of Public Prosecutions, previously scheduled to begin at 1:30pm.

At 12:53pm the public hearing concluded and the witnesses and the public withdrew.

**6. Resumption of Deliberative Meeting**

The Committee agreed to consider whether to publish a further written submission by the ICAC to the inquiry (received by the Committee at the public hearing on 18 March) out of session, providing an email response to the secretariat on Monday 21 March 2016.

**7. Next Meeting**



The Committee adjourned at 12:55pm until a date and time to be determined.

## MINUTES OF MEETING NO 15

1:03pm, 1 June 2016

Room 814/815, Parliament House

### Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Hoenig, Mr Khan, Mr Patterson, Mr Taylor.

### Officers in Attendance

Jason Ardit, Elspeth Dyer, Jenny Whight, Tanja Zech.

### 1. Apologies

The Committee noted apologies from Ms Mihailuk, Revd Nile, Ms Smith and Ms Voltz.

### 2. Confirmation of Minutes

Resolved, on the motion of Mr Hoenig, seconded by Mr Taylor:

That the draft minutes of meeting no 14, held on 18 March 2016, be confirmed.

### 3. Correspondence

The Committee noted the following items of correspondence sent:

\*\*\*

- ii. The Hon Megan Latham, ICAC Commissioner, dated 11 April 2016, regarding questions taken on notice; publication of ICAC's supplementary submission to the Committee's Hale inquiry; and Crown Solicitor's legal advice regarding publication of material presented to the Committee by the Commissioner.
- iii. The Hon Megan Latham, ICAC Commissioner, dated 14 April 2016, regarding publication of ICAC's supplementary submission to the Committee's Hale inquiry.

The Committee noted the following items of correspondence received and draft responses to items i, ii and vii:

\*\*\*

- iii. The Hon David Levine AO RFD QC, ICAC Inspector, letter to Committee Director dated 30 March 2016, forwarding Inspector's response to ICAC Commissioner's evidence at public hearing on 18 March.
- iv. The Hon Megan Latham, ICAC Commissioner, dated 5 April 2016, regarding response to questions taken on notice; publication of ICAC's supplementary submission to the Committee's Hale inquiry lodged 18 March; and Crown Solicitor's legal advice regarding publication of material presented to the Committee by the Commissioner.
- v. The Hon Megan Latham, ICAC Commissioner, dated 12 April 2016, regarding response to questions taken on notice and publication of ICAC's supplementary submission to the Committee's Hale inquiry lodged 18 March.

\*\*\*

The Committee agreed:

- a. That the correspondence be noted;
- b. \*\*\*

**4. Inquiry to review the report of the ICAC Inspector regarding Operation Hale**

The Committee discussed treatment of a submission from Ms Margaret Cunneen SC to the Committee's Hale inquiry, lodged on 18 April 2016.

Resolved, on the motion of Mr Patterson, seconded by Mr Taylor:

That the submission of Ms Margaret Cunneen SC to the Committee's Hale inquiry, lodged 18 April 2016, be accepted by the Committee and published on the Committee's webpage.

**5. \*\*\***

**6. Proposed inquiry concerning the ICAC Inspector's Report to the Premier: The Inspector's Review of the ICAC**

**6.1 Consideration of proposed inquiry and associated arrangements**

The Committee considered whether to conduct an inquiry regarding the Inspector's Report to the Premier: The Inspector's Review of the ICAC in accordance with a letter from the Premier to the Chair, dated 20 May 2016, referring the report for the Committee's consideration and response.

The Committee also considered the Chair's draft terms of reference; the Chair's draft list of targeted stakeholders; the Chair's draft timetable; and hearing and reporting arrangements for the proposed inquiry.

The Committee agreed to add Mr Geoffrey Watson SC to the Chair's draft list of targeted stakeholders.

Resolved on the motion of Mr Patterson, seconded by Mr Taylor:

- a. That the Committee conduct an inquiry regarding the ICAC Inspector's Report to the Premier: The Inspector's Review of the ICAC, in accordance with the Premier's referral letter dated 20 May 2016 and the Chair's draft terms of reference;
- b. That the Chair issue a media release announcing the inquiry and calling for submissions by 22 July 2016;
- c. That the Committee agree upon the Chair's draft list of targeted stakeholders as amended;
- d. That the Chair write to those on the agreed list of targeted stakeholders inviting submissions by 22 July 2016;
- e. That the Committee hold hearings for the inquiry in early September 2016;
- f. That the Committee agree upon a witness list for the hearings out of session, once written submissions are received, and allow the Chair to liaise with Committee staff regarding inviting witnesses to attend;
- g. That the Committee meet in August 2016 to discuss inquiry direction including publication of submissions received;
- h. That the Committee report to the Parliament regarding the Inspector's report to the Premier by the end of the year;
- i. That the Committee report to the Parliament regarding its review of the Inspector's report on Operation Hale in a separate report, by the end of the year.

