

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

Organisation: NSW Independent Commission Against Corruption
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**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

NEW SOUTH WALES

SUBMISSION

TO THE

**PARLIAMENTARY COMMITTEE ON THE ICAC
INQUIRY INTO THE ICAC INSPECTOR'S
*REPORT TO THE PREMIER: THE INSPECTORS REVIEW OF THE ICAC***

20 JULY 2016

Introduction

This submission by the NSW Independent Commission Against Corruption (“the Commission”) is made for the purposes of the Parliamentary Committee on the ICAC (“the Committee”) inquiry into the ICAC Inspector’s *Report to the Premier: The Inspector’s Review of the ICAC*” dated 12 May 2016 (“the Report”).

This submission addresses the terms of reference of the Committee’s inquiry. The Commission does not consider there is any need for changes to its powers, governance or oversight arrangements. The Commission is well placed to determine whether there should be changes to its procedures and structure in order to meet legislative requirements, operational needs and budgetary constraints.

The Commission has previously provided the Committee with a copy of its May 2016 submission to the Premier of NSW on the Report (“the submission to the Premier”). The submission to the Premier addresses each of the 16 recommendations made by the ICAC Inspector in the Report and sets out the Commission’s response to those recommendations. The submission to the Premier should be considered by the Committee in conjunction with this submission, which, in the Commission’s view, should be made public.

While this submission will not repeat the matters canvassed in the submission to the Premier, it is relevant to briefly summarise the Commission’s position in relation to the recommendations in the Report. The 16 recommendations are reproduced in Appendix 1 to this submission.

The Commission does not support recommendations 1 to 4, 6 to 13, 15 and 16. This is because some would seriously compromise the Commission’s effectiveness, some are unnecessary because the issues they seek to address are already addressed by the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) and internal Commission policies and procedures and, in some cases, no policy or practical justification is provided for their adoption.

The Inspector’s “principal recommendation” (Recommendation 1) is that the Commission should conduct all examinations in private. Adoption of this recommendation would seriously weaken the Commission’s proven effectiveness in exposing and preventing corruption. It is contrary to the considered conclusions reached by the 2004-5 Independent Review of the ICAC conducted by Mr Bruce McClintock SC and the more recent 2015 Independent Panel Review conducted by the Hon Murray Gleeson AC and Mr McClintock. The Commission agrees with the Independent Panel’s assessment that public inquiries “...serve an important role in the disclosure of corrupt conduct [and] in disclosing the ICAC’s investigative processes”.

Adoption of Recommendation 6 would seriously compromise the Commission’s effectiveness by removing its power to make any factual findings absent a finding of serious corrupt conduct.

Recommendation 15, which provides that consideration be given to the introduction of an “exoneration protocol”, ignores the basis upon which corrupt conduct findings are made under the ICAC Act and relevant case law.

Recommendations 2, 3, 4, 7, 8 and 16 are already addressed by the ICAC Act or in the Commission's internal policies and procedures.

The report provides no apparent policy or practical justification for recommendations 9, 11, 12 and 13.

Recommendation 10 is unnecessary because the Inspector currently has access to the assessments information he is seeking under this recommendation.

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

The rationale for and conduct of public inquiries is dealt with in the submission to the Premier. This submission deals with the Commission's other powers and the conduct of investigations.

The Commission has been entrusted with significant powers under the ICAC Act and other legislation. The Commission considers that these powers are necessary and appropriate to effectively investigate and expose corrupt conduct and to enable it to identify weaknesses in public sector procedures and practices with a view to working with the relevant public authorities to reduce the opportunities for corrupt conduct. The Commission has appropriate procedures, which are periodically revised, to ensure its powers are exercised effectively and appropriately.

The Commission does not consider there is a need for any changes to its powers and does not consider there is any basis for imposing further limitations on the exercise of its powers. The Commission is well placed to determine whether there should be changes to its procedures in order to meet legislative requirements and operational needs.

