

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

Organisation:

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Position:

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PARLIAMENT OF NEW SOUTH WALES

**COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST
CORRUPTION**

SUBMISSION BY IAN TEMBY

1. Many examples can be given of the efficacy of the Independent Commission Against Corruption (ICAC) method, including public hearings. The one now highlighted is taken from the early days.

Driver Licensing Inquiry

2. In the 1970s and 1980s, and perhaps earlier, corrupt driving examiners employed by the Department of Motor Transport (DMT) and later the Roads and Traffic Authority (RTA) issued driving licences in exchange for bribes paid through select driving schools. Often the licence recipients were bad drivers, or could not pass written tests concerning knowledge of the road rules. The bribes paid rose from 10 shillings early on to \$20 or \$30 late in the period mentioned. The corrupt practices were widespread, but largely confined to the Sydney metropolitan area. Many driving examiners were not corrupt, but a lot were. Also some false licences were issued in the names of dead people, or former residents who had left Australia. This facilitated fraud, and compromised border security. And of course the safety of road users was endangered.
3. Because bribes were only taken from driving instructors who were in the club, and because examiners had to maintain about a stipulated pass/fail rate, this meant young people who could drive well, and knew the rules, were required to sit the tests and pay test fees two or

three times. And - perhaps most importantly - many Sydney residents knew what was going on, and had to grin and bear it. In much the same way many residents of this State felt powerless about police corruption 50 or 40 or even 30 years ago.

4. Steps were taken. In 1978, the Minister for Transport referred the problem area for investigation and report by the Public Service Board, which delegated the conduct of the inquiry to Mr W.J. Lewer, a very experienced Magistrate. This followed claims in the Parliament of widespread corruption within the DMT, and a storm of press publicity. Mr Lewer did a good job. He found that malpractices were widespread and long-standing, very many instances of neglect of duty or worse, and that enforcement of the law was lamentably lacking. The DMT in effect did nothing. The corrupt practices continued, unabated.
5. From time to time there were prosecutions, and convictions. Each of them of course was treated as a single instance in the wilderness. That is how the criminal law operates. From time to time examiners were sacked, but the practices continued, unabated.
6. In 1988, a joint standing committee of the Parliament (commonly called the Stay Safe Committee) conducted an inquiry which concluded that *"a large malpractice problem exists in the driver licensing operations of the DMT"*, and made a number of recommendations for change. Not much flowed by way of beneficial change. However, committee representatives consulted with the Commissioner of Police who agreed to form a task force, and early in 1989 a police officer named Lennon, who had previously been employed as a driving examiner, came forward to confess his sins and identify very many people who were paying or receiving bribes. At about this stage the ICAC, which had begun operation in March 1989, was notified and became actively

involved. Lennon was used to gather evidence. He went to motor vehicle registries, wearing a listening device pursuant to warrant, and with a covert camera in a briefcase. He and his former colleagues told war stories, which were highly incriminating.

7. Prosecutions would have been difficult, because bribery charges require particularity which generally could not be proved, and conspiracy charges had fallen out of favour with the Courts by the late 1980s. Clearly the problem was a systemic one, demanding a systemic remedy. The Commissioner of Police and the ICAC agreed that the Commission should conduct a formal investigation, supported by hearings. That was done.
8. Evidence was taken in public over 81 days, and in private twice, with the transcript of one of those private hearings later becoming public. The ICAC reported to the Parliament in December 1990. By then a great deal of essential reform had already taken place. The RTA, by then headed by Bernard Fisk, who was determined to drive out corruption, was assisted by corruption prevention experts from the ICAC. The knowledge tests were computerised, so that the bad old days when twenty multiple choice questions could be answered correctly by corrupt methods - e.g. pinpricks on test papers - solved that problem. Driving tests were allocated randomly, so that cosy relationships between particular instructors and particular examiners were expunged. There were some prosecutions, chiefly for lying to the ICAC. And some people were dismissed. But the problem was solved by extensive systemic change. The bad old days have not resumed, in the ensuing period now approaching 30 years.

ICAC Hearings - Public or Private?

9. The ICAC was set up by statute to minimise corruption in the public sector using three methods, each of which was achieved in the DMT/RTA Inquiry. They were (and to this day are):
 - formal investigations, utilising coercive powers and hearings;
 - corruption prevention; and
 - public education.
10. Recently the government was urged by the Inspector of the ICAC that all examinations conducted by the Commission should be in private. That requires identification of the benefits that flow from public hearings. They are, or at least include, the following.
11. A body such as the ICAC depends upon public confidence, for two main reasons. People who know of corrupt practices will only report them to a body they reckon can be relied upon to act effectively. These information flows are very useful in identifying problem areas, and institutional targets for investigation. And public hearings serve the critical purpose of educating the public. The reason why police corruption is now only to be found occasionally, and in pockets, is due in large part to the work done by both the Wood Royal Commission and the ICAC conducting public hearings, but also because members of the public generally no longer feel bound to look on resignedly. An informed and empowered public, which demands propriety, is the greatest protection against corrupt practices.

