

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

Organisation:

Name: The Hon Harvey Cooper AM

Position: Former Inspector of the ICAC

Date Received: 18 July 2016



15 July 2016

Damien Tudehope MP,
Chair,
Committee on the Independent Commission against Corruption,
Parliament House,
Macquarie Street,
SYDNEY NSW 2000

Dear Mr. Tudehope,

Inquiry into the Inspector's Report to the Premier: The Inspector's Review of the ICAC

I refer to your letter of 6 June 2016 inviting me to make a submission to the above Inquiry and submit my contribution herewith.

My letter is being sent by email with a hard copy following.

Yours sincerely,



(HARVEY COOPER AM)

Inquiry into the ICAC Inspector's Report to the Premier: The Inspector's Review of the ICAC.

Submissions from Harvey Cooper AM (former Inspector of the ICAC)

INTRODUCTION

Essentially, I agree with the conclusions and recommendations of the Report of the Independent Panel Comprising The Hon. Murray Gleeson AC and Mr. Bruce McClintock SC on its Review of the Jurisdiction of the ICAC dated 30 July 2015.

I shall limit my submissions to matters involving the relationship between the Commissioner of the ICAC and the Inspector which arise out of Terms of Reference numbered three.

“3) The current oversight arrangements for the ICAC, including the role, powers and resources of the ICAC Inspector, and possible options for reform.”

I shall commence by setting out my recommendations and then proceed to the reasons in support of them.

RECOMMENDATIONS

1. That the recommendation of the Honourable David Levine AO RFD QC, the current Inspector of the ICAC, for an expanded role involving greater involvement in the operational decisions of the ICAC and more particularly described in paragraphs 94 and 125 and 126 of his Report to the Premier be not accepted.
2. Amendments be made to Part 9 of the Act so as to provide that when the Inspector is preparing a report under part 9 of the ICAC Act which may contain decisions, findings or comments capable of adversely affecting the interests of any person or persons, he shall, in advance of the publication of any such report notify such persons of the details of such intended decisions, findings or comments and give to each of such persons the opportunity to respond. In particular, such persons must be given the opportunity to rebut any evidence that is adverse to their case or prejudicial to them personally by way of submission or by adducing further evidence or information. The term “persons” includes corporations.
3. That the Act be further amended to provide that, should the Inspector make adverse decisions, findings or comment in regard to the Independent Commission against Corruption and the Commission disagree with the Inspector's position, the Commission's response to such adverse comment be reproduced in full in the Inspector's Report.

COMMENTS IN SUPPORT OF THE FIRST RECOMMENDATION

In his report to the Premier, the Honourable David Levine AO RFD QC says as follows:

*94 **Recommendation:** consideration be given to expanding the role of the Inspector to allow review of ICAC's decision to NOT investigate a matter. Also to allow the*

Inspector to issue guidelines which must be followed by ICAC in consultation with the ICAC. Those guidelines should then be tabled in Parliament. (Similar to the Queensland provisions, although those functions are performed by the Parliamentary committee in Queensland.)

125 As to the relationship between the Inspector and the Commissioner evidence has been given as to the existence of a Memorandum of Understanding and steps recently have been taken to try to put in place a regime which provides for the Inspector to be informed of all matters being dealt with by the Commission. Such a regime is in place as between the inspector and the Police Integrity Commission.

126 It is my view that the relationship between the Office of Inspector and the ICAC will operate with greater harmony in the following circumstances. That the Inspector be informed first, of those matters which the Commission declines to investigate and the reason for so doing, and secondly, and more importantly the Inspector be informed of all matters actively the subject of consideration for investigation or under investigation, the operational name, and the progress thereof. Such a course will not interfere in any way with the secret and sensitive operational aspects of the Commission's functions. There is no basis for presuming that any operational aspect of the Commission's investigations will be compromised by the mere fact that the Inspector knows of them from the beginning, as it were.

