

Mr Damian Tudehope MP  
Chair  
Committee on the ICAC  
Parliament House  
Macquarie Street  
SYDNEY NSW 200

19 September 2016

Dear Mr Tudehope

**Re: Inquiry into the ICAC Inspector's report to the Premier**

I refer to your letter dated 15 September 2016 requesting answers to three further questions. The questions and answers are set out below.

- 1. In the submission of the Rule of Law Institute to the inquiry (submission 3), it is stated on page 5 that during Operation Dewar Mr Murray Kear was given little time to prepare for the public inquiry. Could you please advise of any steps that the ICAC takes to ensure legal representatives and witnesses have reasonable time to prepare before appearing before ICAC? Does the ICAC have any written policies or procedures concerning this?**

Given the reference to what is stated at page 5 of Speed's submission, it is appropriate to set out some information on the circumstances relevant to the ability of Mr Kear and his legal representative to prepare for the public inquiry.

Mr Kear was aware from at least early September 2013 that the Commission was conducting an investigation and that the investigation concerned, in part, his decision to terminate Ms McCarthy's employment. From this time onwards Mr Kear produced material to the Commission relevant to the investigation.

On 22 October 2013 Mr Kear was served with a summons requiring his attendance at a compulsory examination. The summons set out the allegations under investigation. These included that he had taken detrimental action against Ms McCarthy in reprisal for her having alleged that Mr Pearce had engaged in misconduct while employed by the SES, that he had improperly showed favour to Mr Pearce by failing to appropriately deal with alleged misconduct by Mr Pearce and that he had attempted to mislead the Commission. Mr Kear gave evidence in a compulsory examination on the afternoon of 24 October 2013.



On 7 November 2013 Mr Kear was served with a summons requiring his attendance at a public inquiry to commence on Tuesday 3 December 2013. The summons provided that the public inquiry was being conducted for the purposes of an investigation of allegations that:

- a. Murray Kear, the Commissioner of the New South Wales State Emergency Services (SES) took detrimental action against Tara McCarthy including dismissing her from the position of Deputy Commissioner, SES in reprisal for Tara McCarthy making allegations that Stephen Pearce, a Deputy Commissioner of the SES had engaged in corrupt conduct.*
- b. Murray Kear improperly showed favour to Stephen Pearce by failing to appropriately investigate allegations made by Tara McCarthy that Stephen Pearce had engaged in corrupt conduct.*
- c. In relation to allegations [a] and [b], Murray Kear made false statements to or attempted to mislead an officer of the ICAC in the exercise of their functions under the ICAC Act.*

On Thursday 28 November 2013 Mr Oates, Mr Kear's legal representative, was advised that the Commission had compiled a DVD of relevant documents for the purpose of the public inquiry and that a copy of the DVD could be collected from the Commission's premises upon Mr Oates undertaking not to divulge or communicate the contents to any person except for the purpose of providing legal advice to Mr Kear in connection with the public inquiry. Mr Oates signed the undertaking and collected the DVD on Friday 29 November 2013. The contents of the DVD included material created by Mr Kear and other material within his knowledge as Commissioner of the SES.

The public inquiry commenced on Tuesday 3 December and continued to Friday 6 December 2013.

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.

The excerpt from the Operation Dewar public inquiry transcript reproduced in Mr Speed's submission is taken from the transcript of Friday 6 December (the last day of the public inquiry). This occurred during Mr Oates' examination of Mr Kear. In the course of that examination Mr Oates put a proposition to Mr Kear concerning a conversation Mr Kear had had with two other people who had previously given evidence in the public inquiry. Counsel Assisting objected, *inter alia*, on the basis that the matter in issue had not been put by Mr Oates to those witnesses. Mr Oates responded in the terms set out in the transcript excerpt reproduced in Mr Speed's submission. It was pointed out by Counsel Assisting that a statement of one of the relevant witnesses had been previously provided to Mr Oates and the public inquiry had been twice adjourned to allow Mr Oates time to take instructions from Mr Kear in order to determine whether there should be

any cross-examination of either witness. Mr Oates did not press the point on 6 December and continued with his examination of Mr Kear.

Commission policy requires that a person required to appear at a compulsory examination or public inquiry be given reasonable notice. Unless there are special circumstances, Commission policy requires persons required to attend a compulsory examination to be served with a summons at least five working days before the compulsory examination. 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. These requirements are set out in section 4.1.6 of **Operations Manual Policy and Procedure IP03 "Compulsory Examinations and Public Inquiries"** (IP03). A copy is enclosed.

Section 30(3) of the *Independent Commission Against Corruption Act 1988* (the ICAC Act) requires a person required to attend a compulsory examination to be informed, before or at the commencement of the compulsory examination, of the nature of the allegation or complaint being investigated. Section 31(6) of the ICAC Act requires a person required to attend a public inquiry to be informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated. These requirements are also set out in section 4.1.5 of IP03.

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 the 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. Section 4.7.4 of IP03 deals with the restricted website.

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.

