

**Submission
No 13**

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

Organisation: Office of the Inspector of the Crime Commission
Name: The Hon Graham Barr QC
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Mr Damien Tudehope MP
The Chair
Joint Committee on the ICAC
Parliament House
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Dear Mr Tudehope

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

Thank you for your letter dated 6 June 2016. I wish to offer observations on two of the terms of reference of your Inquiry, namely:

1. The extent, nature and exercise of the ICAC's current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform; and
4. Whether the outcome of legal action taken in response to the ICAC's corrupt conduct findings is adequately reflected on the public record; and possible options for reform.

Following recent publicity of matters involving the Independent Commission against Corruption (the Commission) there has been much public comment comparing the success of the Commission in exposing corruption with the lack of any resulting prosecution. Many of the public comments of which I am aware appear to have incorrectly accepted that the guilt of those investigated by the Commission had already been proved or as good as proved.

This suggests a level of confusion among members of the public about the significantly different functions of the Commission as an investigator and the Director of Public Prosecutions (DPP) as a prosecutor. If left uncorrected, this could undermine public confidence of both the Commission and of the DPP in matters relating to corruption involving public officials.

The Commission's function is different from the function of the criminal courts. The latter function, simply put, is to enquire whether an accused person has committed an offence and, if so, to decide whether and how to punish that person.

Criminal proceedings, in which the State prosecutes, may be distinguished from enquiries before the Commission as well as from civil actions between persons. An example will illustrate. A beats B. The State prosecutes A for assault. He is acquitted. B sues A in an action for assault and succeeds, recovering damages. The two actions rested on identical facts; the results are different but compatible. A is not punished because guilt has not been proved beyond reasonable doubt, but he must compensate B because, more likely than not, he caused B's injuries.

The same distinction must be made between the criminal process and the processes of the Commission. The function of the Commission is to investigate, expose and prevent relevant corruption and to educate relevant authorities and officials and members of the public about corruption and its effects. There is no inconsistency between a finding by the Commission of corruption and the absence of a conviction of an offence implying the same corruption, either because the prosecutor decides that the evidence does not justify criminal proceedings or because the person found corrupt by the Commission is acquitted of the charge. The reason is as before. The processes are different because the agencies administering them have different functions.

Consistently with this view, I do not agree there is a need to introduce an "Exoneration Protocol" as suggested in paragraph 51 of the Inspector of the Commission's report. The absence of a criminal conviction arising from the same or similar or cognate facts as those considered by the Commission should not give rise to the setting aside of the Commission's findings or any protocol or declaration that might mask or water them down. Given that different principles apply in criminal proceedings, especially as to standard of proof, it is appropriate for the findings of the Commission to stand independent of any subsequent criminal conviction or lack thereof.

When members of the public are found guilty of criminal offences and punished, the public generally have a right to know who the offender is, what the offender did and what sentence was imposed. That is part of the working-out of general and personal deterrence and retribution in our criminal law.

Similarly, when members of the public subject to the oversight of the Commission are found corrupt, when institutions and their systems are found corrupt, the public generally have a right to know. That is part of the wider function of exposing and controlling corruption in public office.

Persons found corrupt by the Commission are not thereby convicted of any offence. They are not punished. Just as one would not, merely because A was acquitted, deny B's just recovery of damages, one would not say that because the person found corrupt had not been found guilty of an offence there ought not be a public announcement of the finding of corruption. To do so would deny the public the right to know where there is corruption in public office. This knowledge is an essential part of the Commission's function of exposing and so preventing corruption.

Moreover, the naming of persons as corrupt implies that others who have been suspected of corruption are not corrupt. So the limits of corruption are established and made known and relief afforded to the incorrupt.

I do not otherwise wish to comment on any other matters relating to the Inquiry's Terms of Reference.

~~Yours faithfully~~


The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
19 July 2016