Submission No 3

REVIEW OF THE INSPECTOR'S REPORT TO THE PREMIER: THE INSPECTOR'S REVIEW OF THE ICAC

Organisation: Rule of Law Institute of Australia

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THE RULE OF LAW INSTITUTE OF AUSTRALIA

SUBMISSION

TO THE NSW PARLIAMENTARY COMMITTEE

ON THE ICAC INSPECTOR'S REPORT

MAY 2016

SUBMISSION

SUMMARY

The Rule of Law Institute of Australia has considered the Report of the Office of the Inspector of the Independent Commission Against Corruption ("ICAC")[1] and ICAC's response[2], and makes this submission.

The Inspector in his Report rightly concentrates on how to improve the workings of ICAC and the Institute supports his recommendations. However, the recommendations do not deal with the fundamental problem, the culture of ICAC. You can improve the structure of an organisation but if the culture is wrong, nothing will change.

ICAC is an essential organisation. It is important that it exercise its powers effectively. It has extraordinary powers of investigating and reporting all manner of behaviour in the very wide definition of corrupt conduct. It demands the highest standards from others, and to maintain public confidence and trust, must expect no less of itself.

ICAC and all of its staff must, presume innocence until the contrary is shown by all the evidence and must exercise and be seen to exercise their powers fairly and justly.

This submission concentrates on one case study: Murray Kear. This case study reveals failures by ICAC to presume innocence and to maintain those high standards, and calls for a public inquiry to determine what improvements should be made to the organisation to maintain effectiveness, fairness, and justice.

In the meantime, Mr Kear should be reinstated.

[1] Report to the Premier: The Inspector's Review of ICAC, 12 May 2016

[2] Submission to the Premier of NSW on the ICAC Inspector's Report on his review of ICAC, 25 May 2016

MURRAY KEAR: Background

Murray Kear was the head of the NSW State Emergency Service ("SES") an organisation known for its work in emergencies. It was made up of about 10,000 volunteers and about 225 fulltime profession staff.

Before being appointed Mr Kear was for 28 years in Fire Rescue NSW (previously called NSW Fire Brigade) and rose to the position of Assistant Commissioner.

He commenced with the SES in 1998 as its head and over a period of five years built the organisation to a highly trained professional team. There was never a suggestion of impropriety or mismanagement and Mr Kear lead his team with dedication and distinction.

In late 2012, he arranged to have a new Deputy appointed as one of two Deputy Commissioners. Shortly thereafter, the new Deputy made complaints to ICAC against the other Deputy, Steve Pearce.

These complaints were not pursued by ICAC at the time.

Over the next few months, the same Deputy made a series of further complaints about the Mr Pearce. By reason of the worsening atmosphere between the two deputies and the adverse effect on the organisation, Mr Kear warned them that he was considering terminating the employment of one or both.

In May 2013, Mr Kear decided to terminate the employment of the new Deputy and gave as his reason loss of trust and confidence.

The dismissed Deputy then complained to ICAC that she had been dismissed for making the complaints.

Investigations by ICAC

During the following months ICAC investigated the allegations.

ICAC interviewed witnesses and obtained statements from them in private sessions. However, it did not interview Peter Clarke (a retired naval rear admiral, and a consultant on leadership issues) who Mr Kear consulted in respect of problems caused by the relations between the two Deputies.

Although Mr Clarke was mentioned in relevant emails and despite him contacting ICAC, ICAC did not interview him nor obtain a statement from him. No explanation has been given by ICAC for this failure

The witnesses that were interviewed complained to this Institute that ICAC investigators appeared not to be interested in the truth, only in obtaining evidence that showed Mr Kear's guilt.

It is clear that the investigation process was flawed by not presuming innocence. All the evidence should have been examined with that presumption. Then the examination would have shown inter alia that the relationship between Mr Kear and Mr Pearce was grossly exaggerated. Therein lies the danger of relying on legal inadmissible evidence, it is legally inadmissible for good reason and such evidence should not be relied upon.

