

29 July 2010

The Hon Richard Amery MP
Chair
Parliamentary Joint Committee on the ICAC
Parliament of NSW
Macquarie Street
Sydney NSW 2000



Dear Mr Amery,

I refer to your letter received 23 July 2010 enclosing questions on notice. I am setting out your questions followed by the relevant answer.

QUESTION

Preliminary observations

1. The Annual Report refers to the Committee's 2008 recommendation for the Inspector to seek an increase in funding to enable him to undertake a broad range of audits of the ICAC. The report states that the Inspector's funding for 2008-2009, of \$600,000, represented a 6.25% reduction from the previous year's budget, and that the budget would not be increased for 2009-2010 (p 2). The report also noted that expenditure was \$454,665 (p 8).

Is the reduction of the Inspectorate's budget significant and, in particular, is the Office's budget sufficient to enable you to perform your audit and complaint handling functions under the ICAC Act?

2. What is the projected budget for the Inspector's Office in the 2010-2011 financial year?
3. The Annual Report states that the Inspector proposes to review options for low cost alternative accommodation for the Office in 2009-2010 (p 2), while noting that implementing a solution would depend on available funds.
 - a. Has the Inspector located other suitable office accommodation?
 - b. In what way would budget constraints prevent relocation of the Office, given that the Inspector's expenditure appears well below budget?

ANSWER

Since August 2009 the office has been staffed by the Office Manager and myself. Together we have managed to deal with all complaints and enquiries received as well as to produce three audit reports. I have attended the office generally two days per week although on occasion that has increased to three days. At the time of writing the actual expenditure for 2009/2010 is not available but I anticipate it will be about \$300,000. Accordingly, the answer to part 1 of your

question is in the affirmative. However, if an extensive investigation is required in the future in order to deal with a complaint then additional staff would be engaged on a casual basis.

Notwithstanding that the expenditure for 2009/2010 was approximately \$300,000, an indicative budget of \$600,000 will be sought for 2010/2011 to allow for extra costs due to requirement for a lengthy complex investigation(s).

I did make enquiries in August and September 2009 to locate other accommodation. Although the current location of the office has in the past been of concern to potential employees, the two people who work in this Office find the location convenient from the viewpoint of transport to and from their respective homes. Furthermore, although many complainants have attended this office to be interviewed in relation to their complaints none has expressed concern with its location. Indeed, some have commented positively on its proximity to Redfern railway station and comparative ease of car parking. Budget constraints have not been a consideration.

The main difficulty with the current location is that the Security and Recovery Coordination Directorate has the right to occupy the premises virtually at a moment's notice. The understanding is that this right will be exercised only in the event of a major emergency.

QUESTION

Impact of recent legislation upon the Inspector's role and power

4. The Annual Report discusses the way in which the Inspector's ability to conduct audits of the ICAC's use of certain powers is impeded by provisions of the *Telecommunications (Interception and Access) Act 1979 (Cth)* (TIA Act) and the *Surveillance Devices Act 2007 (NSW)* (SD Act) and suggests amendments to both Acts to overcome this issue.

The Inspector initially brought this matter to the Committee's attention during 2009, and the Committee expressed its support for a legislative resolution to the issue and asked that the Inspector advise it of any developments.

- a. Has there been any response from the NSW Attorney-General in regard to the Inspector's suggested amendments?
- b. To what extent has the Inspector been impeded in the performance of his functions by the failure to address these issues, for example, is the ICAC Commissioner still authorising disclosure of documentation and material to the Inspector to circumvent his lack of access under the legislation?

ANSWER

The best way of answering this question is to set out the events of the past year in chronological order.

Unfortunately, notwithstanding support from your Committee and from the ICAC Commissioner, no amendments have been made.

By letter dated 12 May 2009 to the then Premier I sought support for the suggested amendments to each of the two Acts. On the same day I wrote to the Chair of your Committee enclosing a copy of the letter to the Premier seeking its support.

On 4 August 2009 I sent an e-mail to the Legal Officer, Telecommunications and Surveillance Law Branch, National Security Law and Policy Division of the Commonwealth Attorney Generals Department requesting the amendments to the TIA Act.

By letter dated 11 September 2009 your Committee wrote to me advising its support for the legislative amendments.

On the 14 January 2010 I wrote to the NSW Attorney General in his capacity as the Minister responsible for the SD Act to seek his support for an amendment to that Act. I enclosed a copy of your Committee's letter of 11 September 2009.

On 14 January 2010 I wrote to the then Premier in her capacity as the minister responsible for the *Independent Commission Against Corruption Act* (ICAC Act) seeking her support for amendments to the SD Act and enclosed a copy of your Committee's letter of 11 September 2009. I pointed out that I had no response to my letter of 12 May 2009 to the then Premier.

By letter dated 25 January 2010 from the Australian Government's Attorney General's Department I was advised:

"While the Department understands the importance of your role as Inspector and the impact that role has in maintaining the integrity of the telecommunications interception regime, the TIA Act does not allow any agency to use their powers under the TIA Act for auditing purposes. In fact, the TIA Act limits the powers of all agencies to the investigation of specific offences and restricts the inspection role specifically to the Ombudsman.

