

Independent Commission Against Corruption

Responses to questions taken on notice at the public hearing held on Friday 7 August

1. Question from Mr Adam Marshall MP, Transcript of Evidence, p 20:

Mr ADAM MARSHALL: You may not be able to answer this question; you may need to take advice. How do you explain the presence of television news crews that had to drive for at least an hour and a half to get to Mr Torbay's residence to film the execution of the raid?

Ms LATHAM: I do not know how long the search took. You are talking about matters that occurred before my time. If you want me to provide an answer, I am happy to do so on notice.

Mr ADAM MARSHALL: If you wish take the question on notice that is fine.

Ms LATHAM: I will take it on notice and provide an account in relation to that raid.

Response:

The Commission has responded to the Inspector on a similar issue raised with him by a complainant about the attendance of the media at a search of Mr Torbay's residence. In the Commission's view, the Inspector is the appropriate entity to inquire into specific complaints of this nature.

However, as information about this search is in the public domain, including through media reports, the Commission makes the following observations:

1. Several ICAC officers attended Mr Torbay's property to execute a search warrant at 9.38am on 27 March 2013. They were all wearing vests marked "ICAC".
2. Sometime after the officers arrived, but before the warrant was executed, a car pulled up and a male person got out and began taking photographs. It is not known whether this person lived in the street, was a journalist or just happened to be passing by.
3. The search warrant was executed at 10.08am and officers remained in and around the house conducting a search until 2.30pm.
4. News items about the search appeared online in the Armidale Express at 10.24am and in the Sydney Morning Herald at 12.49pm.
5. At some stage in the afternoon, ICAC officers were filmed near the house by television cameras.

It is clear from this timeline that several persons, including neighbours and the male person who took photographs, would have been able to alert the media to the presence of ICAC officers. The Commission has no information about who specifically may have alerted the media.

2. Question from Mr Adam Marshall MP, Transcript of Evidence, p 20:

Mr ADAM MARSHALL: Given the article on page 27 of today's Australian under the headline "Watson rejects claims of leaking", I must ask this question. The article claims that as part of what ended up being Operation Credo and Operation Spicer a search warrant was executed on 4 December 2013 at Mr Chris Hartcher's office. An article in the Sydney Morning Herald of 6 December announced that Mr Hartcher would be the subject of two ICAC inquiries.

However, it was not until 18 February 2014 that the commission publicly announced the two inquiries—Operation Credo and Operation Spicer. Again you may need to take this question on notice. How does a media outlet find out and publish that the commission is undertaking two inquiries months before they are announced by the commission?

Ms LATHAM: I cannot give you an answer.

Mr ADAM MARSHALL: You can take the question on notice.

Response:

In general terms, prior to the Commission announcing that it is going to hold a public inquiry, a number of investigative steps will have been taken over an extended period. This can include executing search warrants, interviewing witnesses, holding compulsory examinations with witnesses and serving summonses on witnesses to appear at a public inquiry. During these processes, many persons necessarily become aware of the subject matter of ICAC investigations and the likely course of those investigations. It is sometimes necessary to canvas with witnesses whether they will be available at a particular time to give evidence at an inquiry.

In the circumstances, it is impossible for the Commission to speculate about how media outlets might know the general information that an inquiry is going to be held about particular issues. There could be any number of sources. The Commission can say that it does not provide any information to media outlets about public inquiries except through authorised media releases that go to all media outlets at the same time when an inquiry is announced.

If any member of the Committee has specific information which suggests otherwise, it would be appropriate to refer it to the Inspector.

3. Questions from Mr Chris Patterson MP, Transcript of Evidence, p 26:

Mr CHRIS PATTERSON: The ICAC was ordered to pay the costs of Cunneen in three hearings—one in the Supreme Court, one in the Court of Appeal and one in the High Court—and obviously your own legal costs. Has this happened with any other operation that you are aware of?

Ms LATHAM: I can take that question on notice, but that just follows the usual rules that apply in any litigation: the loser pays the costs. That is the rule that applies in any litigation.

Mr CHRIS PATTERSON: Absolutely. I am not questioning that. So you will take on notice the question: Has that occurred with any other operation?

Ms LATHAM: Yes, I can take that on notice. I do not know.

Mr CHRIS PATTERSON: Thank you. I appreciate that. Again on notice, do we know the estimate of those costs or is that something you cannot answer?

Response:

The only matters, apart from the Cunneen matter, in which the Commission has been ordered to pay costs are Balog in 1990, Greiner in 1992, Woodham in 1993 and Kinghorn in 2014 (although this last matter is presently under appeal). The Commission has no estimate of the costs in the Cunneen matter at this time.

4. Question from the Hon Trevor Khan MLC, Transcript of Evidence, pp 30-31

The Hon. TREVOR KHAN: In the context of ICAC, what is your procedure for advising persons who may be impacted by the evidence given by a witness holding a letter of comfort? How does the other side know that this bloke is on a promise?

Ms LATHAM: All I can say is that we are not obliged to disclose any decision that we take in the course of an operation. The 1point about an inquisitorial process is that you do not in fact tell the subject of the investigation what information you hold and how you obtained it.

The Hon. TREVOR KHAN: In the context of hearings before the commission, a witness may be in receipt of a letter of comfort and none of the persons who may be impacted by that evidence will be told that the witness is in receipt of a letter of comfort.

Ms LATHAM: That is quite possible.

The Hon. TREVOR KHAN: That is the fact, is not?

Ms LATHAM: As said, it is quite possible that that is what occurs. There may be circumstances where we do disclose it but we are not obliged to.

The Hon. TREVOR KHAN: Would you like to check back and see in your time as commissioner when you have disclosed to the other side during a hearing—

Ms LATHAM: I am happy to take that on notice but, as I said, your question was premised on there being some obligation to disclose it or on some legislative basis for the undertaking.

Response:

As outlined in other correspondence to the Committee, there is a commonly recognized and used procedure for obtaining evidence from a proposed witness by way of an induced statement. Such a statement is made on the basis that the contents, if repeated in evidence during an inquiry, will not be used to found an adverse finding against the witness, provided that the witness does not mislead or lie to the Commission. In the event that such a witness is found to have lied to, or misled the Commission, the witness may nevertheless be prosecuted under s 87 of the ICAC Act.

This procedure does not guarantee that evidence from another source will not be used to make adverse findings against the witness. The terminology “letter of comfort” does not apply in these circumstances.

During the term of the current Commissioner, in the course of opening the Spicer inquiry on 6 August 2014, counsel assisting said:

“Mr Thomson was offered an inducement by ICAC that in exchange for providing a statement, the statement would not be used against him in criminal proceedings in NSW except if he gives false or misleading evidence.”

Mr Thomson’s statement was provided to all legal representatives on 11 August 2014.

To the best of the Commissioner’s recollection, there has been no other occasion in the course of inquiries over which she has presided that such a disclosure has been made. In view of the fact that almost all witnesses before the Commission give evidence on the basis that what they say will not be used against them in other proceedings, the Commission is of the view that there is no relevant distinction between the protection afforded by an induced statement and the protection afforded by an order under s. 38 of the ICAC Act..