12. Apart from a couple of examples already given, very many others are available. Who can forget the inquiry into the planning processes of the Wollongong City Council, which showed highly improper relationships between a member of planning staff and no less than three developers, councillors who did favours in exchange for benefits, and even a couple of criminals impersonating senior ICAC officers and receiving tens of thousands of dollars in exchange for the promise to ensure the inquiry was disappeared. Who can forget the more recent inquiries concerning the former MLC, Eddie Obeid? And so I could go on.
13. The Courts sit in public. Why? Because public confidence in them is essential, and if the Courts fail to perform as they should the public are entitled to know. The same arguments apply to the ICAC, and to Royal Commissions and like bodies.
14. If the ICAC was driven behind closed doors, with nobody really knowing what it was doing unless and until it reported to Parliament, it would become just like the old and infamous Star Chamber in England. The Commission is there to serve the public interest. The members of the public are very interested in the work it does. They are entitled to know of that work as it is done.
15. On two occasions reviews of the ICAC Act conducted for government by distinguished lawyers have looked at the question whether the Commission should be obliged to do its work in private. In 2005, McClintock SC said at 6.5.25:

I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons

why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is generally speaking preferable that those issues are publicly determined.

16. In 2015, Hon. Murray Gleeson AC and McClintock said at 9.4.6:

... the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.
...

and at 9.4.8-9:

There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted. The exception is, of course, the decision to hold the public inquiry in *Cunneen*. That is an insufficient basis to recommend a change.

The Parliament and the ICAC

17. The ICAC was created by the Parliament. It provides its reports to the Parliament. It is not answerable to the government of the day. The Commissioner can only be sacked by the Parliament. This Committee has defined powers with respect to the ICAC, as does the statutory Inspector.
18. Of course it is not just public sector institutions and individuals who misbehave themselves from time to time. So do politicians, from time to time. In my experience, when they began to be called upon to answer for their conduct, the reaction was one of outraged incredulity. Ever since that time there has been pressure from members of the political class for the Commission to do more by way of private

hearings, and less in public. Those efforts have met with some success. The figures are revealing. The attached table contains the best available, drawn from ICAC annual and online reprints.

19. In each of the first seven years since the Commission began its work (to 1995-1996) the number of public hearing days exceeded the number of days on which private hearings were conducted, often by a wide margin. And generally private hearing days were short. In most years since, with the exception of 2004-2005, there have been more compulsory examinations (as they are now called) than private hearing days, and often many more. Indeed in the five years to 2013-2014, there were 849 compulsory examinations, and 397 days of public hearings.
20. I have not overlooked the fact that s 31 of the ICAC Act was repealed and a new section, substantially in its present form, was inserted. The section now provides that the Commission may, if satisfied it is in the public interest to do so, conduct a public inquiry, the following considerations being relevant (without limitation), namely:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

21. In my submission the present statutory provisions strike the right balance. Certainly there is no room for the suggestion that the Commission has, in a headstrong way or at all, favoured public hearings over compulsory examinations in private. Indeed the contrary is the case.

Local Government


22. The ICAC Inspector in his May 2016 report suggested at [4] that “*at some time consideration be given to removal of Local Government and Universities from the jurisdictional reach of the ICAC*”. His reasons for so suggesting are wholly unrevealed by the report. The Commission’s experience, at least in the first five years, was that to get the propriety message across to local government, especially in relation to tendering, it was necessary to investigate bodies in that sector at least annually, and research undertaken for me shows that close to 20% of investigation reports to Parliament over the ensuing 27 years (33 out of 176) have related to local government. The ratio of reports concerning institutions of higher learning is lower, but still significant.

Other Recommendations by Inspector

23. With one exception I have no comment to make with respect to other recommendations by the ICAC Inspector in his 2016 report. Some of them are sensible.
24. The exception relates to the idea that the function of the Inspector, and resources available to him or her, should be greatly increased. Properly understood, the Inspector fulfils a function akin to audit, and that

should continue to be the case. In particular, as the Gleeson/McClintock report concluded at 11.1.10:

One submission received by the Panel was to the effect that a decision to conduct a public inquiry should require the approval of the Inspector. The Panel considers that this would be an inappropriate involvement of the Inspector in operational decision-making and would not be consistent with the statutory functions presently exercised by the Inspector.



30 June 2016



IAN TEMBY AO QC

I am grateful to Lisa Allen, the Librarian to the NSW Bar Association, for research assistance.

Years	Number of Investigation Reports to parliament	Commissioner	Hearing days - public	Hearing days - private (now called compulsory examinations)	Both
To June 1989	Nil – 7 formal investigations under way	Temby from March	3 investigations	3 investigations	
1989-90	5	Temby	235.5	29.5	
1990-91	9	Temby	150.5	38.5	
1991-92	8	Temby	193	118	
1992-93	8	Temby	65	50.5	
1993-94	5	Temby to March 1994 - Mant	43.5	20	27
Totals	35		687.5	249.5	27
1994-95	5	Holland - O'Keefe - from Nov 1994	19	6	3
1995-96	2	O'Keefe	102	31.5	24
1996-97	5	O'Keefe	58	75	24
1997-98	6	O'Keefe	44	41	32
1998-99	8	O'Keefe - Moss - from Nov 1994	40	87	
Totals	26		263	240.5	83
1999-00	7	Moss	50	62	
2000-01*	6	Moss	20	49	
2001-02	6	Moss	46	56	
2002-03	5	Moss	18	54	
2003-04	10	Moss - Cripps from Nov 2004	33	35	
Totals	34		167	256	
2004-05	6	Cripps	94	43	
2005-06	7	Cripps	27	32	
2006-07*	6	Cripps	24	49	
2007-08	7	Cripps	51	70	
2008-09	13	Cripps - lpp - from Nov 2009	28	33	
Totals	39		224	227	
2009-10	9	lpp	70	124	
2010-11	12	lpp	65	130	
2011-12	6	lpp	70	135	
2012-13	6	lpp	108	257	
2013-14	12	lpp - Latham from Jan 2014	84	203	
Totals	45		397	849	
2014-15	5	Latham	64	127	
2015-16	4	Latham			
Totals	9				