## **6.2 Consideration of correspondence received relating to the proposed inquiry**

The Committee considered the following correspondence:

- i. Mr Graham Kelly, former ICAC Inspector, dated 17 May 2016, regarding the ICAC Inspector's Report to the Premier: *The Inspector's Review of the ICAC, 12 May 2016*.
- ii. \*\*\*
- iii. \*\*\*

Resolved, on the motion of Mr Humphries, seconded by Mr Patterson:

That the Committee secretariat write to Mr Graham Kelly noting his correspondence and asking if he would like the Committee to consider accepting it as a submission to its inquiry concerning the ICAC Inspector's Report to the Premier: *The Inspector's Review of the ICAC*.

## **7. General Business**

The Committee discussed the recent Local Court decision arising out of ICAC's Operation Dewar. The Committee noted it can consider this matter as part of its inquiry concerning the Inspector's review of the ICAC as it is the Committee's role to monitor the way in which the ICAC performs its functions and it can do so by aid of reference to a particular matter as this is within the confines of the restrictions imposed by section 64 of the *Independent Commission Against Corruption Act 1988*.

## **8. Next meeting**

The Committee adjourned at 1:12pm until August at a date and time to be determined.

## **MINUTES OF MEETING NO 16**

11:47am, 1 August 2016

Room 1254, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Mr Taylor and Ms Voltz.

### **Officers in Attendance**

Carly Maxwell, Elspeth Dyer, Jenny Whight, Jacqueline Linnane and Tanja Zech.

### **1. Apologies**

The Committee noted apologies from Mr Hoenig, Mr Humphries and Ms Smith.

### **2. Confirmation of Minutes**

Resolved, on the motion of Mr Patterson, seconded by Mr Taylor:

That the draft minutes of meeting no 15, held on 1 June 2016, be confirmed.

### **3. Correspondence**

The Committee noted the following items of correspondence received and draft responses to items i and iii:

\*\*\*

- iv. The Hon Megan Latham, ICAC Commissioner, dated 7 June 2016, asking that ICAC's submission to the Premier be treated as a submission to the Committee's inquiry to review the *Inspector's Report to the Premier: The Inspector's Review of the ICAC*, and advising that an additional written submission will also be lodged.
- v. The Hon TF Bathurst, Chief Justice of NSW, dated 10 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- vi. Mr MG Sexton SC, Solicitor General, dated 10 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- vii. Legal Aid NSW, dated 16 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- viii. NSW Electoral Commission, dated 17 June 2016, advising that the Commission will make a submission to the Committee's review of the Inspector's report to the Premier.
- ix. Judge Graeme Henson, Chief Magistrate of Local Court NSW, dated 14 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- x. Professor Gary Sturgess, email dated 21 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- xi. \*\*\*
- xii. Mr Paul Williams, Acting CEO, Australian Crime Commission, dated 24 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- xiii. The Hon Murray Gleeson AC, dated 27 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- xiv. Mr Ian Temby AO QC, dated 30 June 2016, transmitting his submission to the Committee's review of the Inspector's report to the Premier.
- xv. \*\*\*
- xvi. NSW Police Force, dated 11 June 2016, declining to make a submission to the Committee's review of the Inspector's report to the Premier.
- xvii. \*\*\*

The Committee noted the following items of correspondence sent:

- iv. \*\*\*  
Mr Graham Kelly, former ICAC Inspector, dated 2 June 2016, noting his letter dated 17 May 2016 regarding the ICAC Inspector's Report to the Premier and asking if he would like it to be considered as a submission to the Committee's inquiry concerning the Inspector's Report.
- v. \*\*\*
- vi. \*\*\*

Resolved, on the motion of Ms Mihailuk, seconded by Mr Patterson:  
That the correspondence be noted.

\*\*\*

#### 4. \*\*\*

### 5. Inquiry into the Inspector's Review of the ICAC – Report to the Premier

#### 5.1 Publication of submissions

The Committee discussed publication orders for submissions lodged regarding its inquiry into the Inspector's Review of the ICAC.

Resolved, on the motion of Revd Nile, seconded by Mr Marshall:  
That submissions 1-6, 8-18, 20, 22 and 24-26 be received by the Committee and published.

Resolved, on the motion of Mr Taylor, seconded by Mr Patterson:  
That submissions 7, 19, 21, 23 and 23A be received by the Committee but not published.

The Chair requested that Committee staff compile a table outlining the response in each written submission to each of the recommendations contained in the Inspector's report.

### **5.2 Public hearings 8 and 9 September**

The Committee discussed the Chair's draft witness list for public hearings on 8 and 9 September 2016.