Furthermore, it was reported that NSW Fire Commissioner Greg Mullins gave a statement to ICAC in a private session. He expected to give evidence at the public inquiry, then 6 days before the commencement of the public inquiry he received email advice from ICAC that he need not attend unless contacted. If he had been called his evidence would have been favourable to Mr Kear.[3]

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[3] http://www.theaustralian.com.au/national-affairs/state-politics/icac-told-fire-chief-greg-mullins-not-to-testify/news-story/3b19cb6dca0e23fa2c61911fcf185c46

ICAC holds a public inquiry

ICAC decided to hold a public inquiry into the allegation and this took place in December 2013, six months after the dismissal.

It is not known the reasons for the decision to hold a public inquiry. It does not appear to be to encourage others to come forward with information relevant to the investigation, nor to encourage reporting of suspecting corruption, nor to educate the public about corruption, nor any of the other reasons for holding a public inquiry referred to in section 31(2) of the ICAC Act. Rather, if one can gauge from the first moments of the examination by ICAC of Mr Kear, ICAC had made its mind up about Mr Kear's guilt upon a flawed investigation and the purpose of the inquiry was to get a public admission of guilt from Mr Kear.

Mr Kear was given little time to prepare for the hearing as can be seen from the following comment by Mr. Oates representing Mr Kear at the public hearing:

> "**Mr Oates**: Can I just say something on that point, Commissioner? The Commission has myriad resources. This matter has been under investigation for months. The Commission has Senior Counsel, Counsel, there are investigators, lawyers, et cetera, months to consider these issues and months to consider the material. Not so with my client. He has one person representing him and on Friday of last week I received 1,200 pages of material, not indexed, and I was expected to then get on top of that and index it and come along ready to run a case in the same way that they have been prepared, that is simply not equitable."[4]

The hearing received extensive publicity in the media across Australia that ICAC was holding a public inquiry into whether Mr Kear was corrupt.

[4] Operation Dewar Transcript, 292 T

On reading the transcripts of the public hearing it further appears that the examination of Mr Kear was solely to prove that Mr Pearce was a “mate” of Mr Kear and the other Deputy was sacked by Mr Kear because she complained about Mr Kears “mate”. There was no suggestion that Mr Kear received any financial advantage from the dismissal.

Despite the cross examination by the ICAC Commissioner and the counsel assisting, Mr Kear maintained his innocence and claimed that he did not dismiss his Deputy in reprisal of making these complaints. He gave his detailed reasons for the dismissal.

ICAC issues its report on Mr Kear

The present Commissioner, Megan Latham, took up her position in January 2014 and delivered a report on Mr Kear in May 2014. This gave the Commissioner ample time to review the complaint against Mr Kear, the investigations and the transcripts of the public inquiry.

In preparing its report, the Institute would have expected ICAC to fairly and properly review the investigation and make sure that all material witnesses had given a statement and if not, why not. The Institute would have also expected that ICAC would have then have stood back and fairly and properly reviewed the evidence before making a finding of fact and conclusion.

The Institute would also have expected the report to fairly state the facts.

Regretfully these expectations were not realised and it seriously failed to fairly review the facts.

The report found that Mr Kear had engaged in corrupt conduct by deliberately failing to properly investigate allegations against Mr Pearce made by the Deputy and it stated:

> "The Commission is satisfied for the purposes of s9(1)(b) and s9(1)(c) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the appropriate civil standard and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Commissioner Kear has committed a disciplinary offence, namely misconduct, and that his conduct could constitute or involve reasonable grounds for his dismissal."[5]

It then went on to report on the second claim of corrupt conduct and concluded by stating:

> "The Commission is satisfied that Commissioner Kear engaged in corrupt conduct by dismissing Ms McCarthy from her employment with the SES substantially in reprisal for her making allegations about the conduct of his friend Mr Pearce."[6]; and

> "The Commission is satisfied that, if the facts if found were to be proved on admissible evidence to the criminal standard and accepted by an appropriate tribunal, there would be grounds on which that tribunal would find that Commissioner Kear committed a criminal offence of taking detrimental action against Ms McCarthy substantially in reprisal of her making public interest disclosures contrary to s 20 of the *Public Interest Disclosures Act 1994*."[7]

The report failed to provide a fair and balanced view of the evidence and as a result reached a conclusion which was not reasonably open.