The Commission's powers under the ICAC Act were comprehensively considered in 2015 by the Independent Panel comprising the Hon Murray Gleeson AC and Bruce McClintock SC. In their report¹ the only recommended change was that power to make findings of corrupt conduct should exist only in cases of serious corrupt conduct. This recommendation was given effect through amendment of the ICAC Act by the insertion of s 74BA.² It is important to note that the Independent Panel rejected the proposition that any of the Commission's other powers should be limited so that they could only be exercised in circumstances where, objectively, there has been serious or systemic corrupt conduct.³ Relevantly, the Commission's investigation powers remain unchanged. It is not confined to investigating conduct that qualifies as serious corrupt conduct.

The following excerpts from the Independent Panel report in relation to the Commission's powers are relevant:

The question whether provision should be made in the Act, or in other legislation, such as the Supreme Court Act 1970, for general merits review of findings of corrupt conduct has been examined by the Panel. The Panel does not recommend this course, which would involve an inappropriate confusion of administrative and judicial powers.

¹ Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report, 30 July 2015.

² Independent Commission Against Corruption Amendment Act 2015.

³ Op cit page 64.

*The Panel has considered whether the ICAC's power to hold public inquiries should be removed, or limited. For reasons given in Chapter 9, it does not recommend that course.*⁴

The Commission's powers were also examined as part of the McClintock review conducted in 2004-5. It was noted in Mr McClintock's report on his review that little had occurred that would warrant a revision of the 1993 conclusion of the Parliamentary Committee that concerns about the Commission's misuse of its coercive powers have proved to be groundless. Mr McClintock concluded that the Commission's powers were appropriate to meet its objectives.⁵

Overview of powers

Under the ICAC Act the Commission has power to:

- obtain information from a public authority or public official (s 21)
- obtain documents (s 22)
- enter public premises to inspect and take copies of documents (s 23)
- conduct compulsory examinations (s 30)
- conduct a public inquiry (s 31)
- summons a witness to attend and give evidence and/or produce documents or other things at a compulsory examination or public inquiry (s 35)
- arrest a witness who fails to attend in answer to a summons (or is unlikely to comply with the summons) (s 36)
- issue or apply for the issue of a search warrant (s 40)
- prepare a report on an investigation (s 74).

In addition to these powers the Commission can:

- apply for telecommunications interception warrants and stored communications warrants under the *Telecommunications (Interception and Access) Act 1979*
- obtain approval under the *Law Enforcement (Controlled Operations) Act 1997* for the conduct of operations that would otherwise be unlawful
- obtain authorisation to use false identities under the *Law Enforcement and National Security (Assumed Identities) Act 2010*
- apply for warrants to use listening devices, tracking devices, optical surveillance devices and/or data surveillance devices under the *Surveillance Devices Act 2007*.

These powers are exercised in accordance with operational needs.

⁴ Ibid page x.

⁵ *Independent review of the Independent Commission Against Corruption Act 1988 Final Report*, paragraphs 6.4.1 and 6.4.2

Statistical information on the use of some of these powers in the 2013-14, 2014-2015 and 2015-16 periods is set out in the following table.

| Power | 1/7/13 to 30/6/14 | 1/7/14 to 30/6/15 | 1/7/15 To 30/6/16 |
|--|-------------------------|-------------------------|-------------------------|
| Notice to produce a statement (s 21) | 18 | 16 | 8 |
| Notice to produce a document or thing (s 22) | 609 | 879 | 522 |
| Notice authorising entry to public premises (s 23) | 0 | 3 | 0 |
| Summons (s 35) | 448 | 308 | 167 |
| Arrest warrant (s 36) | 0 | 0 | 0 |
| Order for prisoner (s 39) | 0 | 0 | 0 |
| Search warrant (s 40) | 33 | 17 | 11 |
| Assumed identity approvals | 3 | 0 | 3 |
| Controlled operation approvals | 0 | 0 | 0 |
| Surveillance device warrants | 4 | 2 | 2 |
| Telephone interception warrants | 21 | 5 | 13 |
| Stored communications warrants | 3 | 0 | 0 |
| Telecommunications data authorities issued | 963 | 550 | 266 |
| Number of compulsory examinations | 203 | 127 | 65 |
| Number of public inquiries | 9 | 7 | 6 |
| Number of public inquiry days | 84 | 64 | 48 |
| Investigation reports furnished to Parliament | 12 | 4 | 4 |

While the Commission's powers are extensive, they are not unique when compared to powers provided to other agencies including the Police Integrity Commission, NSW Crime Commission, the Australian Crime Commission, other state-based anti-corruption commissions, Special Commissions of Inquiry and Royal Commissions.

