NSW GOVERNMENT
Office of the Inspector of the
Independent Commission Against Corruption

23 August 2017

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Ms Elspeth Dyer
Committee Manager
Parliamentary ICAC Committee

Via email: ICACCommittee@parliament.nsw.gov.au

Dear Ms Dyer

Towards the end of my evidence before the Parliamentary ICAC Committee on 7 August 2017, the Committee asked me to do two things:

1. To provide comments on the recommendations made by the Acting Inspector, Mr Nicholson SC, in his Report concerning ICAC Operation Vesta;
2. To provide comments on the evidence given by Messrs Lander and Macmillan before the Committee, also I believe on 7 August 2017, in relation to whistle blower issues.

This submission deals with the first matter, that is, the five recommendations that appear in [535] on pp 88-89 of Mr Nicholson's Report.

Recommendation 1

This recommendation is in the following terms:

> It is recommended that steps be taken to amend to sections 8 and 9 of the ICAC Act to remove the "could" test from each section, so that findings of corrupt conduct are available only in circumstances where it was reasonable for the Commission to expect a properly instructed reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission underpinning the corrupt conduct finding would be sustained.

I strongly disagree with this recommendation. It fails to take account of decisions of the New South Wales Court of Appeal which have dealt with these provisions and, indeed, of the consideration which I gave to the matter in my 2005 Report. It would be a mistake to change a provision whose meaning has been authoritatively determined by the Courts many years ago in circumstances were both the Courts and the ICAC itself, as well as ordinary citizens, have acted upon the basis of that judicial construction. The most relevant authority is *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. My discussion of it appears and this issue in Chapter 4 of my 2005 Report *Independent Review of the Independent Commission Against Corruption Act 1998 Final*

Report, Bruce McClintock SC. See especially section 4.2 "Appropriateness of Definition – General Considerations", and in particular [4.2.20] - [4.2.29] where I specifically considered and rejected the possibility of amending sections 8 and 9 so as to remove the word "could". I also point out there that such a change would deprive the ICAC of much of its investigative power because such power is based on the definition of "corrupt conduct".

Recommendation 2

This recommendation is in the following terms:

> It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given as to whether or not the common law offence of misconduct in public office should be incorporated into statute law for the purpose of better defining its elements and its sentencing range.

I have no particular objection to this proposal, although it does not seem to me to warrant any urgent Parliamentary attention. The reason is that, while misconduct in public office is a common law offence, its elements have been settled by decisions of the Court of Appeal which trial judges have applied. There does not seem to have been any difficulty in doing so.

Recommendation 3(a)

> That section 9(1)(b) and (c) be repealed on the basis that existing disciplinary tribunals and the Fair Work Commission are capable of dealing with matters to which these sections relate.

I disagree with this suggestion which seems to me to reveal a misunderstanding of the place of the ICAC on the one hand, and disciplinary tribunals and the Fair Work Commission on the other, in the scheme adopted by the ICAC Act 1988. The relevant function of the ICAC is to investigate and expose corruption. Obviously, some forms of corruption involve, or could involve a disciplinary offence as defined in section 9 of the ICAC Act. That definition includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law. The tribunals which deal with such matters are there to determine whether sanctions should be imposed upon a person for breaches of such matters and to determine what penalty should be imposed, e.g. dismissal, demotion. That function is quite distinct from that of the ICAC. It seems to me that the flaw in this logic is revealed by pointing out that the same considerations would apply to criminal offences. The fact that courts are there to deal with such matters has never been thought to provide a basis for suggesting that the ICAC should not do so.

Recommendation 3(b)

> Alternatively, that section 9(1)(b) and (c) be amended so that any ICAC finding that misconduct of a kind has been considering as conduct falling within the description of "corrupt conduct" as identified in section 8, but which did not qualify as conduct to which section 9(1)(a) – criminal conduct – applied, but did qualify as conduct to which section

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9(1)(b) and/or section 9(1)(c) applied should be described as "employment based misconduct" and can no longer qualify as "corrupt conduct".

I disagree with this recommendation for the reasons given in respect of Recommendation 3(a). It appears to me to be unnecessary in any event.

Recommendation 4

It is recommended that, through hearings of the Joint Committee Parliamentary (sic) consideration should be given to whether or not the addition of a "closed inquiry" as described in this report would serve to advance the investigation capacity and effectiveness of the ICAC.

I strongly oppose this suggestion. The ICAC already has power to carry out compulsory examinations which are required to be conducted in private – see section 33(5). If it is intended that the ICAC should be able to make findings of corrupt conduct and announce them publicly after such a private hearing, I would oppose it. It is crucially important, for the same reasons that courts usually conduct their business in public, that the ICAC do so too. Secrecy of this type was a characteristic of the Star Chamber.

Recommendation 5

It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act; and if so, in what circumstances and by what means could an "affected" person pursue exoneration.

I disagree with this suggestion which has been previously suggested by my predecessor, the Hon David Levine AO RFD QC. See the submission I made in response to Mr Levine's 2015 report to the Parliamentary Committee. The reason why this provision is unnecessary and retrograde is that, merely because someone is acquitted of a criminal charge brought as a result of an ICAC investigation does not mean that they have in any sense been "exonerated". ICAC's role is to expose corruption. To enable it to carry out that important task it is given a series of coercive powers which enable it to gather and rely upon evidence that is not admissible in criminal proceedings. Thus, it is perfectly possible that because, for example, of an admission made by someone in a ICAC investigation that finding of corrupt conduct may be made based on that admission. However, that admission, no matter how cogent and relevant, may not be admissible in criminal proceedings. It does not follow however that the person has not engaged in corrupt conduct from the fact of an acquittal, still less that he or she has been "exonerated".

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I will deal with the second matter which the committee asked me to deal with, the evidence of Messrs Lander and Macmillan, when their Hansard is available.

Yours sincerely,

[redacted]

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