On the issue of the report in May 2014, there was further extensive publicity in the media across Australia that Mr Kear was corrupt.

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[5] ICAC Report: Investigation into the conduct of the commissioner of the NSW State Emergency Service, May 2014, P19

[6] ICAC Report: Investigation into the conduct of the commissioner of the NSW State Emergency Service, May 2014. P24

[7] ICAC Report: Investigation into the conduct of the commissioner of the NSW State Emergency Service, May 2014. P24

Mr Kear asked to resign

Several weeks after the issue of the report, Mr Kear was asked to resign as head of the SES, and, in doing so, he forfeited his position, his salary, and a substantial amount of his superannuation entitlement.

He was disgraced, unemployed and unemployable.

Mr Kear criminally charged

In the period from the report by ICAC until the end of 2014, ICAC went about briefing the Director of Public Prosecutions ("DPP").

In early 2015 Mr Kear was charged by ICAC with dismissing the Deputy substantially in reprisal for the making complaints. This was done notwithstanding the fact that no action was taken against Mr Pearce and he was cleared by the Public Services Commissioner.

The offense which Mr Kear was charged with carried a maximum term of imprisonment of two years.

It is extraordinary that in Australia the following provision existed in respect of the offence.

Section 20 (1A) of the *Public Interest Disclosure Act 1994* states:

> "In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a public interest disclosure."

The presumption of innocence is removed and in its place the accused has to prove that he did not commit the offence!! This is a denial of proper legal criminal process where the prosecutor is required to prove beyond reasonable doubt that the accused is guilty. It is what we would expect in North Korea, not Australia.

The practical effect of such a provision is that the accused has to go into the witness box, make a statement and be cross-examined, to call witnesses and have them subject to cross examination, all to prove his innocence.

In the case of Mr Kear the full force of ICAC was brought against him for dismissing his Deputy.

- First, the inquisitorial powers of ICAC, search warrants, the obligation to answer questions, the public hearing, the cherry picking of evidence and exclusion in the report of evidence favourable to Mr Kear.
- Then, the public report of ICAC condemning him as corrupt.
- Then, being forced to retire, disgraced without an ongoing wage and being unemployable.
- Then, all the powers and resources of ICAC in prosecuting him with an offense which presumed guilt unless Mr Kear proved his innocence.

ICAC's failure to brief the DPP properly

The brief from ICAC to the DPP should have contained statements from all relevant witnesses, whether in support of guilt or innocence, and no part of a statement should have been omitted.

But ICAC failed to obtain a statement from a material witness, Mr Clarke, who offered to provide evidence and it also failed to provide the full statements of some of the other witnesses.

ICAC appears not to understand that in presenting a case to court on a criminal charge, it is required to present all evidence, for and against guilt. It should do this in its report on any investigation.

The trial of Mr Kear

The trial lasted 16 days.

Mr Kear was represented by a solicitor, Greg Goold, and the DPP by counsel. Mr Kear gave evidence and was cross-examined. Mr Kear called a series of witnesses including Mr Clarke, Mr Mullins, Mark Morrow, and some of the SES senior executive team.

They gave evidence of the unworkable and toxic atmosphere after the Deputy was appointed.

Former Internal Audit Bureau investigator Helen Colbey gave evidence that she had told ICAC investigators of Mr Kear's concerns about the complaining Deputy's tendency to "shoot from the hip" or make unsubstantiated allegations, comments ICAC deleted from her formal statement made public at its inquiry given to the DPP. "He just basically said to me that she gathers a whole range of documentation… it tends to be shooting from the hip, for want of a better word, rather than having the… total picture that he would have expected she might have before she raised those issues," Ms Colbey said in her original interview with ICAC.