In my view there are at substantial objections to these recommendations namely:

It removes from the Commissioner the sole responsibility under the ICAC Act for the administration of that Act. The proposal changes the ICAC from a Commission to a duo. If the Inspector is informed of the matters set out above, what is he going to do with that information? If he disagrees with the action or inaction proposed by the Commissioner, is the Inspector to have the right to overrule the Commissioner and compel her/him to comply with the Inspector's ruling?

It deprives members of the public of the opportunity of having a person independent of those involved in the activities and decision making processes of the ICAC to consider their complaints. Under the proposal the Inspector will be a party to those activities and decision making processes. Thus a complaint to her/him could not be a complaint to an independent person. It would involve "Caesar sitting in judgement upon Caesar." This can hardly "induce in the members of the public confidence in its capacity to ensure the propriety of the conduct of the ICAC itself"?

Under existing provisions of the ICAC Act, the Inspector can audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and also assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities. The Inspector may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and is entitled to full access to the records of the Commission and to take or have copies made of any of them. In addition he may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, As well, he may require officers of the Commission to attend before him to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission,

But the Inspector does not act as an appellant tribunal to review the decisions of the Commission. He cannot impose his view upon that of the Commissioner. His power is limited to making reports and recommendations. This delineates the respective functions of the Commissioner and the Inspector by providing the Inspector with the means of obtaining knowledge of what the Commissioner is doing without vesting in him the power to interfere with what the Commissioner is doing.

Past experience has demonstrated that where the respective functions of the Commissioner and the Inspector are not clearly delineated and/or overlap, serious differences can arise between them which diminish the standing and reputation of both.

One example occurred in Western Australia in 2007/8 involving the Commissioner of the Corruption and Crime Commission of WA and its Parliamentary Inspector. [See the paper “Public Accountability of the Corruption and Crime Commission” by Malcolm McCusker AO QC delivered 18 June 2008.]

A further example arose between the NSW Police Integrity Commission and its Inspector culminating in an inquiry by the Parliamentary Committee on the Ombudsman and the Police integrity Commission into the handling of complaints against the Police Integrity Commission. That Committee’s Report (No. 9/54 –April 2010) recommended:

That the Minister for Police amend the Police Integrity Commission Act 1996 so that, should the PIC Inspector make adverse comment in regard to the Police Integrity Commission and the Commission disagree with the Inspector’s position, the Commission’s response to that adverse comment be reproduced in full in the Inspector’s complaint report .

And, further, there is the experience over past months in this State even though the functions of the Independent Commission against Corruption and its Inspector are clearly delineated. This experience shows that the condominium envisaged in the Inspector’s recommendations can easily lead to pandemonium with resulting injury to the reputations of the Commission and the Inspector..

Under the terms of the ICAC Act it is the Commissioner and the Commissioner alone who is responsible for ICAC’s administration and operation. The Inspector plays no part in those matters. There is no obligation upon the Commission to seek the advice of the Inspector. The second reading speech in the Legislative Council of the 2005 Independent Commission against Corruption Amendment Bill says:

One of the key changes proposed by the bill is to strengthen the accountability of the ICAC by establishing an independent Inspector of the ICAC modelled on the Inspector of the Police Integrity Commission. The Inspector is needed to address a gap in the accountability of the ICAC. While the parliamentary joint committee on the ICAC is responsible for monitoring and reviewing the exercise of the ICAC’s functions, it is prohibited from examining the particular decisions made by the ICAC.”

The gap in the accountability of the ICAC was filled by clearly defining the limits upon the power of the Inspector.

It is to be noted that the Inspector has no power to punish or to impose his views other than by reports with or without recommendations.

In its report of 30 July 2015 the Independent Panel said:

The Inspector is not intended to act as a general review authority with a function of reconsidering all operational decisions of the Commissioner, let alone all findings of the Commission. If that were the legislative intention, then of course the Inspector's present establishment will be totally inadequate. The reasons behind the setting up of the office of Inspector in the first place appear in the 2005 Report, and they have not been overtaken by subsequent events.