2. **You gave evidence at the public hearing on 9 September that generally material is made available to relevant parties prior to the commencement of an ICAC public inquiry by way of granting access to a restricted website. Does the ICAC have any written policies or procedures concerning this?**

Apart from providing access to material prior to the commencement of a public inquiry, the restricted website may also be used during the course of the public inquiry to provide parties and their legal representatives with access to other relevant material that is proposed to be tendered as evidence during the course of the public inquiry and other information, such as lists containing the names of proposed witnesses and the dates on which it is proposed they will give evidence.



The Commission's policy with respect to the use of the restricted website is set out in section 4.7.4 of IP03.

The Commission's procedures for the use of the restricted website are set out in the Operations Manual **Work Instruction IP03-C "Hearing Briefs" and Work Instruction IP03-D "Use of the public and restricted website for Commission hearings"**. Copies are enclosed.

3. **Does the ICAC have any written policies or procedures regarding the treatment of exculpatory evidence that is discovered by ICAC during an ICAC investigation? In particular, is there any requirement to provide exculpatory evidence that is credible, relevant and significant to persons of interest?**

The Commission's policies and procedures with respect to the provision of material to witnesses (and their legal representatives) attending a compulsory examination or public inquiry are set out in IP03, IP03-C and IP03-D.

The Commission's task in conducting an investigation is to establish the truth of what happened. It does this by making findings of relevant facts on the balance of probabilities. Such factual findings may tend to inculcate or exculpate individuals. The Commission ensures that 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.

The Commission recognises there may be other cogent, reliable, relevant and significant evidence not within its knowledge that may affect the fact finding process. Such information may, for example, only be within the knowledge of an affected party. To this end the Commission's **Standard Directions for Public Inquiries** (copy enclosed) makes provisions for parties to apply to have the evidence of a witness or witnesses placed before a public inquiry (paragraph 19), to adduce mitigatory evidence (paragraph 20) and to have a document placed before the public inquiry (paragraph 26). Such evidence can then be taken into consideration by the Commission in making factual findings.

Please advise if the Committee requires any further information with respect to these or any other matters.

Yours sincerely



The Hon Megan Latham  
Commissioner

## **Standard Directions for Public Inquiries**

## **INDEPENDENT COMMISSION AGAINST CORRUPTION**

### **STANDARD DIRECTIONS FOR PUBLIC INQUIRIES**

**OCTOBER 2014**

The following directions apply to the conduct of a public inquiry by the Independent Commission Against Corruption (the Commission).

#### **Sitting times**

1. The Commission ordinarily sits from Monday to Friday each week. Usual hearing hours are from 10:00am to 4:00pm, with a luncheon adjournment from 1:00pm to 2:00pm.

#### **Authorisation to appear**

2. The Commission may authorise a person to appear at a public inquiry or a specified part of a public inquiry if it is shown to the satisfaction of the Commission that the person is substantially and directly interested. Authorisation can be granted subject to conditions.
3. The Commission may withdraw authorisation to appear or make the authorisation subject to altered or additional conditions, at any time.
4. Authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Commission subject to the Commission's control and to such extent as the Commission considers appropriate.

#### **Legal representation**

5. The Commission may authorise a person giving evidence at the public inquiry to be legally represented.
6. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The Commission will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:
  - a. It could be demonstrated that there is some reasonable purpose for seeking representation of that kind;
  - b. The most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated;

- c. All of the lawyers involved give an undertaking, through the most senior lawyer, to inform the Commission immediately upon recognising that a conflict of interest has arisen.

### **Conduct of the public inquiry – witnesses**

7. Subject to the control of the Commission, counsel assisting will determine which witnesses are called and the order in which those witnesses are called and examined. It may be necessary to call some witnesses to give evidence on more than one occasion.
8. The Commission may decide to receive the evidence of a witness orally or by statement. The Commission will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
9. Persons required to give evidence will be provided with appropriate notice of the time the Commission will call upon their summons to attend and give evidence. Witnesses with a particular period of unavailability are required to give notice of that unavailability to the Commission at the earliest possible opportunity.
10. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
11. All witnesses will be called to give evidence by counsel assisting, and then examined by counsel assisting. If there is more than one counsel assisting the Commission there may be circumstances in which the witnesses might be examined by more than one of the counsel assisting the Commission. The witness may then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest to do so. The witness may then be examined by his or her own legal representative. Counsel assisting may re-examine. Duplication and repetition must be avoided.
12. In determining whether a person has sufficient interest to cross-examine a witness, the Commission may call upon the cross-examiner to:
  - a. Identify the purpose of the cross-examination,
  - b. Set out the issues to be canvassed,
  - c. State whether a contrary affirmative case is to be made, and if so the details of that case.
13. The Commission may:
  - a. Limit the particular topics or issues upon which a party can examine or cross-examine;
  - b. Impose time limits upon examination or cross examination.