The Commission's experience over the past 28 years is that these powers are needed to effectively investigate, expose and prevent corrupt conduct.

How the powers are exercised

The Commission is ever mindful of the need to ensure it exercises its powers lawfully and ethically. To this end it has instituted various procedures that must be followed by Commission officers in considering whether a power should be exercised and how that power should be exercised.

The Commission notes that the exercise of its powers has been the subject of audits by the two previous ICAC Inspectors. The current ICAC Inspector has not conducted any similar audit. It is relevant to consider the findings of the former Inspector, the Hon Harvey Cooper AM, concerning his audit of the Commission's powers under ss 21, 22, 23, and 35 of the ICAC Act:

Accordingly in conducting this audit I have looked at each exercise of the powers to determine whether it has been taken for the purposes of an investigation into suspected corruption on the part of a public official or authority and, whether it was reasonable in all the circumstances balancing on the one hand the rights of the individual and, on the other hand, the need to protect society from the damage which results from corruption on the part of public officials or authorities.

The Commission has instituted and maintained a detailed and impressive system of controls designed to achieve this balance in its procedures. It achieves this goal by requiring the participation of a number of its officers in the approval process and the need for the facts and reasons supporting the request for the exercise of the power to be clearly documented.

Examination of the documentation indicates that each exercise of the powers has been appropriate and well founded.⁶

Similar findings were made by Inspector Cooper with respect to the other audits he conducted of the exercise of powers under ss 21, 22, 23 and 35 of the ICAC Act, the exercise of search warrant powers and the use of surveillance devices.

The Commission's Operations Manual sets out procedures for the exercise of relevant statutory powers. These procedures ensure that all relevant legislative requirements and internal Commission requirements are identified and addressed.

The Operations Manual is updated to reflect changes to legislation and procedure. Any changes to the Operations Manual must be approved by the Commission's Executive Management Group (EMG).

The Commission has also developed a General Investigation Standards and Procedure document, which sets out the minimum standards for the conduct of Commission investigations.

In addition, lawyers are assigned to each investigation. All applications for the exercise of statutory powers, whether under the ICAC Act or other legislation, are reviewed by the responsible lawyer to ensure they meet relevant regulatory and Commission requirements. Applications are then reviewed by the Executive Director, Legal.

If approved by the Executive Director, Legal, applications for the exercise of powers under the ICAC Act and some other statutes are submitted to the Commissioner or an Assistant Commissioner for final approval.

Applications for surveillance device warrants are considered by judges of the NSW Supreme Court. Applications for telecommunications interception warrants are usually made to judicial members of the Administrative Appeals Tribunal (Commonwealth). Applications for search warrants are considered by a magistrate or Local Court registrar.

⁶ *Report of an Audit into the Exercise by the Independent Commission Against Corruption of its Powers under Sections 21, 22, 23, & 35 of the Independent Commission Against Corruption Act 1988*, April 2013, page 36.

The Executive Director, Legal audits the Commission's assumed identity records as required under the *Law Enforcement and National Security (Assumed Identities) Act 1998* and the *Law Enforcement and National Security (Assumed Identities) Act 2010*.

The conduct of each investigation is monitored by the Commission's Investigation Management Group (IMG)⁷ which meets monthly. Reports on each investigation are submitted to each INMG meeting.

