

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

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15 July 2016

The Chair  
The New South Wales Parliamentary ICAC Committee  
Parliament House  
6 Macquarie Street  
SYDNEY NSW 2000

Attached herewith is the response of the Accountability Round Table to the invitation of the New South Wales Parliamentary ICAC Committee to make a submission to its inquiry into the ICAC Inspector's Report to the Premier.



**THE HON. STEPHEN CHARLES QC**  
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Accountability Round Table



THE ACCOUNTABILITY ROUND TABLE  
SUBMISSION TO THE NEW SOUTH WALES PARLIAMENTARY ICAC COMMITTEE  
ON THE REPORT OF THE INSPECTOR OF THE INDEPENDENT COMMISSION  
AGAINST CORRUPTION TO THE PREMIER OF NEW SOUTH WALES

Dated 12 May 2016

**ART's Response, July 2016**

The Accountability Round Table (ART) is grateful for and welcomes the opportunity to respond to the Report of the ICAC Inspector. The Inspector's "principal recommendation" (Recommendation 1) is that the ICAC should conduct all examinations in private. The ART seeks to respond only to Recommendation 1, to which it is strongly opposed.

In considering Recommendation 1, the ART relies on the long-standing and well-established ethical and common law principle that public office is a public trust. It applies to all holding public positions, whether elected or non-elected. The principle was recently explained by Sir Gerard Brennan, as follows –

"It has long been established legal principle that a member of Parliament holds "a fiduciary relationship towards the public" and "undertakes and has imposed upon him a public duty and a public trust."

"The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that

all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.”<sup>1</sup>

The same principle applies to non-elected public officers.<sup>2</sup>

The application of this principle is central to a proper analysis of the issue raised by Recommendation 1. For what is under discussion is the operation of ICAC, a key element in the NSW Government integrity system in

- holding public trustees accountable in the discharge of their fiduciary duties to the people of NSW, and
- minimising the risk of corrupt conduct by public trustees.

The *ICAC Act* 1988 by s.31(1) entitles the ICAC to conduct a public inquiry “if it is satisfied that it is in the public interest to do so.” In arriving at such a state of satisfaction, ICAC is, by s.31(2) required to consider –

- “(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.”

As s.2A of the *ICAC Act* demonstrates, the principal objects of the legislation are “to investigate, expose and prevent corruption involving or affecting public authorities and public officials”, and to “educate public authorities, public officials and members of the public about corruption and its detrimental effects .....”.

The reasons why it is necessary for a body such as ICAC to be entitled to hold public inquiries have been considered on many occasions, and are well-understood. In the Royal Commission into the Builders Labourers Federation (BLF) in the 1980s, the issue was raised in the High Court.<sup>3</sup> Mason J stated that an order that a commission proceed in private –

“seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report.”

In this context it is relevant that the Royal Commission into the activities of the BLF was taking place contemporaneously with proceedings in the Full Court of the Federal Court, seeking the deregistration of the BLF.

Furthermore the ICAC’s ability to hold public inquiries has been considered and supported in at least two reviews of ICAC’s operations, first by Bruce McClintock SC in his 2004-5 review<sup>4</sup> and secondly in the more recent 2015 review conducted by the Hon. Murray Gleeson AC and Mr McClintock. In the latter case, the Independent Panel accepted 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.”<sup>5</sup>

The leading textbook on the Law of Royal Commissions also contains the observation that –

“Royal Commissioners are frequently reluctant to use private hearings, as they diminish the capacity of commissions to acquire information from the public, undermine public confidence in commissions, and reduce the ‘cleansing effect’ of hearings.”<sup>6</sup>

The ICAC itself has argued in a submission to this inquiry that to adopt Recommendation 1 would seriously weaken ICAC’s proven effectiveness in exposing and preventing corrupt conduct, and that the ICAC’s accountability is enhanced by having public inquiries.<sup>7</sup>

The Victorian Government in a Discussion Paper of March 2016 has opened an inquiry into the role of the Independent Broad-based Anti-corruption Commission (IBAC) in Victoria’s Integrity System. One of the matters raised in the Discussion Paper is the ability of the IBAC to conduct compulsory public examinations as part of an investigation. The Discussion Paper states<sup>8</sup> that the benefits of public examinations in executive inquiries such as Royal Commissions are “well understood in Victoria” in light of a number of recent public inquiries. The Discussion Paper then continues –

“In its 2014-15 Annual Report, IBAC noted that public examinations are ‘vital to IBAC in fulfilling its primary function of exposing public sector corruption and police corruption’. A public examination as part of an investigative process can:

- gather evidence and information from witnesses to expose the truth about corrupt conduct in Victoria’s public sector;
- inform the public sector and the community about the detrimental impact of corrupt conduct and police personnel misconduct;
- highlight the ways corrupt conduct and police personnel misconduct can be prevented;

- deter further wrongdoing by individuals who would commit corrupt conduct or police personnel misconduct;
- prompt public sector officers and bodies to examine their own processes to prevent corrupt conduct; and
- encourage others to identify corrupt conduct or police personnel misconduct and come forward to IBAC with this information.”