- Resolved, on the motion of Revd Nile, seconded by Mr Patterson:
- a. That the witnesses on the Chair's draft witness list be invited to attend to give evidence at a public hearing for the Committee's inquiry into the Inspector's Review of the ICAC;
  - b. That Mr Geoffrey Watson SC also be invited to attend to give evidence at a public hearing for the Committee's inquiry into the Inspector's Review of the ICAC;
  - c. That the Chair issue a media release announcing the public hearings to take place on 8 and 9 September 2016.

### **6. General Business**

Mr Khan noted that he may be Acting President of the Legislative Council at the time of the public hearings for the Committee's inquiry into the Inspector's Review of the ICAC. If so, Mr Khan will not be able to attend the public hearings in his capacity as a Committee member.

### **7. Next meeting**

The Committee adjourned at 11:58am until 8 September 2016.

## **MINUTES OF MEETING NO 17**

10:35am, 8 September 2016  
Macquarie Room, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Hoenig, Mr Humphries, Mr Lynch, Revd Nile, Mr Patterson, Mr Taylor, and Ms Voltz.

### **Officers in Attendance**

Carly Maxwell, Elspeth Dyer, Jacqueline Linnane and Tanja Zech.

### **1. Apologies**

The Committee noted apologies from Mr Khan, and Ms Mihailuk.

## 2. Confirmation of Minutes

Resolved, on the motion of Revd Nile, seconded by Mr Humphries:

That the draft minutes of meeting no 16, held on 1 August 2016, be confirmed.

## 3. Membership of Committee

The Committee noted that on 25 August 2016, Mr Lynch was appointed to serve on the Committee in place of Ms Smith who has been discharged. The Chair welcomed Mr Lynch.

The Committee also noted that on 25 August 2016, Mr Adam Marshall was appointed as Parliamentary Secretary for Northern NSW and Renewable Energy, and has therefore ceased to serve on the Committee by virtue of section 66(1)(b) of the *Independent Commission Against Corruption Act 1988*.

## 4. Correspondence

The Committee noted the following items of correspondence received and draft responses to items i and vi:

- i. The Hon Megan Latham, ICAC Commissioner, dated 4 August 2016, asking whether the ICAC will be provided with a copy of the five submissions to the Committee's Inquiry into the Inspector's Review of the ICAC, that the Committee elected not to publish on its website.
- ii. The Hon David Ipp AO, QC, former ICAC Commissioner, dated 2 August 2016, advising that he is not available to attend the Committee's public hearings to be held 8 and 9 September 2016.
- iii. The Hon Murray Gleeson AC, QC, advising that he does not wish to give evidence at the Committee's public hearings for its inquiry into the Inspector's Review of ICAC.
- iv. Mr Michael Sexton SC, Solicitor General for NSW, dated 18 August 2016, declining to provide the Committee with a copy of legal advice provided to him by the Victorian Chief Crown Prosecutor concerning allegations arising from ICAC's Operation Hale.
- v. Mr Christopher Brierley, Partner, HWL Ebsworth Lawyers, regarding the Committee's invitation to Mr Geoffrey Watson to appear before the Committee at a public hearing regarding the Inspector's report to the Premier reviewing the ICAC.
- vi. \*\*\*
- vii. Mr Rick Mitry, on behalf of Ms Margaret Cunneen, Mr Stephen Wyllie and Ms Sophia Tilley, dated 7 September 2016, providing witness statements re Ms Tilley's accident on 31 May 2014.
- viii. \*\*\*
- ix. Mr Bruce McClintock SC, email dated 7 September 2016, commenting regarding private ICAC hearings and DPC's submission to the Committee's inquiry into the Inspector's Report to the Premier regarding re-structure of the ICAC and Inspectorate.

The Committee noted the following items of correspondence sent:

- iii. The Hon David Ipp AO, QC, former ICAC Commissioner, dated 9 August 2016 inviting further written comment to the Committee's inquiry into the Inspector's review of ICAC (*Committee members agreed out of session, by email on 8 August, to send the letter*).

- iv. Mr Blair Comley PSM, Secretary, Department of Premier and Cabinet, dated 16 August 2016, requesting further written information regarding structural reform to the ICAC (*Committee members agreed out of session, by email on 15 August, to send the letter*).
- v. Mr Michael Sexton SC, Solicitor General for NSW, dated 16 August 2016, requesting a copy of legal advice provided to him by the Victorian Chief Crown Prosecutor, Mr Gavin Silbert QC concerning allegations arising from ICAC's Operation Hale (*Committee members agreed out of session, by email on 15 August, to send the letter*).
- vi. Mr Blair Comley PSM, Secretary, Department of Premier and Cabinet (DPC), dated 5 September 2016, attaching a copy of Mr Ipp's comments regarding DPC's submission to the Committee's inquiry into the Inspector's report to the Premier (*Committee members agreed out of session, by email on 5 September, to send the letter*).

Resolved, on the motion of Mr Humphries, seconded by Mr Lynch:  
That the correspondence be noted.