Decision to commence an investigation

The ICAC Act requires that in exercising its functions, the Commission:

- must regard as paramount, the protection of the public interest and the prevention of breaches of public trust⁸
- is required, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and to take into account the responsibility and role of public authorities and public officials to prevent corrupt conduct.⁹

In considering whether or not to conduct, continue or discontinue an investigation, the ICAC Act requires the Commission to have regard to such matters as it thinks fit including whether or not in the Commission's opinion:

- the subject matter of the investigation is trivial
- the conduct concerned is too remote in time to justify an investigation
- in the case of a complaint-initiated investigation, whether the complaint is frivolous, vexatious or not made in good faith.¹⁰

If both houses of the NSW Parliament refer a matter to the Commission to investigate, the Commission must investigate the matter.¹¹

Most investigations commence as preliminary investigations. A preliminary investigation may be conducted for the purpose of discovering or identifying conduct that might be made the subject of a more complete investigation or deciding whether to make particular conduct the subject of a more complete investigation. If appropriate, a matter may then be escalated by the IMG to a full investigation (known as an "operation").

A preliminary investigation may be approved as an operation where:

- there is evidence or reliable information sufficient to suggest the occurrence of corrupt conduct justifying a more complete investigation
- the subject matter of the investigation involves:
 - serious conduct; for example, where, bribery or another serious criminal offence is involved, the value of money or benefit alleged is significant or the seniority of the public official/s involved, or

⁷ Previously the Strategic Investigation Group (SIG).

⁸ Section 12 ICAC Act

⁹ Section 12A ICAC Act

¹⁰ Section 20(3) ICAC Act

¹¹ Sections 13(1)(b) and 20(3) ICAC Act

- systemic and/or organised conduct
- the investigation of the matter involves or is likely to involve the use of significant resources and Commission powers, for example because:
 - of the complexity and/or number of allegations being investigated
 - cross-divisional use of Commission resources or significant assistance/cooperation with an external agency may be required
 - the investigation requires the use of specialised skills and/or technology
 - compulsory examinations or a public inquiry are likely to be held
 - covert and intrusive methodologies such as surveillance devices, telephone intercepts and/or a controlled operation are likely to be necessary.

After conducting a preliminary investigation into conduct that may involve possible electoral or lobbying offences referred to it by the NSW Electoral Commission, the Commission must discontinue the investigation if the conduct does not involve any possible electoral or lobbying offences and it is not related to possible corrupt conduct that the Commission is already investigating and the Commission is not otherwise authorised to investigate the conduct.¹²

The investigation process

A case manager is appointed for each Commission investigation. This person is responsible for regularly reviewing the conduct of the investigation to ensure compliance with relevant procedures and investigation plans.

Investigation teams are multi-disciplinary. One or more lawyers are assigned to each investigation. If the matter involves potential system issues one or more corruption prevention officers will also be assigned.

The IMG is responsible for making and/or approving key decisions made in the course of a Commission investigation.

Investigations may focus on both historic and current activities. Methods of investigation will vary depending on the nature of the conduct under investigation. Investigation plans are prepared for all matters and each investigation is regularly assessed to determine the most appropriate investigation strategy.

Operational orders and tactical plans are required for any significant operational activity, such as the execution of a search warrant or the conduct of a controlled operation, to ensure compliance with the Commission's investigation and risk management precepts.

¹² Section 13A(3) ICAC Act.

A debrief is required following the execution of an operational order or tactical plan to assess performance against objectives and identify possible improvements to systems, procedure and methodology.

The primary purpose of a Commission investigation is to determine whether any:

- corrupt conduct, conduct connected with it or conduct liable to allow, encourage or cause the occurrence of corrupt conduct has occurred, is occurring or is about to occur
- conduct referred by the NSW Electoral Commission could involve possible criminal offences
- laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct
- methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

Compulsory examinations or a public inquiry may be conducted as part of the investigation, however, not all investigations require compulsory examinations or involve a public inquiry.

The conclusion of an investigation may result in no further action or a number of different actions. These may include referral to a public authority of information that is relevant to the exercise of its functions (such as information for consideration of disciplinary action or system changes to reduce the likelihood of corrupt conduct), the dissemination of intelligence and other information, a brief of evidence for referral to the NSW Director of Public Prosecutions (DPP) or the furnishing of a report on the investigation to the Presiding Officers of the Parliament. The Commission is required to prepare reports where it has conducted a public inquiry and where matters are referred to the Commission by both Houses of Parliament.¹³

2. The current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform

The Commission makes changes to its structure from time-to-time to address operational needs and budgetary restraints. The Commission does not consider there is any need to change its governance. As a leading anti-corruption agency the Commission is a model for structure and governance that represents good practice. This is recognised by other Australian and international agencies that regularly consult with and obtain advice from the Commission on best practice.

