Submission No 4

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

Organisation:

Name: Professor Nicholas Cowdery AM QC

Position:

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Inquiry into the ICAC Inspector's Report to Premier:

The Inspector's Review of the ICAC

SUBMISSION BY: **PROFESSOR NICHOLAS COWDERY AM QC**

23 June 2016

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I was invited by letter dated 6 June 2016 (File ref: LAC16/167) to make a submission to the inquiry. I am presently (among other appointments) a Visiting Professorial Fellow in the Faculty of Law, University of New South Wales. I am a former Director of Public Prosecutions for NSW (1994-2011) and I have been a Barrister since 1971. I have been an Associate (Acting) Judge of the District Court of NSW for periods in 1988, 1989 and 1990.

I have read the Inspector's Report. The Inspector has made 16 specific Recommendations and I indicate my views as follows (adopting his numbering from pages 2-5). I shall then address Recommendations 1 and 15 more fully.

Recommendations

1	I do not agree with this blanket statement – see below.
2 & 3	I agree.
4	I agree, accepting that identifying pertinent aspects of "the public interest" can be problematic at times.
5, 6, 7	I agree.
8	I agree, with the omission of paragraph 3(b). I do not see a reasonable basis for providing the item to the Attorney General or Director of Public Prosecutions with a recommendation. The DPP will have no interest in or power to deal with such an item in such circumstances in the absence of a reference for advice or prosecution.
9	I agree. The Inspector should have powers in relation to ICAC's actions generally, including its determination not to investigate.
10-14	I agree.
15	I disagree – see below.
16	I agree.

Recommendation 1

The Inspector recommends that all Examinations be in private.

I accept the arguments made (and noted by the Inspector) for the benefit of public hearings in certain circumstances. In my view "the risk of unfair reputational damage, political grand-standing"

and any other unjustified damaging consequences of public hearings may be avoided (or at least minimised) by the creation of a protocol describing the criteria to be applied whenever it is proposed that a hearing be public.

The criteria would focus principally on the benefits of a public hearing (public information, media publicity, deterrent effect, identification of further evidence, etc) and the harms (to reputation, to public acceptance of and support for the ICAC process, to participants, etc) and the need to strike a balance.

Recommendation 15

I am of the view that the Inspector, in his recommendation for an "exoneration protocol" (by whatever name and process), has fallen into the trap of too closely identifying the ICAC investigation process with the criminal prosecution process.

ICAC investigates corruption and does so primarily in an inquisitorial fashion that is not bound by the rules of evidence – any material and information considered reliable may be relied upon. Hearings may become adversarial. Findings are made. If the material available points to the commission of criminal offences, processes are put in place to refer matters to the ODPP.

The prosecution process then begins. It is accusatorial and adversarial. The evidence available must be evaluated and any prosecution may proceed only upon the strength of evidence that is legally admissible. This means that in many cases the informational basis for adverse findings by ICAC will not enable the prosecution test to be satisfied and prosecutions will not proceed.

That conclusion does not reflect in any way upon the validity of ICAC's findings or its processes in pursuit of its purposes.

Consequently, to connect the validity of ICAC's findings with the outcome of any prosecution process is deeply flawed. To set up the absence of a conviction (not a charge) as a basis for setting aside the ICAC findings is illogical. Even to set up the absence of a charge would be a logical *non sequitur*. The ICAC findings are in separate proceedings, based on (usually) a different corpus of information and not subject to the vagaries of the criminal trial process which can affect strong and weak cases alike.

To broaden the basis of the comparison to "the same or similar or cognate facts as warranted the making by the ICAC of a finding" makes the logical link even more tenuous.

That said, there may be merit in consideration being given to the establishment of some sort of review process that would enable challenge to and review of ICAC findings by a person adversely affected, who would be required to establish sufficient grounds – and ICAC would be a party to any such proceedings. Regard would need to be had to the process that led to the findings (eg public v private hearings, publicity, etc) when deciding whether or not a review was warranted in the private and public interest.

Nicholas Cowdery AM QC