

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

Organisation:

Name: Mr Geoffrey Watson SC

Position:

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Committee on the Independent Commission Against Corruption
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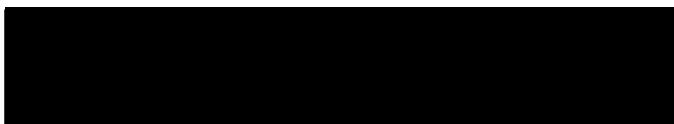
Dear Mr Tudehope

Inquiry into the ICAC Inspector's report to the Premier: the Inspector's review of the Independent Commission Against Corruption

1. I refer to your letter dated 6 June 2016 and thank you for the invitation to make a submission to your Committee.
2. In preparing this submission I have had regard to your Terms of Reference, but I believe the best assistance I can provide is by organising this submission my own way – noting that each of the points I make falls within your Terms of Reference.
3. There are two principal submissions I would like to make – they run along the following lines:
 - (a) There should be no *further* changes to ICAC's powers and procedures at present. Changes have recently been made as a result of an extensive report. Surely now we should all wait and see how those changes work themselves out; and
 - (b) ICAC should retain the power to conduct public inquiries.
4. I will also address two of the specific recommendations made by Inspector Levine.

No imperative for change

5. Now is the wrong time to be contemplating *further* changes to ICAC's powers and structures.
6. Over the last 18 months there have been substantial changes to ICAC's jurisdiction, powers and practices. These have been brought about by judicial decisions and legislation.
7. The legislative changes were brought about following a substantial report, and reflect a rare example of bipartisan cooperation.
8. The report to which I refer is the work of the Independent Panel – two independent consultants of the highest qualification. The report was produced after months of work, and involved wide consultation amongst experts and interested parties. This consultation process was careful and transparent – those consulted by the Independent Panel are listed in the report, as are all those who made submissions to it.



9. The Independent Panel report was delivered on 30 July 2015. Legislation reflecting the recommendations of the Independent Panel was passed into law within days.
10. Now would seem to be the appropriate time to allow matters to settle down. No-one yet knows how well ICAC will function under the changes. But we will know in time. Why not wait to see how the changes work out in practice?
11. It should also be observed that there is no genuine impetus for further change to ICAC. It is true that there are those who have spoken publicly in favour of change – but they are nearly always someone who has been found to have committed corrupt conduct by ICAC, or has had some corrupt transaction foiled by ICAC's investigations.

Continuation of public inquiries

12. Combatting corruption is one of the most difficult tasks confronted by government. The key feature of corruption that it is conducted in *secret*. It is for this reason that special powers are provided to anti-corruption agencies – not just to ICAC, but to anti-corruption agencies all around the world.
13. Corruption undermines community confidence. Any corruption encourages a public perception of more widespread corruption. The *only* way in which to regain the confidence of the public is by *exposing* the corruption. This can only be secured by public inquiries.
14. This is not just my view: the leading anti-corruption authorities and agencies around the world want the power to conduct public inquiries. If you have any doubt about this, I suggest you could consult some of the leading Australian authorities (I will limit these to those authorities outside New South Wales) – the Hon Tony Fitzgerald QC, the Hon Stephen Charles QC, and the Hon Tim Smith QC. You could also speak to the peak anti-corruption bodies – such as Transparency International and the Accountability Round Table. I am sure that all will recommend open public hearings as the best means of exposing corruption.
15. There are many reasons why public inquiries are important. One is that conducting these matters in private creates mistrust of the agency. The idea of conducting investigations in private conflicts with the statutory purpose of ICAC to expose corruption. Exposure is a critical function of investigative commissions of this kind.
16. ICAC operates as a standing Royal Commission. Just imagine if someone suggested that the *WA Inc Royal Commission* or the *Fitzgerald Royal Commission* should have been conducted in private? Why treat ICAC differently from the recent *Trade Union Royal Commission* or the current *Child Abuse Royal Commission*? There would be justifiable public outrage if those investigations were conducted in private.
17. Also consider as a case study a recent ICAC public inquiry: ICAC's investigations into Botany Council. Who could argue against the positive influence of that public inquiry? And what a comparatively feeble impact that investigation would have had, had it been conducted in private.
18. Finally, the arguments against public inquiry are weak. Again, they come mainly from persons found corrupt by ICAC, or persons who lost money as a result of ICAC's investigations.

The Inspector's recommendations

Recommendation 6


19. The idea that s74BA(2) be repealed is impractical. The removal of s74BA(2) would undermine ICAC's ability to report on its investigations. ICAC must make factual findings to fulfil its statutory purpose.
20. The Inspector says that s74BA(2) is contrary to the intention of the Independent Panel. With respect, I do not read the Independent Panel report that way; neither, apparently, did the two Houses of the NSW Parliament.

21. The intent behind s74BA(2) is to allow ICAC to make a full report on the matters it investigated. The absence of a power to make full factual findings would lead to the absurd result that ICAC could not identify the evidence of an honest witness upon which ICAC relied in making a finding of corrupt conduct. It will also mean that ICAC was unable to make sufficient factual findings to justify corrupt conduct findings. Say, for example, ICAC believes certain evidence from persons who are not going to be made subject to a corrupt conduct finding. Say ICAC wishes to use that evidence to make an adverse finding against a third person. If Recommendation 6 was adopted, that would have to be excised from ICAC's report. The only thing remaining would be an unexplained adverse finding against the third person – which, because the basis for the finding was unexplained, would be set aside by the Supreme Court.
22. Recommendation 6 is also counterproductive (if one accepts the Inspector's suggestion that honest persons should have their reputation cleared). If Recommendation 6 was adopted there would have been no opportunity to record that certain witnesses' evidence was honest, or to clear the reputation of persons from any cloud of corruption.

Recommendation 15

23. The idea of an "*exoneration protocol*" is a novel proposal – I know of no precedent for it. None is cited. With respect, it is not only unnecessary, it reflects a misunderstanding of ICAC's role.
24. An "*exoneration protocol*" is unnecessary for two reasons. First, because it is part of its reporting function, ICAC regularly makes findings that particular persons gave honest evidence and that other persons, whose conduct might otherwise have been suspect, were not involved in any corrupt conduct. This "*exonerates*" those persons.
25. Secondly, if ICAC had truly erred there is already in place an opportunity to have corrupt conduct findings set aside – through judicial review in the Supreme Court. That operates to permit "*exoneration*". Many persons aggrieved by decisions of ICAC have taken that course, but very few have succeeded in establishing that the ICAC finding was incorrect. If nothing else, this shows that ICAC's findings are made carefully and correctly.
26. The suggested rationale for an "*exoneration protocol*" reflects a misunderstanding. A person subject to adverse findings by ICAC is not "*exonerated*" either because the DPP decides not to press charges, or because the person is acquitted of a criminal offence in a subsequent hearing. To suggest otherwise is a misunderstanding of the difference in the role of ICAC from that of the DPP, and a difference in the role of ICAC from the criminal courts. For example, the finding made by one of our finest judges, the Hon David Ipp AO QC, is hardly undermined by some magistrate declining to convict someone, based on different evidence and subject to a different standard of proof.
27. Again, it is important to observe that those persons propounding this kind of approach are the same group of disaffected persons whose conduct was corrupt, or who have lost money as a result of ICAC foiling their corrupt arrangements. They even include some persons against whom the finding of corrupt conduct has been confirmed by the Supreme Court and the Court of Appeal.

Yours sincerely



GEOFFREY WATSON SC