The Commission's structure

The Commission is headed by a Commissioner who exercises the functions conferred or imposed on the Commissioner under the ICAC Act and other legislation. The Commissioner oversees the Commission's work.

¹³ Section 74, ICAC Act.

The position of Deputy Commissioner is responsible, under delegation from the Commissioner, for the day-to-day oversight of staff and operations and for providing high-level operational and strategic advice to the Commissioner and executives.

The roles of the Commission's operational areas are described below.

The **Investigation Division** comprises two operational areas: the investigations section, and the investigations services section.

Until recently the investigations section consisted of the preliminary investigation team and three operational investigation teams. A reduction in funding for the Commission for 2016-17 has resulted in the disbandment of the preliminary investigation team, leaving only three investigation teams. Personnel within the investigations section include investigators, forensic accountants, intelligence analysts and support staff. The investigations services section includes surveillance officers, technical and forensic personnel and property and products support staff.

Sharon Loder is the Executive Director of the Investigation Division. In 2015–16 the division was funded for 50 full-time equivalent (FTE) positions. In 2016-17 the division is funded for 44 FTE positions.

The **Corruption Prevention Division** carries out the corruption prevention and educative functions described under the ICAC Act. The principal functions include examining the laws, practices and procedures of public officials, while also educating, advising and assisting public authorities and the community on ways in which corrupt conduct may be eliminated.

The division also conducts analyses of significant corruption risk areas in the public sector and publishes reports containing guidelines and recommendations to assist public sector managers to effectively and efficiently prevent corruption.

Dr Robert Waldersee is the Executive Director of the Corruption Prevention Division. In 2015–16 the division was funded for 20.8 FTE positions. In 2016-17 the division is funded for 16.11 FTE positions.

The **Legal Division** assists the Commission to perform its principal functions and to exercise its statutory powers in a lawful, effective, ethical and accountable manner by providing high-quality, accurate and timely legal services.

Commission lawyers assist in the planning and conduct of all investigations and provide advice, as required, to other sections of the Commission. They may also act as counsel in compulsory examinations. Commission lawyers prepare briefs for, and instruct counsel at, public inquiries. They also assist with the preparation of investigation reports, oversee the preparation of briefs of evidence for submission to the DPP and liaise with DPP lawyers in relation to answering requisitions for further evidence and the conduct of any prosecutions.

Roy Waldon is the Executive Director of the Legal Division and Solicitor to the Commission. In 2015–16 the division was funded for 10.6 FTE positions. In 2016-17 the division is funded for 9.6 FTE positions.

The **Corporate Services Division** is a business partner with the operational divisions of the Commission, and is responsible for providing support services to enable the Commission to undertake its statutory functions. It provides administrative, security, financial, and information management and technology services. The division also manages other functions, including recruitment, payroll, risk management and procurement.

Andrew Koureas is the Executive Director of the Corporate Services Division. In 2015–16 the division was funded for 19 FTE positions. In 2016-17 the division is funded for 19 FTE positions.

The **Assessments Section** receives and registers all complaints, reports (whether from external agencies or internally generated) about alleged corrupt conduct, general enquiries and feedback. It also manages and reviews matters that the Commission refers for investigation by public sector agencies under s 53 and s 54 of the ICAC Act.

Andrew Garcia is the manager of the Assessments Section. In 2015–16 the section was funded for 14 FTE positions. In 2016-17 the section is funded for 11 FTE positions.

The **Communications and Media Section** is responsible for media liaison including for public inquiries and corruption prevention activities, preparing reports and other papers for publication, managing the Commission's Internet and Intranet sites and providing communications advice for all Commission projects

Nicole Thomas is the Manager of Communications & Media. In 2015–16 the section was funded for 3 FTE positions. In 2016-17 the section is funded for 3 FTE positions.