COMMENTS IN SUPPORT OF THE SECOND AND THIRD RECOMMENDATIONS

As experienced, learned and honourable as persons vested with power are, they can nonetheless, fall into error. The purpose of the second and third recommendations is to limit the damage resulting from such error.

In this context it is appropriate to look at the course of the correspondence as set out in the Inspector's Report under section 77A of the ICAC Act on Operation "Hale".

On 31 October 2014 he wrote to the Commissioner referring to the Commission's Press Release regarding the forthcoming public hearing in operation Hale and said "*In the light of the opening statement of the Press Release quoted, I would have thought that I, as Inspector, and in the light of my career in the administration of justice in NSW, should have been informed of this particular ICAC investigation.*"

The Inspector's expectation is not supported by the terms of the ICAC Act.

The letter goes on to express the view that in the absence of other material, the ICAC press release and the press coverage could reasonably lead to the view that ICAC has abrogated to oneself the task of investigating whether there has been an attempt to pervert the course of justice, something which a reasonable person would expect the NSW Police to carry out. Accordingly production of all relevant material was required pursuant to section 57B of the Act. This requirement was quite proper.

On the same day the Commissioner replied setting out her views on the legal authority for the operation and pointing out that there is a restriction on her producing records provided to her by a Federal Agency pursuant to the Telecommunications (Interception and Access) Act 1979 (Cth). Appreciation was expressed for the Inspector's assurance that the material will be received on a highly protected basis.

On 3 November the Commissioner wrote to the Inspector as follows:

"The Commission has just received an enquiry from a journalist, seeking comment upon an e-article appearing today in Crikey, penned by Alex Mitchell. The article refers to the fact that you have written to the Commission "asking for an explanation of its decision to conduct the Cunneen Inquiry. The Commission has responded "no

comment" to the journalist's enquiry. He indicatedI that he would contact your office. I trust your response will be to the same effect."

This last sentence met with the Inspector's comment "*I did not yield to the Commissioner's expectation, I am not subject to the Commission in any respect (s. 57B(3))*". The Commissioner's comment was not a command to the Inspector but referred to requirements imposed on both the Commissioner and the Inspector by the Telecommunications (Interception and Access) Act 1979 (Cth) and section 111 of the ICAC Act. This was explained in some detail in the letter from the Commissioner to the Inspector dated 14 November.

On 15 April 2015 the High Court of Australia found that the conduct alleged against Ms Cunneen did not amount to "corruption" within the meaning of that term in the ICAC Act in the case of *Independent Commission Against Corruption v Margareet Cunneen & Ors* [2015] HCA 14.

On the same day the ICAC issued a public statement in the following terms:

"15 Apr 2015 12:17 PM AEST - High Court of Australia decision in ICAC v Cunneen The NSW Independent Commission against Corruption (ICAC) is currently considering the decision of the High Court of Australia in this matter and will be making a public statement in due course."

The effects of the Court's decision were far reaching limiting as it did the jurisdiction of the Commission and rendering necessary close consideration of the potential effects on past present and future investigations. Under such circumstances did wisdom not require a cautious approach? After all this was only the same day as the Court's decision.

The Inspector, however, thought otherwise and, on 16 April wrote to the Commissioner an email which included the following:

"Dear Commissioner,

Re: Operation Hale (Cunneen)

Yesterday the ICAC issued a press release to the effect that it was not proposing to comment upon the judgment of the High Court until it is in a position to issue a public statement.

The Honourable David Ipp AO QC and the Honourable Jerrold Crlpps QC and many others have not been embarrassed to make public statements about the decision of the High Court. There appears from today's press a wide range of comment, speculation and punditry, including a simplistic view that Parliament can cure the state of affairs which ICAC is now perceived to be in by some amendments to the legislation.

