COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

Review of the Report of the Inspector of the New South Wales Independent Commission Against Corruption regarding Operation Hale – Response by the Inspector to proceedings conducted on the 18th of March 2016.

The Hon. David Levine AO RFD QC

(1) At transcript p. 5.3, the Commissioner said:

> *"In the light of the Inspector's personal criticisms of me and his characterisation of the allegation as trivial I invite the members of the Committee to consider whether I would be thought fit to occupy the office of Commissioner if I advised my son to feign a physical symptom at the scene of a car accident because I believed or suspected that he had consumed alcohol before driving and I knew that such a symptom would result in his transfer to hospital with the consequent delay in the administration of a blood alcohol test. The answer to that question largely determines the gravity of the allegation that the Commission was investigating."*

What the Commissioner says represents, to my mind, an indictment, verdict and conviction of Ms Cunneen by the ICAC notwithstanding that there has been no single adverse finding by any authority or Court in relation to whatever it was that the ICAC made the subject of its inquiry. How facile it is to erect an hypothesis, hurl it down as a gauntlet before this Parliamentary Committee whereas in fact, it is nothing more than a debating point with as much weight as a velvet fist in a velvet glove.

(2) No meeting in the ICAC's new premises took place. I think the Commissioner is mistaken. I have never attended the new premises by invitation or otherwise. Early in 2014, shortly after the commencement of my Term, I and my then staff were invited to a "meet and greet" (tea/coffee/cakes) at the then premises of the Commission at Level 21, 133 Castlereagh Street, Sydney. That function occurred on 13 June 2014. Otherwise, members of my staff, of course, have attended the new premises to make or receive deliveries. In the scheme of things it may or may not be important but given the attention the Committee on the 18th of March seemed to pay to the relationship between the Commissioner and myself, I feel it necessary to just clear this aspect up.

(3) As to the matter of referral of material to the New South Wales Police which is the subject of discussion at pages 7.8 to 8.7 of the transcript, it is somewhat confusing and a little unrealistic. I understand the Commissioner to be saying that the information could not be passed on by her to the New South Wales Police and that one of the reasons for that was that it was an operational consideration. I really do not see how this Committee can proceed with its deliberations on this aspect, if it considers it important, in ignorance of the fact that on 29 September 2015, I was informed by the Australian Crime Commission ("ACC") that at some time prior in 2015, it (the ACC) had disclosed the information in the Information Report regarding Margaret Cunneen, (the information which it had provided initially to ICAC) to both the NSW Commissioner of Police and the NSW Crime Commissioner. I have no other details about the disclosure.

(4) I repeat, I still have had no access to any audio material. The ICAC has had access, the ACC has had access, this Committee has had access. I have not. It can hardly be relevant therefore to any consideration of the approach I took to Operation Hale. I really do not understand, again, why the Commissioner is so concerned about this aspect: she presented the material to this Committee for some purpose and after the evidence she gave on the 11th February, on which occasion she presented the material bringing about the inevitable adjournment, and after the obtaining of advice from the Solicitor General by the Committee (part of which apparently has been made available to the ICAC but none of which has been made available to me). I must frankly say that with the state of affairs is to a great degree wanting in clarity overall. The simple fact remains that any audio material was not available to me and thus cannot be relied upon by the ICAC to assert that my Report is flawed nor can it be relied upon by the Committee to come to any conclusion about my Report in such circumstances.

(5) T14-15. I draw your attention to the Commissioner's statement at t.15.3:

> "*I accept you have that information. Let me go back to the point I am trying to make; when the Commission decided that the matter was worthy of a preliminary investigation, at that point we only had the telephone intercepts [T1] product. And so it seemed to us that it was important to confirm or deny whether or not there was other information on the phones that were used at the time of the car accident and either the days after the car accident that, as I said, would either confirm or deny that material, or possibly offer some explanation that would then determine whether or not we were going to take it further.* ...(emphasis added)
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> ...
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> *I am not meaning to be facetious when I say this, but mobile phones travel with the person. They go all over the place. 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 – I am sorry Mr Hoenig, I am saying this for everyone's benefit, not just yours."

It is interesting to note that the focus was on the day of the accident and the following days. We all know it turned out to be much more than that: after harvesting the material on the mobile phones and text messages going back many years, the ambit of the inquiry by the ICAC was indeed "taken further" to include the disciplinary matter that had absolutely nothing to do with the fundamental starting point to which the Commissioner was referring at p.15.

The Commissioner informed me (see pp.42-45 of my Operation Hale Report) that she referred all the material, including 2,274 pages of text messages from Ms Cunneen's phone, pursuant to section 53 of the ICAC Act.