Internal governance

The Commission's governance structure includes:

- the Executive Management Group (EMG) to oversee corporate governance and budgeting, and provide overall strategic direction
- the Investigation Management Group (IMG) to oversee investigations
- the Prevention Management Group (PMG) to oversee Commission corruption prevention activities.

The EMG comprises the Commissioner, Deputy Commissioner and all executive directors. It usually meets fortnightly and is responsible for:

- reviewing and recommending:
 - strategic and business plans
 - risk management
 - general policies, procedures and delegations
 - codes of conduct
 - the overall management framework
- considering and determining corporate-wide management commitment to:

- corporate governance
- management of information systems
- human resources
- finance and general administration
- communication and marketing
- approving and overseeing major corporate projects by:
 - determining the appropriate level of progress reporting required for each project
 - ensuring effective administration and management of organisational resources
 - making decisions on a suitable course of action when a project is delayed or new information is revealed
 - endorsing strategic directions and broad operational priorities
 - ensuring that Commission staff comply with the policies relating to project planning and management.

The IMG comprises the Commissioner, Deputy Commissioner and all executive directors, except the Executive Director, Corporate Services. It oversees Commission investigations, preparation of investigation reports, preparation of briefs of evidence for submission to the DPP, and the progress of criminal prosecutions arising from Commission investigations. The IMG meets monthly.

The functions of the IMG include:

- determining the appropriate level of reporting for, and overseeing the progress of, investigations, investigation reports, briefs of evidence and criminal prosecutions
- providing direction and advice on proposed investigative strategies
- deciding whether a preliminary investigation should be escalated to a full investigation
- making and/or approving key decisions for an investigation
- endorsing and/or determining investigation priorities.

Members of the PMG are the same as for the EMG. It oversees the Commission's corruption prevention activities, and usually meets monthly.

3. The current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform

The Commission does not propose any changes to the current oversight arrangements. The issue of resourcing of the ICAC Inspector is a matter for the ICAC Inspector to address.

The Independent Panel did not make any recommendations to change the present oversight arrangements. A submission by the Bar Association that there should be an oversight body to

review a decision to hold a public inquiry was considered and rejected by the Independent Panel. The Independent Panel considered that:

Both because it is impractical to introduce a single purpose oversight body at a point where an investigation is sufficiently advanced that a public inquiry is under consideration, and because the present scheme and the requirements of section 31 of the Act appear adequate, the Panel does not consider any change to or further restrictions upon the ICAC's powers to hold a public inquiry should be introduced.¹⁴

The two main external oversight bodies for the Commission are the Parliamentary Committee on the ICAC and the Inspector of the ICAC. The Commission is also externally accountable for its work through:

- accounting to the NSW Treasury and the Auditor General for the proper expenditure of funds
- inspection by the NSW Ombudsman of records of telecommunications interceptions, controlled operations and the use of surveillance devices
- inspection by the Commonwealth Ombudsman of records relating to stored communications warrants, preservation notices and access to telecommunications data
- reporting to the NSW Attorney General and the judge who issued the warrant for each surveillance device warrant
- requirements for annual reporting, including those in the ICAC Act.

The Commission's actions are also reviewable by the NSW Supreme Court in the exercise of its administrative law jurisdiction.

The *Public Finance and Audit Act 1983* requires the Commission to keep books and records in relation to the Commission's operations and to prepare a financial report for each financial year. This act requires the Commission to submit the financial report to the Auditor General and the NSW Premier, as the minister responsible for the Commission. The financial report must:

- be prepared in accordance with Australian Accounting Standards
- comply with any written directions of the Treasurer as to form and content
- exhibit a true and fair view of the Commission's financial position and performance.

The Auditor General is required to audit the Commission's financial report. Details of the Commission's financial report and the Auditor General's audit are contained in the Commission's annual reports.

¹⁴ Panel report, paragraph 9.4.10.

The NSW Ombudsman inspects the Commission's records of telecommunications interceptions, surveillance device warrants, and controlled operations to measure compliance with statutory obligations.

The Commonwealth Ombudsman inspects the Commission's records relating to stored communications warrants, preservation notices and access to telecommunications data.