The present standing of the ICAC in the eyes of the public whose interests it exists to champion issues of corruption and integrity is, to say the least, unhappy in my view as Inspector.

[can think of no reason why the ICAC cannot now issue a media release or public statement which in some way could go to explain that the complexities it perceives as flowing from the High Court decision require sober consideration which In fact they are receiving.

To simply draw down the blinds and to be seen to be saying that ICAC will speak when ICAC is ready is an undesirable approach. It is the ICAC's duty to the public forthwith to indicate what it is doing and what it proposes to do and to give some explanation for the course it is taking. It would not be inconsistent with its published media policy to do so.

As I have remarked this Inspectorate's file is still open and I am considering what steps I will take. My consideration is, frankly, thwarted by the silence of the ICAC in this matter."

The allegation of delay and "simply draw[ing] down the blinds", relating as it does to a press release on the same day as the Court's judgment, is factually inaccurate. In addition, the Act gives the Inspector no power to, in effect, demand that the Commission issue a statement. One wonders how the Inspector's consideration can be "thwarted" by the Commission's failure to issue a detailed statement on the same day as the publication of the judgement with its far reaching consequences.

In any event the Commission issued a public statement on 20 April in which it said:

"The decision means that the Commission will be unable to Investigate or report on several current operations, and will severely restrict its ability to report on Operations Spicer and Credo.

It has the potential to involve the State of NSW and the Commission in costly and protracted Litigation involving persons who have been the subject of corrupt conduct findings based on investigations conducted under section 8(2), and will affect current litigation involving such findings."

And

In the circumstances, the Commissioner has made a submission to the NSW Government to consider, as a matter of priority, amending section 8(2) to ensure that the section can operate in accordance with its intended scope and making any such amendment retrospective.

To which the Inspector responded on the same day seeking a copy of the Commission's submission and further details of which investigations were affected and why. In addition, he wrote to the Premier saying, inter alia:

"I have publicly stated in my capacity as Inspector, that caution, with respect, should the exercise by the Government to avoid rushing to judgment as to any necessity to

amend the legislation. Further it is necessary to have a clear view as to the ends to be attained by any such amendments.

In the light of the foregoing it is hardly surprising that the Commissioner sent an email to the Inspector on 27 April which included the following comments:

I refer to your public statements following the judgments in ICAC v Cuneen on Wednesday, 17 April. The first of those statements suggested that the Commission was embarrassed by the High Court decision and that was essentially the reason for the Commission's failure to immediately publicly declare its position. The second comment you made to the media following the Commission's statement on Monday, 22 April was that the Commission's view of the High Court and its proposed submission to the Premier bore the hallmarks of a "poor loser".

*First, let's me assure you that the Commission is not in the least embarrassed by the outcome of the Cuneen litigation. As more than one legal commentator has pointed out, it was a matter of statutory construction that needed resolution regardless of the specifics of the Cuneen investigation. **More importantly, the Commission will not be pressured by the media or any person to make ill-informed and intemperate public statements. Either succumbing to such pressure or the appearance of acceding to such pressure would damage the independence of the Commission.***

Second, your criticism of the Commission's proposal to retrospectively amend the ICAC Act was made without the benefit of understanding the context of a detailed submission to the Premier. The more disconcerting aspect of these comments is that you have apparently aligned yourself with those in the community and the media who regard the Commission's investigation of Ms. Cuneen as improper and unfounded. Given that you announced an audit of this matter well before the Commission's jurisdiction was challenged, I am concerned that you may have compromised your own independence in carrying out that audit. At least one journalist has said that there is now no need to read your report, because we know what will be in it.

It has been announced that you will be interviewed on the Alan Jones program later this week. It will be even more difficult to maintain the appearance of an independent audit should you be drawn into comments about the Commission's decision to investigate Mc Cuneen.

The Commission welcomes any audit of the use of its powers. However, any appearance of, or actual interference in the operational decisions of the Commission severely compromises its charter to investigate corrupt conduct, without fear or favour.