The Discussion Paper then observes<sup>9</sup> –

“A number of recent Victorian executive inquiries have used public examinations to independently investigate and make findings about matters of public interest. The use of public examinations in these inquiries has helped to ensure that:

- the truth of the matter being inquired into was uncovered and put on the public record;
- the public was able to hear and assess the evidence;
- the parties to controversial matters were held to public account;
- the inquiry’s findings were formed in an accountable and transparent manner.”

The IBAC has conducted three public inquiries to expose corrupt conduct in the public sector. One of those, Operation Ord, involved allegations of serious corrupt conduct in the Education Department. The inquiry showed that millions of dollars were transferred to “banker schools”, supposedly for the purpose of facilitating the payment of invoices on behalf of a region or clusters of schools. But the investigation showed that senior departmental officers instead used these schools as a slush fund to pay for alcohol, lavish hospitality and

expensive retreats, and goods and services completely unrelated to departmental activities. The principal player in this conduct was the officer responsible for overseeing the administration of the multi-billion dollars budget allocated to schools. Among the consequences of the public hearings was a significant spike in the number of fresh allegations made to IBAC about corrupt or improper conduct in the education sector. And the Department itself immediately developed a reform program designed to address the vulnerabilities identified in its systems by IBAC's investigation.

No issue has so far been taken with the fairness of IBAC's procedures in any of the public inquiries held by it. Neither the inspectorate, nor any of the parties questioned, has taken issue with the rules applied by IBAC in these hearings. The public hearings already conducted by IBAC have, on the other hand, substantially justified its argument that such hearings are vital to IBAC's role, and the advantages claimed for them. The value of the hearings in Operation Ord having been held in public really speaks for itself.

The statutory regime under which IBAC conducts public hearings differs from that under which ICAC operates. The *IBAC Act* s.117(1) prevents IBAC from conducting an examination in public unless it considers on reasonable grounds that (a) there are exceptional circumstances; (b) it is in the public interest to hold a public examination; and (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing. IBAC has argued in response to the Discussion Paper that the requirement for IBAC to identify exceptional circumstances has given rise to delay through expensive court challenges, and that it will continue to create difficulties due to its vagueness of meaning and uncertainty of application to any given investigation. It therefore favours its deletion, an argument supported by the ART.

The meaning of the expression "exceptional circumstances" in s.117(1) of the *IBAC Act* was considered by the Victorian Court of Appeal in *R & Anor v. IBAC*<sup>10</sup>. The Court found that the words should be interpreted to mean "highly unusual and quite rare" circumstances when



compared to the matters IBAC normally investigates. The Court noted that the conditions IBAC must satisfy to hold a public examination “set the bar at a high level.”<sup>11</sup>

The ART has supported the contention of IBAC that the ability to hold public hearings is “vital to IBAC in fulfilling its primary function of exposing public sector corruption and police corruption” and strongly opposes any proposal to require IBAC to hold its inquiries only in private. Any such move would severely damage IBAC’s ability to expose and eradicate corruption. Furthermore a requirement to conduct only private hearings may well undermine public confidence in a body such as IBAC, likening it to a “Star Chamber”.<sup>12</sup>

The ART contends, with respect, that the Inspector’s report and Recommendation 1, fail to grapple with the arguments given both by IBAC and ICAC for the necessity of retaining the ability to hold public hearings.

For all these reasons the ART agrees with and supports the ICAC submission that the adoption of Recommendation 1 would seriously weaken ICAC’s effectiveness in exposing and preventing corrupt conduct.

## ENDNOTES

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<sup>1</sup> <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-Table-integrity-awards-dec-2013/>.

<sup>2</sup> Lusty, D. "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 *Criminal Law Journal* 337.

<sup>3</sup> The BLF case (1982) 152 CLR 25, at 97.

<sup>4</sup> Independent Review of the ICAC Act 1988 – Final Report, January 2005, par 6.5.25.

<sup>5</sup> Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption report, July 2015, par. 9.4.6.

<sup>6</sup> Royal Commissions and Permanent Commissions of Inquiry, Stephen Donaghue (2001) Butterworths, 154.

<sup>7</sup> ICAC Submission to the Premier of NSW on the ICAC Inspector's Report, May 2016, Summary, pages 1 and 2.

<sup>8</sup> IBAC Discussion Paper, March 2016, par. 2.1.3.

<sup>9</sup> Ibid.

<sup>10</sup> [2015] VSCA 271 at par. 67.

<sup>11</sup> [2015] VSCA 271 at par. 66.

<sup>12</sup> Bayeh v. A-G (NSW) (1995) 82 A. Crim. R. 270 at 286. See also Donaghue. Op. cit. par 7.18, footnote 118.