Amending the TIA Act to enable the Inspector of the ICAC to use the audit functions bestowed by the ICAC Act to conduct a general sampling of the telecommunications interception records obtained by the ICAC under the TIA Act, would affect this legislative division of responsibility. It would also raise consistency issues that would need to be considered across all affected jurisdictions.

Given these concerns, I do not anticipate that your suggested amendments will be recorded into the TIA Act at any stage in the immediate future."

On 9 March 2010 I wrote further letters to the Premier and the Attorney General seeking replies to my earlier letters.

By letter dated 24 March 2010, the Director-General of the Department of Premier and Cabinet advised me that since the issue was first raised in May 2009 officers of the Department of Premier and Cabinet have undertaken consultation with relevant agencies and officers on the proposed amendments and that the Department is currently preparing a proposal for consideration by the Government.

The current situation is that I am precluded from conducting an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the Commonwealth TIA Act.

I regard the Inspector's role as having been created to provide a means of monitoring the extensive and intrusive powers of the ICAC so as to ensure that its use of those powers are appropriate for achieving its statutory objectives.

The obtaining of a warrant and subsequent interception pursuant to the TIA Act are normally unknown to the person(s) who is the object of the warrant and interception. It is therefore only in rare circumstances that a complaint would be received from such a person(s).

Although the TIA Act places obligations upon the NSW Ombudsman, those obligations are limited to ensuring compliance with legal requirements and the keeping of records. The NSW Ombudsman does not test if the ICAC's powers are being exercised appropriately. Thus, a warrant and interception under the TIA Act unrelated to the objectives of the ICAC could proceed undetected. It is for this reason, among others, that the exercise by the Office of the Inspector of its powers of audit have been considered by the NSW legislature to be so important.

The situation under the SD Act is slightly different. The Commissioner of the ICAC has enabled an audit of the Commission's use of surveillance devices pursuant to warrants issued under the SD Act by making a determination that it is in the public interest to provide "protected information" pursuant to subsections (6) and (7) of section 40 of the Act. This means that for me to conduct such an audit I am dependent upon the goodwill of the Commissioner. In my view, this is contrary to the spirit, if not the letter, of section 57C of the ICAC Act.

QUESTION

The Office

5. According to the Annual Report, usage statistics for the Office's website were not available from the Department of Premier and Cabinet (the host of the website) due to a problem with an outsourced service provider (p 10). Has this problem been rectified? If so, please provide the Committee with up to date statistics on website usage for the Office.

ANSWER

Although the Department was asked to take steps to make such usage statistics available, the full changeover of service providers did not occur until March 2010. No statistics were collected by the Department prior to that month. Website statistics for the forthcoming 2010-2011 reporting period are expected to be full and complete.

The usage since March 2010 is:

March 425 hits; April 523 hits; May 599 hits; June 70 hits.

I am unable to provide an explanation for the dramatic drop in June.

QUESTION

Complaints

6. There was a significant drop in complaints received by the Inspector during 2008-2009, with 35 complaints being received, down from 62 for the previous reporting period.
 - a. In the Inspector's view, what factors led to this reduction?
 - b. What effect, if any, has the reduction in complaints had on the Office's workload and staffing?
7. In his concluding comments, the Inspector states that he looks forward to making further improvements in the office's efficiency in handling complaints (p 17). Please outline the improvements that have been made in relation to the handling of complaints, and the further improvements the Inspector intends to make in this area.

ANSWER

According to the relevant Annual Reports the number of complaints received during 2005/2006 was 35, during 2006/2007 was 37, during 2007/2008 was 62 and during 2008/2009 was 35.

Apart from the year 2007/2008 the number of complaints received has always been in the vicinity of 35. During 2009/2010 the number was 38. It would seem that 2007/2008 was an abnormal year. I have no explanation for this abnormality.

Intuitively speaking, the fewer the complaints the lower the work load. However, the extent of the lowering of the work load depends, not so much upon the number, but rather upon the nature of the complaints received and the work required to assess and investigate them. At this stage it appears that the workload can be handled by existing staff. However, as stated earlier, an extensive investigation may require additional staff.

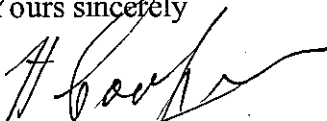
Amongst the improvements to efficiency are: --

- a) A reduction in the number of staff to handle a similar volume of work to that in 2005/2006, 2006/2007 and 2008/2009.
- b) A reduction in the time taken to deal with complaints.
- c) Personally interviewing complainants. Where the interviewee consents, the interview is sound recorded and she/he is provided with an electronic and written copy of the record of the interview.
- d) Revision of our website to provide greater clarity of the function of the Office of the Inspector and to make provision for on-line lodging of complaints.
- e) Development of an internal electronic reporting system which involves progressive recording of steps in each assessment/investigation thereby allowing quicker and easier access to results.

During the year I have concentrated my audits on those activities which involved ICAC's most intrusive powers such as those under sections 21, 22, 23 and 25 of the ICAC Act published in March 2010; data, optical and tracking surveillance under the Surveillance Devices Act published in November 2009; and listening devices under the Surveillance Devices Act published in September 2009.

Please let me know if any further information is required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H. Cooper', written over the printed name below.

Harvey Cooper AM
Inspector