Resolved, on the motion of Mr Taylor, seconded by Mr Hoenig:  
That the Committee note its out of session decisions to send the listed correspondence to the Hon David Ipp AO QC; Mr Blair Comley PSM; and Mr Michael Sexton SC.

The Committee considered the letter of Mr Michael Sexton SC, Solicitor General for NSW, dated 18 August 2016, declining to provide the Committee with a copy of legal advice provided to him by the Victorian Chief Crown Prosecutor concerning allegations arising from ICAC's Operation Hale.

Discussion ensued.

Resolved, on the motion of Mr Hoenig, seconded by Revd Nile:  
That the Committee write to Mr Michael Sexton SC, Solicitor General for NSW, asking whether the decision not to prosecute Ms Margaret Cunneen following ICAC's Operation Hale was influenced by the manner in which Ms Cunneen's mobile phone was seized by the ICAC.

Resolved on the motion of Mr Humphries, seconded by Mr Patterson:  
That the draft response to the ICAC Commissioner's letter dated 4 August 2016 be sent as circulated.

\*\*\*

## **5. Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

### ***5.1 Publication of submissions***

The Committee noted that three submissions were lodged with Committee staff after the closing date of 22 July 2016 – submission 27 from Mr Stephen Murray, submission 28 from the Queensland Crime and Corruption Commission and submission 29.

The Committee agreed by email on 19 August 2016 to publish submissions 27 and 28 on its webpage.

The Committee agreed by email on 26 August 2016 not to publish submission 29 on its webpage.

In addition, the Committee noted that a supplementary submission was also received from the Hon David Ipp AO QC on 8 September 2016, responding to DPC's proposals for structural reform to ICAC and that Mr Ipp would like the supplementary submission to be published.

Finally, the Committee noted that a supplementary submission was also received from the Department of Premier and Cabinet on 8 September 2016, responding to the Committee's request for further information regarding possible structural reform to the ICAC.

Discussion ensued.

Resolved, on the motion of Mr Humphries, seconded by Revd Nile:  
That the Committee note its out of session decision of 19 August 2016 to accept and publish on its webpage submissions 27 and 28 to its inquiry into the Inspector's Review of ICAC.

Resolved, on the motion of Mr Humphries, seconded by Revd Nile:  
That the Committee note its out of session decision of 26 August to accept but not to publish submission 29 on its webpage.

Resolved, on the motion of Revd Nile, seconded by Mr Taylor:  
That the Committee defer its consideration of a publication order for the supplementary submission of the Hon David Ipp AO QC until its next meeting.

Resolved, on the motion of Revd Nile, seconded by Mr Lynch:  
That the Committee publish the supplementary submission of the Department of Premier and Cabinet to its inquiry, as submission 25A, on its webpage.

### **5.2 Public hearings 8 September 2016**

The Committee considered standard resolutions for the conduct of its public hearing on 8 September 2016:

Resolved, on the motion of Mr Taylor, seconded by Mr Patterson:

- That the Committee conduct a public hearing on 8 September 2016 for its inquiry into the Inspector's Report to the Premier reviewing the ICAC;
- That the Committee take evidence from the Hon Harvey Cooper AM, Former Inspector of the ICAC; and Mr Bruce McClintock SC; and from witnesses from the Rule of Law Institute of Australia; the Office of the Inspector of the ICAC; the Office of the Director of Public Prosecutions; and the Department of Premier and Cabinet at the public hearing on 8 September 2016;
- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 8 September 2016;
- That the Chair send questions on notice to witnesses following the public hearing on 8 September 2016 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 8 September 2016 on the Committee's webpage;
- the Committee secretariat publish the transcript of evidence taken at the public hearing on 8 September 2016, after making corrections for recording inaccuracy, on the Committee's webpage.

### **5.3 Private Briefings**



The Committee noted that, in response to the Committee's invitation to appear at a public hearing for its inquiry, Professor Gary Sturgess and Justice Peter Hall indicated that they prefer to attend a private briefing with the Committee on 23 September.

The Committee also considered inviting Mr Stephen Murray, who made a submission to the inquiry (submission 27), to a private briefing.

Resolved, on the motion of Revd Nile, seconded by Mr Hoenig:  
That the Committee invite Mr Stephen Murray to attend a private briefing with the Committee concerning the Committee's inquiry to review the Inspector's report to the Premier.

#### **5.4 Inquiry timeline**

The Committee deferred consideration of a proposed reporting timeline for its inquiry until its next meeting.

#### **6. General Business**

Mr Humphries thanked the staff for the briefing materials prepared in preparation for the Committee's public hearings for the inquiry into the Inspector's report to the Premier.

#### **7. Public Hearing – Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

At 10:52am, the Chair declared the public hearing open and witnesses and the public were admitted.

The Honourable David Levine AO RFD QC, Inspector of the ICAC, was affirmed and examined.  
Mr John Nicholson SC, Assistant Inspector of the ICAC, was sworn and examined.  
Ms Susan Raice, Principal Legal Advisor, ICAC Inspectorate, was sworn and examined.