This lengthy letter was signed off "Regards, Megan Latham".

The emphasis is mine.

The Inspector's reply included the following comments:

"This email caused me the utmost concern as to its contents .

And later:

"I note that this email is signed "regards".

I must say that I find the ICAC email to be insulting, condescending and to border on insolent and reinforces views I have lately expressed as to the breathtaking arrogance of the Commission."

Who is it who is demonstrating "breathtaking arrogance"? Is the Commissioner not entitled to be critical of aspects of the Inspector's conduct and to assert the independence of the Commission?

In response to a request from the Inspector for information about future action by the Commission in the Cuneen investigation, the Commission replied on 15 May that it was considering the course of action it would take and "inform you of that decision as soon as it is made".

The Commission issued a Media Release on 27 May indicating that the evidence it had would be provided to the Director of Public Prosecution pursuant to clause 35(4) of Schedule 4 of the ICAC Act and also setting out the reasons for this action.

The Inspector then emailed :

" I refer to your letter of 15 May 2015. I write to express my profound disappointment that the resources of the ICAC appear to have been insufficient to do me the courtesy, which I anticipated from your letter referred to, of informing me by letter or by email of its decision to refer the matter to the DPP. I do not regard a Medianet communication broadcast to the world at large my being informed of that decision "as soon as it is made".

Which was met with the Commissioner's reply:

I regret that you have interpreted the Commission's failure to separately inform you of its decision in this matter, before the release of its public statement, as a sign of discourtesy. On the contrary, the Commission has acted at all times in the interests of preserving the independence of our two Offices. Any selective pre-release of operational decisions in this matter exposes both our Offices to allegations of influences and/or interference in the performance of their functions, particularly in circumstances where you are undertaking an audit of Operation Hate.

Of this exchange, the Inspector says in his Report :

The Commissioner and the ICAC have struck me in the whole of my term to date as Inspector as being capable of blithely overlooking the profound significance of section 57B(3), 'the Inspector is not subject to the Commission in any respect .

The reality is that that the Commission was not imposing its will upon the Inspector. Rather it was the Inspector who was seeking to impose his will upon the Commission in a way that exceeded his powers under the Act.

The next relevant correspondence is a letter from the Commission to the Inspector on 2 December seeking assurance that it would be provided with procedural fairness in the following terms:.

"In the Australian newspaper of today's date, it is reported that you intend to furnish your report into Operation Hale to the Parliament on Friday 4 December. Since your announcement of an audit into that investigation, the Commission has provided you with all the material that was within the Commission's power to provide. I note that there are no outstanding requests for information and the Commission has not been provided with any notice of adverse comments or findings in respect of its conduct of the investigation.

You would, of course, appreciate that the Commission and Commission officers are entitled to procedural fairness by way of an opportunity to respond to any criticism in advance of the finalisation of the report. Such an opportunity. allows for the existence of any misgivings or doubts about the validity of the exercise of the Commission's powers to be re-evaluated, dispelled or confirmed, as the case may be.

And:

I have at all times maintained a respectful and professional relationship between the Commission and the Office of the Inspector . If you are of a different view, I expect to be informed of the manner in which , and at the time, it is said to have occurred, so that I may respond accordingly . Otherwise I am put in the invidious position of having to defend myself against accusations that are unspecified as to time and context, and which may be capable of a ready explanation.

The inspector replied on 3 December but that reply makes no mention of the provision of any adverse findings.

And so, on 4 December 2015 the Inspector presented his so called Report under section 77A of the ICAC Act for publication. I use the words "so called" because it was published without the Commission having been afforded the opportunity to respond to the serious allegations made therein. This document is merely an accumulation of allegations masquerading as a report.