The transcript of Ms Colbey's original interview with ICAC runs to 30 pages while the statement ICAC gave to the DPP and made public is 11 pages.

It was reported in the press[8] that SES Acting Deputy Commissioner, Mr Mark Morrow, expressed concern that he gave a record of interview with two ICAC investigators during the ICAC inquiry, the transcript of which comprised of 88 pages of transcript and yet ICAC only provided a 21 page statement to the DPP. The Magistrate ordered ICAC to furnish to the Court the original 88 page transcript of the record of the interview.

[8] http://www.theaustralian.com.au/national-affairs/state-politics/icac-forced-to-release-evidence-on-murray-kear-case/news-story/4b0dc623ad6fa97fca0df3296e661245

Mr Kear acquitted and found innocent

On 16 March 2016, Magistrate Grogin dismissed the charge against Mr Kear and found him innocent of the charge.

In the course of his judgement he stated:

> "113. I find that there were many factors behind the dismissal of Ms McCarthy by the Defendant. The inability of Ms McCarthy to assimilate into, co-operate within and lead the SES was, I find, the primary and substantial reason for her dismissal by the Defendant. I am satisfied that the Defendant did not dismiss Ms McCarthy as a reprisal, substantial or otherwise, for her making public interest disclosures. I find that there was no element of revenge, pay-back or retaliation against Ms McCarthy by the Defendant."[9]

This was a finding not simply that Mr Kear was not guilty but a positive finding of innocence.

Application by Mr Kear for recovery of legal costs

Mr Kear made an application to the court to recover his legal costs incurred in the 16-day hearing. Even if a defendant is successful in a civil case, it is usual to recover not more than one half to two thirds of the legal costs actually incurred. But in criminal proceedings it is much worse because the relevant legislation provides that costs are not recoverable even if the accused is successful and acquitted. Mr Kear could only recover costs if he proved the existence of one more of the exceptions to this provision.

1. The court found the investigation by ICAC was conducted in an unreasonable and improper manner

[9] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), 26

Mr Kear had to prove that ICAC's investigation into the alleged offence was conducted in an unreasonable or improper manner.

It must be remembered that Mr Kear did not have the benefit of examining the files of ICAC and relevant emails and notes. All were in possession of ICAC and could have been put forward by ICAC; none were.

On the limited information available to Mr Kear he claimed that a number of interviews conducted by ICAC prior to the charge were not given to the prosecutor, and if given, would have allowed the prosecutor to form the view that Mr Kear was innocent.

The Magistrate said:

> "10. The investigators were aware of the involvement of Mr Clarke from a number of sources, including emails that were seized during the execution of warrants at the SES Headquarters. These emails were exhibits 25 and 26. Mr Clarke was called by the applicant at the hearing. I found that Mr Clarke was a reliable and honest witness who was independent of the SES. He was engaged by the applicant in an attempt to resolve the disunity between Ms McCarthy and Mr Pearce. I found his evidence to be insightful and of great assistance. It would appear that his role in the resolution process was disregarded by the investigators."[10]

As mentioned earlier, ICAC interviewed a number of witnesses other than Mr Clarke and obtained witness statements from them. But they did not serve them on Mr Kear until a subpoena was issued by him for them.

Magistrate Grogin stated:

[10] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 2

"16. The crown further submits that 'each of these witnesses were clearly in the defence camp.' There are no such things as camps, they were witnesses or potential witnesses who may have been available**. I find that investigators cannot simply choose not to serve such evidence from witnesses because they have provided evidence contrary to the prosecution case. The investigation did in fact fail to meet the optimum standards**…."[11]

"18. The investigators withheld important relevant evidence from the applicant

19. I am therefore of the opinion that the investigation into the alleged offence was conducted in an unreasonable and improper manner. I find that this exception has been established."[12]

2. The court found that ICAC initiated the proceedings without reasonable cause and the proceedings were conducted by the prosecutor in an improper manner

The second exception was that the prosecution by ICAC was initiated without reasonable cause and that the proceedings were conducted by the prosecutor in an improper manner.