Section 53(1) provides that "*The Commission may, before or after investigating a matter (whether or not the investigation is completed, and whether or not the Commission has made any findings), refer the matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances.*"(emphasis added)

Section 53(4) provides that: *The Commission may communicate to the relevant authority any information which the Commission has obtained during the investigation of conduct connected with the matter*." (Emphasis added).

In this case, the scope and purpose of the preliminary investigation was identified as follows:

The Commission is investigating an allegation that on 31 May 2014:

(a) Margaret Cunneen, with the intention of perverting the course of justice, counselled Sophia Tilley to "fake chest pains", and
(b) Sophia Tilley, with the intention of perverting the course of justice, did fake chest pains,

to prevent investigating police from obtaining evidence of Tilley's blood/alcohol level at the scene of the accident.

The Commission is also investigating whether in providing information about the circumstances of the accident to a DPP official, or the Treasury Managed Fund insurance agency, Margaret Cunneen provided a truthful account of the circumstances of the accident.

The key word in section 53 is "the matter." The scope is essentially "the matter". It cannot be said that text messages going back to at least November 2011 was

information which the Commission had obtained during the investigation of "*conduct connected with the matter*". The Commissioner's evidence to the Committee and to which I have already referred above, is unequivocal..."*And so it seemed to us that it was important to confirm or deny whether or not there was other information on the phones that were used at the time of the car accident and either the days after the car accident that*..."(emphasis added).

The phones were seized for a specific purpose, as identified above, and yet ICAC harvested all the material on the phones, which was without question outside its own stated scope, and then proceeded to refer all the material to another agency (the DPP) under the guise of it being allowed by section 53. This is clearly an abuse of power and yet the Commissioner holds firmly to the view that the Commission did nothing wrong or acted outside its jurisdiction in referring all that material to the DPP.

I do not dispute the fact that the Commission could have referred the information relevant to "the matter", namely text messages from 31 May 2014 and days thereafter. It did not have the power to refer 2274 pages of text messages which essentially comprised over 4 years of messages, many of them of a personal nature, to another authority. These text messages were in no way connected with the Commission's investigation of conduct of the matter and yet it is evident that once the Commission had Margaret Cunneen's phone in its possession, it decided to look through the lot and not limit itself to what it said it was limiting itself to, namely what occurred on 31 May 2014 after the accident and the days following.

(6) Throughout the transcript and I do not propose to make reference to any particular part, it is evident that the Commissioner was of the view first that I held her in no respect and second that this was based to a great deal upon the language I used. In relation to the present Commissioner with whom personal and professional contact has been minimal, no question of respect arises by reason of her identity. As Inspector, I am concerned with the conduct of the entity known as the ICAC, of which a person who happens to be the Commissioner is the person with whom the buck stops. I am frankly surprised that the present Commissioner who has been both District Court Judge and a Supreme Court Judge and a Crown Prosecutor is sensitive to language to which she would no doubt herself apply the word "robust". I am the Inspector of the ICAC and take offence at the suggestion that I do not respect the present Commissioner by reason of the selective cherry-picking of words used by me in a Report it was my statutory duty to present to this Parliament. My intent was not to degrade the current Commissioner in terms of the respect in which I or anyone else holds her but to carry out my function as Inspector of the institution of which she happens to be the head in relation to Operation Hale.

(7) References made to certain principles said to have been pronounced upon in the Einfeld case (*Einfeld v Regina* [2010] NSWCCA 87.). The Commissioner as is well known was a member of the Court of Criminal Appeal to which the convicted person appealed

unsuccessfully. Save for the reference there statements with which even I do not quibble, there is no basis for comparing whatever it was that concerned Ms Cunneen with the criminality of which Marcus Einfeld was convicted. It is interesting that in the context of the engagement of Mr MacSporran QC from Queensland for the Cunneen affair and the reasons said to apply, it is to be noted that Einfeld was tried, convicted and sentenced by a Judge of the Supreme Court of New South Wales, now the Hon. Bruce James QC. This took place in circumstances where Einfeld had been a Federal Court Judge, a Senior Member of the New South Wales Bar. For a short time an Acting Judge of the Supreme Court of New South Wales after his retirement from the Federal Court of Australia and his return to the Bar. Further of course one can ask why retain Mr MacSporran at all if, as appears to be the position held by the present Commissioner, that there was no conflict of interest or any foundation for apprehended bias.