A tragedy of this situation is that the public still has not been provided with all of the facts. It knows the view the Inspector has. But it does not know what the response of the Commissioner is. It does not have a report which is based upon all evidence of what took place. Instead it is based upon allegations made on the basis of the Inspector's interpretation

of what took place and that interpretation has been skewed by the Inspector's failure to appreciate that the Commissioner does have the right to disagree with him.

In his evidence before the Parliamentary Committee on 14 March 2014 the Inspector said:

I will say this. Even if the doctrine and principles and practice of procedural fairness were applied at its purest level, and I make no admissions as to any deficiency on my part in this regard, the outcome would still be carved in granite..

Is this not the type of justification relied upon by a "lynch mob"? The Inspector's evidence continued:

It is to be borne in mind that what the situation here involves is one component of the Executive overseeing another component of the Executive. The first arm of the Executive, the Inspector, has a duty to make reports and recommendations to Parliament.

These circumstances surely make the provision of procedural fairness in the preparation of the report all the more important.

Further, the course of correspondence included in the report, which I invite you to reread, makes it clear that the ICAC would have been under no misapprehension that its conduct was under examination for the purposes of reporting to Parliament. Its replies may fairly be considered either non responsive or evasive.

The Commissioner was clearly under no such misapprehension. This led to her criticism of the Inspector's Media release in her letter of 27 April and to her seeking the opportunity to respond to adverse findings contained in her letter of 2 December. Far from being non responsive or evasive, the Commissioner was making permitted criticisms of parts of the Inspector's conduct. It was the Inspector who without justification called this a breach of section 53B(3) of the Act,

In the course of his evidence, the Inspector referred to the Commissioner's Press release of 4 December 2015 and drew attention to the part under the heading "Factual errors"

The inspector, on his own admission, did not seek confirmation of Ms. Cuneen's information from the Commissioner. Had he done so, the Commissioner would have been able to comprehensively refute those statements.

The Inspector says of this passage; "a clearer statement of the Commissioner's adversarial position can hardly be imagined"

The Inspector not only denies the Commissioner the right to procedural fairness but he also condemns all justifiable criticisms of his actions as an "adversarial position".

The Inspector further said in evidence before this Committee:

I am the Inspector of the ICAC and have no difficulty, in fact, I would find it impossible to perform my function under the legislation without exercising the unquestioned liberty, I have to express opinions on the material available to in performance of those duties. It is very hard to report and make recommendations without doing so.

There is no doubt that the Inspector has the right to express opinions on the material available to him. But that does not entitle him to express, and make public, opinions which are based on material which is incomplete and/or incorrect due to his failure to afford the Commissioner the opportunity to answer his allegations.

It needs to be borne in mind that a published report under section 77A has the potential to diminish the standing of the ICAC as well as the personal reputations of those who are part of ICAC. Accordingly, the need for care and procedural fairness is all the more essential.

In the case of *Kioa v West* (1985) 159 CLR 550 Mason J said:

28. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. . . . The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.

And

31 The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. It seems that as early as 1911 Lord Loreburn L.C. understood that this was the law when he spoke of the obligation to "fairly listen to both sides" being "a duty lying upon everyone who decides anything".

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 Cullinan J said:

The law of natural justice has evolved without the need for recourse to any fiction of "legitimate expectation". As de Smith, Woolf & Jowell point out. . . a duty to accord natural justice by giving a right to be heard has long been the law of many civilised societies.

"That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden." (footnotes omitted)

As pointed out earlier, the Parliamentary Committee on the Police Integrity Commission accepted that that Commission was entitled to have the opportunity to respond to allegations made by the Inspector prior to publication of the Inspector's report.

CONCLUSION

The Inspector is entitled to refer to his "*career in the administration of justice in NSW*" with justifiable pride. But no-one is free from occasional fallibility. When fallibility occurs in the exercise of the functions of a public office the consequences are usually wide ranging and grave. The above recommendations cannot ensure that error will never occur again. But they can reduce the damage resulting from such errors.



HARVEY COOPER AM

18 JULY,2016