Magistrate Grogin said:

"23. Before proceedings are initiated in any matter, there must be an assessment of the evidence available to the prosecutor. This evidence includes not only that which supports the prosecutor's case but also that which supports the defendant's case. The assessment of this evidence is that which forms the basis of the initiation of the proceedings. It is not sufficient to simply turn a blind eye to that material which would not assist the prosecution. I accept that

[11] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 3

[12] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 3

the reversal of the onus created a situation where the applicant had a positive obligation to prove matters on the balance of probabilities, however the initial assessment of all available evidence and subsequent decision to prosecute was, in my opinion, contrary to the substance of the overall evidence."[13]

The Crown conceded that the prosecution was not provided with the records of the private interview of a number of key witnesses including that of Mr Kear. The Magistrate said:

> "27. The prosecutor submits at [24] that the matter is one of 'significant public interest'. The public interest is that matters are only pursued in appropriate circumstances. The interests of the public administration of justice are founded on proper consideration and evaluation of all evidence in any one matter before any prosecution in commenced. **The existence of 'significant public interest' is not a substitute for the proper administration of justice.**
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> **28. I find that the proceedings were initiated without reasonable cause. I find that the failure of the prosecutor to disclose the interviews to the applicant was improper**. I find that this exception has been established."[14]

3. The court found that ICAC unreasonably failed to investigate a relevant matter of which it was aware or ought reasonably to have been aware and which suggested Mr Kear might not be guilty of the offence

The third basis for obtaining costs was that ICAC failed to investigate a relevant matter which suggested that Mr Kear was not guilty.

Here ICAC failed to investigate the evidence of Mr Clarke.

The Magistrate said:

[13] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 4
[14] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 5

"30. The failure to investigate this aspect of the case was a failure to investigate a relevant matter of which the prosecutor was or ought reasonably to have been aware and that this evidence did suggest that the applicant might not be guilty of the offence as charged. The prosecutor failed to provide the important records of interview of major witnesses to the Crown and these, I find, suggested that the applicant might not be guilty.

31. I find that this exception has been established."[15]

ICAC's report on the Inspector's Report

The Inspectors report referred to the case of Murray Kear and ICAC responded to the Inspectors Report and claimed:

"The Inspector has cited the examples of Murray Kear in Operation Dewar and John Booth in Operation Cavill to demonstrate that a public inquiry can have a significant negative impact on a person's reputation. The information in the report concerning the impact on their reputations relates not to the public inquiries in which they were involved but the findings subsequently made in the relevant investigations' reports."

"In the case of Mr Kear, the Inspector's concern is that Mr Kear suffered unwarranted reputational damage from the findings of corrupt conduct made against him because of his "exoneration" in court. For the reasons given below in response to Recommendation 15, the court finding did not exonerate Mr Kear from the Commission's findings that he engaged in corrupt conduct."[16]

[15] *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), Application for Costs Judgement, 5

[16] Submission to the Premier of NSW on the ICAC Inspector's Report on his review of ICAC, 25 May 2016 p5-6

ICAC's claim that Mr Kear suffered no damage from the public inquiry

ICAC's first claim is that Mr Kear suffered no damage from the public inquiry. But one only has to read the public inquiry and the media coverage to see that this claim is without merit and, worse than that, it shows how ICAC fails to acknowledge the adverse impact of having a public inquiry. As a result of the public inquiry Mr Kear was wrongly portrayed as being guilty, even before ICAC report came out.

A public inquiry by ICAC attracts an audience as it has become a public execution of the accused. All of this appears to demonstrate that ICAC is not equipped to make a proper judgement about holding public inquiries into anyone.