Mr Hoenig disclosed that he has known Mr Nicholson for many years.

The Inspector made an opening statement.

Ms Mihailuk arrived at 11:07am.

Mr Khan arrived at 11:19am.

At 11:30am, the ICAC Inspectorate's evidence was temporarily suspended to allow the Director of Public Prosecutions to give evidence and witnesses from the Inspectorate temporarily withdrew.

Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions NSW was sworn and examined.

Ms Johanna Pheils, Deputy Solicitor Legal, Office of the Director of Public Prosecutions of NSW was sworn and examined.

At 11:58am, the Committee agreed to resume its deliberative meeting to consider hearing evidence from Mr Babb and Ms Pheils *in camera*. The public hearing was adjourned and the public withdrew. The witnesses remained.

#### **8. Resumption of deliberative meeting**

The Committee considered whether to hear from Mr Babb and Ms Pheils *in camera*.

Moved by Mr Hoenig, seconded by Mr Khan:

That the Committee hear evidence from the witnesses from the Office of the Director of Public Prosecutions, Mr Lloyd Babb and Ms Johanna Pheils, *in camera*.

**9. *In Camera* Hearing – Inquiry into the Inspector’s Review of the ICAC – Report to the Premier**

The Committee heard evidence from Mr Babb and Ms Pheils *in camera*.

At 12:13pm, Mr Babb’s and Ms Pheils’ evidence concluded and the witnesses withdrew.

**10. Resumption of Public Hearing – Inquiry into the Inspector’s Review of the ICAC – Report to the Premier**

At 12:16pm, the public hearing resumed and witnesses and the public were re-admitted.

Witnesses from the ICAC Inspectorate, Mr Levine, Mr Nicholson and Ms Raice resumed giving evidence.

At 12:44pm, evidence from the ICAC Inspectorate concluded and the witnesses withdrew.

Mr Robin Speed, President of the Rule of Law Institute of Australia, was sworn and examined.

At 1:04pm, Mr Speed’s evidence concluded and the witness withdrew.

The Hon Harvey Cooper AM, Former Inspector of the ICAC, was sworn and examined.

Mr Cooper made an opening statement.

At 1:25pm, Mr Cooper’s evidence concluded and the witness withdrew and the Committee took the luncheon adjournment.

The public hearing resumed at 2pm.

Mr Bruce McClintock SC, was affirmed and examined.

Mr McClintock made an opening statement.

At 3:16pm, Mr McClintock’s evidence concluded and the witness withdrew.

Ms Mihailuk departed at 3:18pm.

At 3:19pm, Mr Paul Miller, Deputy Secretary Cabinet and Legal, Department of Premier and Cabinet was affirmed and examined.

Mr Miller made an opening statement.

At 3:34pm, Mr Miller’s evidence concluded and the witness withdrew.

The hearing concluded at 3:34pm and the public withdrew.

### **11. Next meeting**

The Committee adjourned at 3:34pm until 9:30am on 9 September 2016.

## **MINUTES OF MEETING NO 18**

9:32am, 9 September 2016

Macquarie Room, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Hoenig, Mr Humphries, Mr Khan, Mr Lynch, Ms Mihailuk, Revd Nile, Mr Patterson, Mr Taylor, and Ms Voltz.

### **Officers in Attendance**

Carly Maxwell, Elspeth Dyer, Jacqueline Linnane and Tanja Zech.

### **1. Confirmation of Minutes**

Resolved, on the motion of Mr Patterson, seconded by Mr Humphries:

That the draft minutes of meeting no 17, held on 8 September 2016, be confirmed.

### **2. Correspondence**

The Committee noted the following items of correspondence received:

- i. Mr Paul Miller, Deputy Secretary Cabinet and Legal, Department of Premier and Cabinet, dated 8 September 2016 responding to a question taken on notice at the Committee's public hearing on 8 September.

The Committee noted the following items of correspondence sent:

- i. The Hon Megan Latham, ICAC Commissioner, dated 8 September 2016, responding to her letter dated 4 August 2016 concerning the five submissions to the Committee's Inquiry into the Inspector's Review of the ICAC that the Committee decided not to publish on its webpage.
- ii. \*\*\*
- iii. Letter to Mr Stephen Murray, dated 8 September 2016, inviting him to attend a private briefing with the Committee concerning the Committee's inquiry into the Inspector's Report to the Premier reviewing ICAC.

The Committee also considered the Chair's draft letter to Mr Graeme Head, Public Service Commissioner, tabled at the meeting, about the possibility of bringing ICAC employees under the Government Sector Employment Framework.

Resolved, on the motion of Revd Nile, seconded by Mr Taylor:

- That the correspondence be noted;
- That the Chair's draft letter to Mr Graeme Head, Public Service Commissioner, be sent.