14. Save as set out in paragraphs 15 to 18 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.
15. If the Commission is to be invited to disbelieve a witness, the material grounds upon which it is said that the evidence should be disbelieved should be put to the witness so that the witness may have an opportunity to offer an explanation.
16. The Commission expects that, where it is contended that deliberately false evidence has been given, or that there has been a mistake on the part of the witness on a significant issue, the grounds of such contention will be put.
17. What is stated in paragraphs 15 and 16 above is not intended to mean that:
  - (a) Mere inconsistencies and unimportant differences in the evidence should be raised.
  - (b) Once the grounds for disbelieving a witness have been put by one party, other parties need to put them again.
  - (c) The grounds for disbelieving a witness need to be put where the Commission is on notice from statements made during the public inquiry by or on behalf of a party, or that party's evidence, or from the general way in which the party has conducted its previous questioning, or some similar source, that the witness's evidence is under challenge on those grounds.
18. Once a witness has been cross-examined on a particular issue no further cross-examination on that issue will be allowed unless the person wishing to cross-examine the witness on that issue can demonstrate the proposed cross-examination differs to a significant degree from the cross-examination that has taken place.
19. Any person wishing to have evidence of a witness or witnesses placed before the public inquiry must notify the Commission of the name of the witness, and provide a signed statement containing their expected evidence. Commission staff may interview the witness, and take further statements if necessary. Counsel assisting will decide whether or not to call the witness. An application may be made directly to the presiding Commissioner to call the witness only after the above procedure has been completed, and counsel assisting has refused to call the witness.
20. Leave may be granted to any affected person (under s 74(3) of the *Independent Commission Against Corruption Act*) to adduce mitigatory evidence bearing upon the exercise by the Commission of its powers under s 74A(2) of the Act. Any affected person wishing to adduce such evidence should apply for leave prior to the close of evidence at the public inquiry.



### **Conduct of the public inquiry – documents**

21. Subject to the control of the Commission, counsel assisting will determine which documents are tendered, and the time at which they will be tendered.
22. A copy of any document proposed to be put to a witness must be provided to counsel assisting as soon as possible after a decision is made to use the document and in all cases prior to its intended use.
23. Prior to the commencement of the public inquiry, the Commission may provide those persons it considers to be substantially and directly interested in the subject matter of the public inquiry with confidential electronic access to certain documents likely to be tendered as exhibits in the public inquiry. This will be done on a case by case basis by the Commission. As a general rule, the Commission will not otherwise make documents or other material available in advance of the public inquiry.
24. One of the purposes of providing this access is to enable persons to identify whether any application should be made for a suppression order in relation to any document or any part of a document.
25. Copies of these documents will not otherwise be provided to any party. Additional documents may be tendered by counsel assisting during the course of the public inquiry. Where such additional documents are tendered, the Commission will provide a party with a copy of the relevant document where the party has a significant interest in the issues to which each document relates.
26. Any person wishing to have a document placed before the public inquiry must notify the Commission by providing a copy of the document. Commission staff may require the production of other documents. Counsel assisting will decide whether or not to tender any document. An application may be made directly to the presiding Commissioner to tender a document only after the above procedure has been completed, and counsel assisting has refused to tender the document.

### **Suppression orders**

27. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
28. Parties granted confidential electronic access to documents should notify the Commission lawyer with carriage of the matter of any application for a suppression order in relation to any document or part of a document. Such notification is to be in writing and must be made as soon as possible. The application should clearly identify the material sought to be suppressed and the public interest grounds on which the material should be suppressed.

29. The presiding Commissioner will determine whether or not to hear oral submissions in support of such written applications.
30. Those making such written applications for suppression orders will be advised once the applications have been determined.

**Publication of, and access to, evidence.**

31. In respect of all evidence, oral and documentary, the following ruling will apply until vacated either generally or in respect of particular evidence:
  - a. the testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence;
  - b. any person (or the legal representative of that person) having leave to appear before the Commission will have access to any book, document or writing tendered in evidence for the purpose only of appearance before the Commission and subject to any other direction made by the Commission;
  - c. for the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station, online publication or television channel may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by counsel assisting, subject to the condition that:
    - i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
    - ii. any part of the contents thereof indicated by counsel assisting as unsuitable for publication must not be published without the leave of the Commission. Such leave can be sought, for example, if there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor to the Commission.

**Submissions**

32. Unless otherwise ordered, at the conclusion of the evidence oral submissions will not be allowed but orders will be made for the making of written submissions. The Commission may limit the particular topics or issues which may be addressed, and impose time or page limits on submissions. Ordinarily, orders will be made requiring

counsel assisting to provide written submissions within 14 days of the close of evidence and all other parties to provide their written submissions 14 days thereafter.

33. Unless otherwise ordered, all written submissions are subject to a suppression order under s112 of the *Independent Commission Against Corruption Act* that the submissions not be published or communicated to anyone except the Commission, the parties involved in the public inquiry and their legal representatives, or by Commission officers for statutory purposes or pursuant to further order of the Commission.

#### **Liaison with the Commission**

34. Any contact with the Commission made necessary by these directions, or other enquiries in respect of the conduct of the public inquiry, should be made through the Commission lawyer with carriage of the relevant investigation to which the public inquiry relates.