As the Inspector said in his report:

> "51. ICAC's position must be considered in light of the matters to which I have referred above, as only recent examples of persons who complain that they have had their reputations destroyed by the process of an ICAC public inquiry and yet ultimately have been found to have been neither corrupt nor guilty of a criminal offence. These people have no recourse to repair the impact of the ICAC public inquiry and it is likely that their names will always be associated negatively with an ICAC inquiry. The more so by reason of the perpetual archiving of public and social media." [17]

The public can only assume that where there's smoke, there's fire and when a person's conduct is publicly inquired into it is readily assumed that he must be guilty of something. This natural tendency will not change and a public inquiry into investigation is rarely, if ever warranted. There is good reason why the police conduct all of their inquiries behind closed doors until they are ready to charge a person.

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[17] Report to the Premier: The Inspector's Review of ICAC, 12 May 2016. P20. See also Paul Pearce: Parliamentary Oversight from Parliamentary Perspective: The NSW Parliamentary Committee on ICAC: Australian Parliamentary Review, Autumn 2006 Vol 21(1) p95-101

To this is added the fact that ICAC purports to be a court in the way it is constituted, in the way it conducted hearings and in the way it promotes its findings. It is generally perceived to be a court by the public. It is therefore not surprising that any public hearings it conducts, in full view of television cameras, radio and other media is likely to be sensationalised and regularly seen out of context.

ICAC's claim Mr Kear was not exonerated

ICAC's second claim is even more extraordinary. It begins by correctly stating the legal position and then fails to appreciate the efforts of an acquitted in the minds of the public.

> "Criminal courts do not operate as a mechanism for review of Commission findings. The fact that a person found to have engaged corrupt conduct is not prosecuted for a criminal offence or, if prosecuted, not convicted does not "exonerate" that person from a corrupt conduct finding. In any event, criminal proceedings do not "exonerate" a person from a criminal offence. In a criminal court persons are "acquitted" or found "not guilty". They are not found "innocent" or "exonerated"."[18]

Here ICAC publicly stated in its original report in May 2014 that Mr Kear had engaged in corrupt conduct by dismissing the Deputy substantially reprisal for her making complaints. The Magistrate in April 2016, after a 16 day trial, found that Mr Kear did not dismiss the Deputy substantially in reprisal for making complaints.

The two findings are incompatible.

The effect of the Magistrate's judgement was that the finding of corrupt conduct by Mr Kear was wrong.

[18] Submission to the Premier of NSW on the ICAC Inspector's Report on his review of ICAC, 25 May 2016 p21

On any definition of “exonerate,” Mr Kear was “exonerated”- he was found not only not guilty but innocent.

Even if Mr Kear had simply been acquitted of the offence, the presumption is that he was innocent of the offence.

The public inquiry

What can be learnt from the Kear case?

First, that Mr Kear should be immediately reinstated.

Second, there needs to be a public inquiry on the lessons to be learnt. The warring between ICAC and its detractors must stop to preserve the public’s respect for the organisation. No one is a winner in this war. The detractors need to appreciate that ICAC and its investigators must have extensive powers to detect and prevent corruption. And ICAC needs to develop a culture of presuming innocence and justly and fairly exercising its powers.

It is essential that the inquiry is not a Royal Commission into ICAC and not a private political whitewash. It is also essential that the inquiry concentrates on positive recommendations for ICAC to develop a presumption of innocence culture and to justly and fairly exercise its powers without unduly affecting ICAC’s operations. It would not be the function of the panel to inquire into the failings or successes of ICAC.

The inquiry should be conducted by a panel of three and a small secretariat. The three should command the respect of all interested parties and not be politically motivated; someone like Bret Walker should be the chairman. It should aim to have its positive recommendations for improvements made within three months and disclosed to the public.

Robin Speed

President, Rule of Law Institute of Australia

This submission does not necessarily represent the views of the Governing Committee of the Rule of Law Institute of Australia.