

**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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Submission to the Committee on the Independent Commission Against Corruption regarding the Inquiry into the ICAC Inspector's Report.

Introductory comments

I write in response to the letter of 6 June 2016 (file ref: LAC16/167) from the Chair, Mr Damien Tudehope MP, which invited me to make a submission to the inquiry.

I was the ICAC Commissioner from November 1999 to November 2004 and I note that the Inspector's Report is stated to principally relate to the period 2005 to date.

I also note that I was interviewed by The Hon. Murray Gleeson AC and Mr Bruce McClintock SC when they were writing their report in 2015. I consider that their report took appropriate account of my views and I therefore consider that it is unnecessary for me to go over matters which have been dealt with in that report.

In writing this submission, I have confined my comments to those matters where my experience as ICAC Commissioner may be able to assist the Committee with respect to matters which have not been dealt with by the Gleeson/McClintock Report.

Should Examinations be conducted in private?

I refer to Recommendation 1 in the Inspector's Recommendations that Examinations should be in private. I feel that whether Examinations or inquiries should be public or private should remain at the discretion of the Commissioner. There is a reason for the generous remuneration and five year set term for the ICAC Commissioner- the reason is to ensure independence from all outside influences, government, public or media and an expectation that the remuneration would attract a person who can take tough decisions, make appropriate sound judgment calls and be able to control the hearings so as to avoid problems such as "show trials", "unfair/unnecessary damage to reputations", the inquiry becoming a media circus, or excessive posturing by people appearing before the Commissioner.

Justice Levine's concerns as expressed in his report have considerable force. Other advantages of private hearings may include: avoiding collusion between witnesses, maintaining the integrity of an investigation, sometimes the desire of the Commission to keep some cards close to its chest, testing the testimony without another witness framing his/her answers further on and other procedural advantages. However against these considerations, it is appropriate to balance the advantages of education, deterrence, principles of openness and accountability to the public.

The present Act allows the Commissioner to alternate between public and private hearings so as to ensure that the public interest is properly and best served, which includes preserving a person's reputation when that is warranted. I feel that the existing flexibility should be maintained. Thus, if the Committee feels that there should be more private hearings as opposed to public hearings, I would suggest that that view should be expressed as advisory rather than prescriptive.



Should the Inspector be informed of all assessments made by ICAC and the reasons therefor?

I refer Recommendation 10 in the Inspector's Recommendations. I fully support the Inspector being able to gain unfettered access to ICAC information which would allow him to make his assessments. However Parliament should be careful not to impose an overly onerous and unnecessary regime on ICAC. It's one thing to make all its paperwork available for inspection by the Inspector, it is quite another to oblige the ICAC to create further paperwork or provide further explanations as a matter of course. A very large number of matters come to the attention of ICAC. Many of these matters warrant only brief consideration. While I was ICAC Commissioner, there was an Operations Review Committee (ORC) which met approximately every two months. At that time, the ORC did receive a report on all matters considered by ICAC. My recollection is that each ORC meeting received a report of many hundreds of pages. The preparation of this report required significant ICAC resources and I understand that concern about this diversion of ICAC resources was one of the reasons for replacing the ORC with the Inspector after my term of office. The move to establish an Inspector was also welcome for other reasons. An Inspector was able to look at serious complaints more meaningfully and in greater depth, and was able to focus on specific allegations from the public, complainants or from other sources. The Inspector is able to bring professional expertise to such issues. It was a big advantage of the creation of the Inspector that the workload of ICAC, (which was an already overworked organisation) could be better focussed on operational work while being able to put its energy towards the needs of the Inspector when required.

To oblige ICAC to present written reasons to the Inspector for all assessments as a matter of routine would make the load perhaps even greater than that which was required for the ORC. That could be an ineffective and counterproductive use of ICAC's time. Therefore, I have reservations about this recommendation. ICAC should of course respond to particular queries from the Inspector.

I agree that the Inspector should be adequately resourced to carry out the oversight role but to preserve ICAC's efficiency and effectiveness, it is important that the Inspector should not become a sort of "shadow" ICAC.

Should the Deputy Commissioner be a Statutory Appointment?

I refer to Recommendation 12. During my time as Commissioner I established the position of "Deputy Commissioner" to perform in effect the role of chief operating officer.

The role was established primarily to direct matters which were procedural and administrative. At times the Deputy Commissioner was given the role of hearing commissioner but this was mostly at preliminary stages before a more permanent hearing commissioner was appointed to hear a case and my policy was that such appointments as hearing commissioner should be separately authorized.

If the role has morphed or changed at a later time to that of "deputizing" in all ways to that of the Commissioner, then of course, it would be appropriate to follow Justice Levine's recommendation. If not, then statutory reinforcement may not be necessary, and indeed it could detract from efficiency if the most able administrative officer was limited to a term of office of five years.

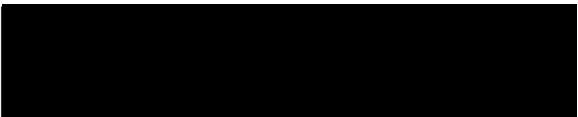
### Should there be an Exoneration Protocol?

I refer to Recommendation 15. I support the sentiment expressed by Justice Levine regarding the justice of such a move where matters reported upon by ICAC go to a Court of Law. My only concern is that there are matters reported upon by ICAC which do not go to prosecution because they fall short of a criminal act or for other reasons. Thus, this recommendation, if adopted, would tend to give a procedural advantage to those accused of criminal acts relative to those accused of lesser wrong doings.

### Summary

I believe it was a guiding philosophy in the creation of ICAC that it should have broad discretions because of the public benefits in being able to investigate and expose corruption in a flexible manner. The main safeguard against abuse or overreach is the judgement of the Commissioner and, to attract Commissioners of the right calibre, the position is extremely well remunerated and of high status. I believe that this philosophy is fundamentally correct and that it should not be abandoned because of some issues which history may show are relatively isolated.

I suggest that the key question for the Committee to consider is whether the issues which have led to this inquiry reflect structural problems with ICAC or whether they largely reflect circumstances which are particular to the last few years. If the former is the case, then it should be possible to make structural changes while preserving flexibility. If the latter is the case, then it may be that only minor changes are required.



Irene Moss AO  
13 July 2016