### **3. \*\*\***

## **4. Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

### **4.1 Publication of submissions**

The Committee considered whether to publish a supplementary submission from the Hon David Ipp AO QC, received on 1 September 2016.

Resolved, on the motion of Mr Lynch, seconded by Mr Khan:  
That the Committee accept the supplementary submission of the Hon David Ipp AO QC to its inquiry into the Inspector's review of ICAC as submission 16A, and publish it on its webpage.

#### **4.2 Public hearing and in camera hearing, 9 September 2016**

The Committee considered standard resolutions for the conduct of a public hearing and an *in camera* hearing on 9 September 2016 for the inquiry:

Resolved, on the motion of Revd Nile, seconded by Ms Mihailuk:

- That the Committee conduct a public hearing on 9 September 2016 for its inquiry into the Inspector's Report to the Premier reviewing the ICAC;
- That the Committee take evidence from Mr Graham Kelly, former Inspector of the ICAC; and witnesses from the NSW Ombudsman and the ICAC at the public hearing on 9 September 2016;
- That the Committee take evidence from Mr Andrew Tink AM at an *in camera* hearing on 9 September 2016;
- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 9 September 2016;
- That the Chair send questions on notice to witnesses following the public hearing and *in camera* hearing on 9 September 2016 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 9 September 2016 on the Committee's webpage;
- That the Committee secretariat publish the transcript of evidence taken at the public hearing on 9 September 2016, after making corrections for recording inaccuracy, on the Committee's webpage.

#### **4.3 Inquiry reporting timeline**

The Committee noted the Chair's proposed reporting timeline for the inquiry, tabled at the meeting.

#### **5. \*\*\***

#### **6. Public Hearing – Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

At 9:41am, the Chair declared the public hearing open and witnesses and the public were admitted.

Professor John McMillan, Acting Ombudsman, NSW Ombudsman, was affirmed and examined.

Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, was affirmed and examined.

Ms Linda Waugh, Deputy Ombudsman, NSW Ombudsman, was affirmed and examined.

Ms Megan Smith, Legal Counsel, NSW Ombudsman, was affirmed and examined.

Professor McMillan made an opening statement.

At 10:28am, the evidence of witnesses from the NSW Ombudsman concluded and the witnesses withdrew.

The Committee took a short adjournment and the public withdrew.

**7. Resumption of deliberative meeting**

At 10:43am, the Committee resumed its deliberative meeting with Mr Andrew Tink AM present. Mr Tink advised the Committee that he would prefer to give his evidence in public.

Resolved, on the motion of Mr Lynch, seconded by Mr Patterson:

That the Committee take evidence from Mr Andrew Tink AM, for its Inquiry into the Inspector's Review of the ICAC, at a public hearing.

**8. Resumption of Public Hearing – Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

At 10:45am, the public hearing resumed and the public was re-admitted.

Mr Andrew Tink AM was affirmed and examined.

Mr Tink made an opening statement.

At 11:34am, Mr Tink's evidence concluded and the witness withdrew.

At 11:35am, Mr Graham Kelly, Former Inspector of the ICAC, was affirmed and examined.

Mr Kelly tendered a short curriculum vitae, outlining his current and former employment and professional experience.

Mr Kelly made an opening statement.

At 12:18pm Mr Kelly's evidence concluded and the witness withdrew.

The Committee took the luncheon adjournment and the public withdrew.

The public hearing resumed at 1:05pm and witnesses and the public were admitted.

The Hon Megan Latham, Commissioner, Independent Commission Against Corruption, was sworn and examined.

Mr Andrew Koureas, Executive Director, Corporate Services Division, Independent Commission Against Corruption, was sworn and examined.

Dr Robert Waldersee, Executive Director, Corruption Prevention Division, Independent Commission Against Corruption, was affirmed and examined.

Mr Roy Waldon, Executive Director, Legal Division and Solicitor to the Commission, Independent Commission Against Corruption, was sworn and examined.

Ms Sharon Loder, Executive Director, Investigation Division, Independent Commission Against Corruption, was affirmed and examined.

The Commissioner made an opening statement.

At 2:18pm, the evidence of witnesses from the Independent Commission Against Corruption concluded and the witnesses withdrew.

The public hearing concluded at 2:18pm and the public withdrew.

#### **9. Next meeting**

The Committee adjourned at 2:18pm until 23 September 2016.

## **MINUTES OF MEETING NO 19**

9:09am, 23 September 2016

Room 1136, Parliament House

#### **Members Present**

Mr Tudehope (Chair), Mr Hoenig, Mr Humphries, Mr Khan, Mr Lynch, Mr Provest, Mr Taylor (until 11:29am) and Ms Voltz (until 9:58am).

#### **Officers in Attendance**

Carly Maxwell, Elspeth Dyer and Tanja Zech.