However, notwithstanding the Commissioner's claims that there was no conflict of interest, she states at page 28 that:

> *"I come back to the point that in relation to what we call peripheral witnesses, there was no impediment to either Deputy Commissioner Hamilton or me simply presiding at a compulsory examination where it was just a case of asking a member of the public who happened to – for example, the first person on the scene who arrived as soon as the accident occurred and was the first person to speak to Ms Tilley. There were people who were simply considered peripheral in the sense that we wanted to know what they say and heard but there was no direct conflict or even indirect conflict in relation to either Commissioner (sic) Hamilton or me presiding over the compulsory examination."*

Further, at page 29, the Commissioner when asked whether she would have remained in the public inquiry stated:

> *"No, I certainly would not for the reason that it involved a senior official in the administration of justice. The compulsory examinations I conducted did not involve Ms Cunneen or any other member of her family and I would never have done that".*

The Commissioner concedes that at that some point in time during the preliminary investigation in Operation Hale, there was an assessment of witnesses to determine whether they were peripheral and thus there would be "*no direct or even indirect conflict*". She also states that she would never have conducted an examination of Ms Cunneen or members of her family. Why not? If the Commissioner continues to maintain, as she does, that there was no conflict or apprehension of bias, there can be no impediment to her presiding over an examination of Ms Cunneen or members of her family. I cannot understand how these apparent conflicting positions can be reconciled. Ms Cunneen was a "senior official" from the beginning: her status as such never changed.

Further in relation to the issue of conflict or apprehended bias, the Commissioner gave evidence that she directly supervised Ms Cunneen for a period of 9 months in an office of about 6 lawyers, but that that was in 1987 and thus the distance of time apparently overcomes any suggestion of conflict or apprehended bias. This directly contradicts her initial media release on 4 December, namely that she had no professional relationship with Ms Cunneen.

(8) I turn to what I regard as another statement that I have difficulty in understanding made by the Commissioner on p.23.4 as in my view it erects and imprisons the Commissioner in an intractable paradox, namely that:

> *"I simply responded and took the view at the relevant time that a meeting at that stage would be inappropriate, and it would be inappropriate because it was public knowledge that Ms Cunneen had made a complaint about various aspects of the investigation and it was public knowledge that the Inspector was conducting an audit or an investigation into Operation hale. I took the view that any meeting between us at that stage would have the appearance of bias if at some stage Ms Cunneen wished to pursue her complaint to the Inspector. It may well have compromised the independence of the inspector in dealing with that complaint – ... I said to him that it would compromise any complaint that he subsequently needed to deal with – yes, I did. And I can take you to the correspondence."*

This exchange of correspondence is referred to in my original Report and your attention in drawn in particular to the letter dated the 27th of April 2015 on pp.32 and 34 (so-called "Alan Jones" letter).

What the Commissioner appears to be saying is that as soon as I embarked upon pursuing a complaint made to me about the conduct of the ICAC, I am in some way compromised in my independence and thus there is a foundation for ICAC having no dealings with me in relation to the pursuit of anything in relation to a complaint.

I find these statements irreconcilable with the intensity of the Commission's complaint that there was a denial of procedural fairness. In the instant inquiry the attitude expressed in the letter referred to and repeated at p.23 of the transcript of the 18th of March, points to the ICAC having placed itself in a position as to be unapproachable in circumstances where it is a matter of public knowledge that the Inspector is going to "Inspect". That state of affairs does not sit well with complaints about the denial of procedural fairness. Because the Inspector is known publicly to be investigating a complaint, the ICAC will not be accommodating because the Inspector has compromised his independence as opposed to exercising it. The ICAC will nonetheless, will always be able to complain of the denial of procedural fairness, apparently the more so when the structure it has erected to which I have just referred, will preclude even a meeting with the Inspector.

(9) The fourth matter that the Commissioner dealt with in her brief opening statement on the 18th of March (t.5.3) was as follows:

> "*Fourthly, the allegation being investigated cannot reasonably be described as legless, of fundamental and relative triviality, or no more than what an ordinary member of the community as a mother would do in the circumstances. Ms Cunneen's office in the administration of justice was significant in the Commission's assessment of the gravity of the alleged conduct, and the Inspector acknowledged as much in his report.*"

With respect to my reference to the matter being "trivial", I state that I am of the view that perverting the course of justice is not a trivial offence. However, it can be the case that whilst the facts may technically constitute the elements of the offence, they are not necessarily serious. Each case must be determined on its merits.

(10) I do not propose to say anything more on the subject of "Inspector's personal criticisms": I reject the Commissioner's assertions in that regard.

(11) With respect to the Notices to Produce forthwith issue, the case relied upon by the Commission, namely *Egglishaw v Australian Crime Commission* [2010] FCAFC 82, can be distinguished on the facts. In their joint advice to me, Counsel referred to *Egglishaw* and their advice, as already noted, was that the Notices were unlawful. Subsequent to their joint advice, Counsel were provided with the statements of the ICAC investigators in relation to the service of the Notice to Produce on Ms Cunneen, which included the conversation Ms Cunneen had with ICAC Investigators, and their advice remains unchanged, namely that the Notices to Produce forthwith in Operation Hale were unlawful. As I have already stated, this is question of law and can ultimately only be settled by a Court.

The Hon David Levine AO RFD QC
30 March 2016