#### **1. Apologies**

The Committee noted apologies from Ms Mihailuk, Mr Patterson and Revd Nile.

#### **2. Confirmation of Minutes**

Resolved, on the motion of Mr Lynch, seconded by Mr Khan:

That the draft minutes of meeting no 18, held on 9 September 2016, be confirmed.

#### **3. Membership of Committee**

The Committee noted the extracts from Votes and Proceedings no 84, 15 September 2016 and that Mr Provest has been appointed to serve on the Committee in place of Mr Marshall.

#### **4. Election of Deputy Chair**

The Chair conducted an election for Deputy Chair of the Committee. The office was left vacant on 25 August 2016 when Mr Marshall was appointed Parliamentary Secretary for Northern NSW and Renewable Energy, and therefore ceased to serve on the Committee by virtue of section 66(1)(b) of the *Independent Commission Against Corruption Act 1988*.

Resolved, on the motion of Mr Taylor, seconded by Mr Khan:

That Mr Provest be elected Deputy Chair of the Committee.

#### **5. Correspondence**

The Committee noted the following items of correspondence sent:

- Mr Graeme Head, Public Service Commissioner, dated 9 September 2016, requesting information about the possible effect of bringing ICAC employees under the Government Sector Employment Framework.

- Mr Michael Sexton SC, Solicitor General for NSW, dated 9 September 2016, seeking further information about the decision not to prosecute Ms Margaret Cunneen SC following Operation Hale.
- The Hon Megan Latham, ICAC Commissioner, dated 15 September 2016, containing further questions following the Committee's public hearing for the inquiry into the Inspector's report to the Premier on 9 September 2016.

The Committee noted the following items of correspondence received:

- \*\*\*
- Mr Michael Sexton SC, Solicitor General for NSW, responding to the Committee's enquiry about the decision not to prosecute Ms Margaret Cunneen SC following Operation Hale.
- Mr Graeme Head, Public Service Commissioner, dated 19 September 2016, responding to the Committee's request for information about the possible effect of bringing ICAC employees under the Government Sector Employment Framework.
- The Hon Megan Latham, ICAC Commissioner, dated 20 September 2016, responding to the Committee's further questions following the 9 September public hearing and attaching the ICAC's policies and procedures regarding compulsory examinations and public inquiries, hearing briefs, use of the public and restricted website for ICAC hearings, and standard directions for public inquiries.

Resolved, on the motion of Mr Lynch, seconded by Mr Khan:

- That the correspondence be noted;
- That the Committee publish the response of the Public Service Commissioner dated 19 September 2016 regarding the Committee's request for information about the possible effect of bringing ICAC employees under the Government Sector Employment Framework, on the Committee's webpage;
- That the Committee publish the letter of the ICAC Commissioner, dated 20 September 2016, responding to the Committee's further questions following the 9 September public hearing and the attached Standard Directions for Public Inquiries, on the Committee's webpage; but not publish the remainder of the attachments to the letter.

## **6. Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

### **6.1 Publication of submissions**

Resolved, on the motion of Mr Taylor, seconded by Mr Khan:

That the Committee note its out of session decision of 16 September 2016 to publish the supplementary submission of Dr Irene Moss AO as submission 9A on its webpage.

### **6.2 Evidence**

Mr Khan noted the answers to questions taken on notice by the Director of Public Prosecutions (DPP) at the public hearing on 8 September, lodged with the Committee staff on 21 September. He further noted an apparent inconsistency between the evidence contained in those answers and the evidence given by the ICAC Commissioner at the public hearing on 9 September regarding the evidence that had been provided to the DPP in the Kear matter.

Discussion ensued.

Resolved, on the motion of Mr Khan, seconded by Mr Hoenig:

That the Chair write to the ICAC Commissioner noting the apparent inconsistency between the DPP's answers to questions taken on notice and evidence given by the Commissioner at the public hearing on 9 September, and inviting comment.

### **6.3 Private briefings**

The Committee conducted private briefings with Mr Stephen Murray, Professor Gary Sturgess and Justice Peter Hall.

7. \*\*\*

### **8. Next meeting**

The Committee adjourned at 11:52am until a date and time to be determined.

## MINUTES OF MEETING NO 20

1:00pm, 11 October 2016

Room 1254, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Humphries, Mr Khan, Mr Lynch, Ms Mihailuk, Mr Taylor, and Ms Voltz.

### **Officers in Attendance**

Carly Maxwell, Elspeth Dyer, Jacqueline Linnane and Tanja Zech.

### **1. Apologies**

The Committee noted apologies from Mr Hoenig, Mr Patterson and Revd Nile.

### **2. Confirmation of Minutes**

Resolved, on the motion of Mr Taylor, seconded by Mr Lynch:

That the draft minutes of meeting no 19, held on 23 September 2016, be confirmed.

### **3. Correspondence**

The Committee noted the following items of correspondence sent:

*Sent*

- i. The Hon Megan Latham, ICAC Commissioner, dated 23 September 2016, concerning evidence given at the Committee's public hearing on 9 September and the DPP's answers to questions taken on notice.

The Committee also noted the following items of correspondence received and the Chair's proposed response to item iii.

*Received*



- i. Mr Robin Speed, President of the Rule of Law Institute, emails dated 22 September 2016 regarding evidence given by the ICAC Commissioner and DPP at the Committee's public hearings on 8 and 9 September.
- ii. Mr Robin Speed, President of the Rule of Law Institute, dated 23 September 2016 regarding evidence given by the ICAC Commissioner and DPP at the Committee's public hearings on 8 and 9 September.
- iii. The Hon Megan Latham, ICAC Commissioner, dated 29 September 2016, response concerning evidence given at the Committee's public hearing on 9 September and the DPP's answers to questions taken on notice and attachments:
  - o Extract of Mr Murray Kear's Counsel's submission to the ICAC public inquiry in Operation Dewar;
  - o The DPP's submission regarding costs, dated 16 May 2016, in the matter of DPP v Kear;
  - o Statement of Mr Darren Curd, ICAC Investigator, dated 1 July 2014, in the matter of Murray Kear – Operation Dewar;
  - o Extracts of Exhibits 1 and 2 – Operation Dewar.

Discussion ensued.

Resolved, on the motion of Mr Lynch:

- That the Chair's proposed response to the ICAC Commissioner's letter dated 29 September 2016 be amended to add a final sentence to the second paragraph: "It is open to you to publish your letter and documents";
- That the Chair's proposed response to the ICAC Commissioner be sent, as amended.

#### **4. Inquiry into the Inspector's Review of the ICAC – Report to the Premier**

##### **4.1 Possible recommendations**

The Committee considered a document containing the Chair's possible recommendations for inclusion in the Committee's report for the inquiry.

Discussion ensued.

##### **4.2 Revised timetable**

The Committee noted a revised reporting timeline for the inquiry.

#### **5. \*\*\***

#### **6. Next meeting**

The Committee adjourned at 1:47pm until a date and time to be determined.

## **MINUTES OF MEETING NO 21**

1:03pm, 26 October 2016

Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair, by telephone), Mr Hoenig, Mr Humphries (by telephone), Mr Khan, Mr Lynch, Ms Mihailuk, Revd Nile and Mr Patterson (by telephone).

**Officers in Attendance**

Carly Maxwell, Elspeth Dyer, Jacqueline Linnane and Tanja Zech.

**1. Apologies**

The Committee noted apologies from Mr Taylor and Ms Voltz.

**2. Confirmation of Minutes**

Resolved, on the motion of Mr Hoenig, seconded by Ms Mihailuk:  
That the draft minutes of meeting no 20, held on 11 October 2016, be confirmed.

**3. Correspondence**

The Committee noted the following item of correspondence sent:

- The Hon Megan Latham, ICAC Commissioner, dated 11 October, responding to the Commissioner's 29 September request to have her letter and attached documents regarding evidence given at the Committee's public hearing on 9 September, published.

Resolved, on the motion of Ms Mihailuk, seconded by Revd Nile:  
That the correspondence be noted.

**4. \*\*\***

**5. Inquiries into the Inspector's Review of the ICAC and the Inspector's Report regarding Operation Hale – Consideration of the Chair's Draft Report**

The Committee considered the Chair's draft report distributed to members by email on 21 October 2016 *in globo*.

Mr Lynch moved that Recommendation 2 be deleted and replaced with: "That the use of the ICAC's extraordinary powers be authorised by majority agreement of the three member Commission".

Amendment put and agreed to.

Resolved on the motion of Mr Lynch, seconded by Mr Khan:

- That the Committee secretariat make consequential amendments to the Executive Summary and paragraphs 1.4, 1.6, 1.10, 1.11 and 1.18 arising out of the amendment to recommendation 2.
- That the consequential amendments be circulated to members by email, and any comments provided to the Committee secretariat by 5pm, 26 October 2016.

Mr Khan moved that paragraph 15 of Appendix One be amended by deleting all words after 'material' in the second line.

Amendment put and agreed to.

Mr Khan moved that paragraph 16 of Appendix One be amended by deleting the words 'of the Inspector material' from the first line.

Amendment put and agreed to.

Resolved, on the motion of Revd Nile, seconded by Mr Lynch

- a. That the Committee adopt the Chair's draft report as amended and that it be signed by the Chair for presentation to both Houses.
- b. That the Committee authorise the secretariat to make appropriate final editing and stylistic changes as required.
- c. That once tabled the report be published on the Committee's webpage.
- d. That the Chair issue a media release announcing the tabling of the Committee's report for dissemination by the Committee secretariat.

**6. \*\*\***

**7. Next meeting**

The Committee adjourned at 1:12pm until a date and time to be determined.