Section 20(5) of the ICAC Act requires the Commission to provide reasons to complainants and those who report possible corrupt conduct under s 11 of the ICAC Act of its decision to discontinue or not commence an investigation and to inform each such person of the reasons for its decisions.

Other ways in which the Commission demonstrates accountability to the community include conducting public inquiries, posting public inquiry transcripts and relevant exhibits on the Commission's website, and publishing investigation reports and other material prepared by the Commission.

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

The Commission considers that the outcome of legal action taken in response to findings of corrupt conduct is adequately reflected on the public record and there is no need for any changes.

To the extent this section of the terms of reference concerns Recommendation 15 of the Report, the relevant issues have been dealt with in the Commission's submission to the Premier.

As noted in that submission, Commission procedure addresses situations where persons are not prosecuted or acquitted following a Commission recommendation that consideration be given to their prosecution. The Commission publishes on its website and in its annual reports the outcomes of all such recommendations. This means that if the DPP decides to not prosecute a person, or a person is found not guilty of a criminal offence, then this information is published on the Commission's website and in the next annual report.

In the last few years there have been a number of court challenges to corrupt conduct findings made by the Commission. These include the following cases where proceedings were dismissed with costs awarded to the Commission:

- *Duncan v ICAC* [2014] NSWSC 1018 and [2016] NSWCA 143
- *McGuigan & Poole v ICAC* [2014] NSWSC 1018 and [2016] NSWCA 143
- *Atkinson v ICAC* [2014] NSWSC 1018 and [2016] NSWCA 143
- *Petch v ICAC* [2014] NSWSC 1693

- *D'Amore v ICAC* [2012] NSWSC 473 and [2013] NSWCA 187.

In 2015 Supreme Court proceedings were commenced by Andrew Poole, Michael Chester and Craig Ransley seeking declarations that the corrupt conduct findings made against them in the Commission's Operation Acacia report were wrong in law and a nullity. Consent orders were filed in September 2015 discontinuing the proceedings involving Messrs Poole and Chester. On 28 September 2015 orders were made in the Supreme Court dismissing Mr Ransley's proceedings with costs.

Other proceedings have involved unsuccessful attempts to quash or have Commission reports declared a nullity – see *NuCoal Resources Ltd v ICAC* [2015] NSWSC 1400) and *Cascade Coal & Ors v ICAC* [2016] NSWCA 143).

There has been one recent case in which the NSW Supreme Court declared that a finding of corrupt conduct in the Operation Jasper report was not made according to law and was a nullity. This was the matter of *Kinghorn v ICAC* [2014] NSWSC 1018. The Commission filed a summons seeking leave to appeal this decision. On 15 April 2015 the High Court delivered its judgment in *ICAC v Cunneen* [2015] HCA 14. That judgment affected the corrupt conduct finding in relation to Mr Kinghorn because that finding was made on the basis that his conduct could adversely affect the "efficacy" rather than the "probity" of the exercise of official functions. As the Commission then had no arguable basis to sustain its appeal it consented to the dismissal of its summons seeking leave to appeal. On 6 May 2015, the *Independent Commission Against Corruption (Validation) Act 2015* ("the Validation Act") came into effect. One effect of the Validation Act was to validate findings of corrupt made before 15 April 2015 where the finding was made on the basis the conduct could adversely affect the efficacy of the exercise of official functions. As a result, the Commission filed a notice of motion on 7 May 2015 seeking to have set aside the consent order dismissing its appeal in the Kinghorn matter. On 28 October 2015 the NSW Court of Appeal dismissed the Commission's notice of motion (*ICAC v Kinghorn* [2015] NSWCA 342).

The Commission will record this outcome in its 2015-16 annual report and in the section of the Commission's website dealing with the findings made in the Operation Jasper report.¹⁵

The outcome of all litigation matters is reported in the Commission's annual reports.

Litigation matters involving the Commission are generally dealt with in open court. As matters of public record, court judgments are published and are readily accessible. In some cases judgments also receive media attention.

5. Any other related matters

The Commission has no other related matters it wishes to raise with the Committee at this stage.

¹⁵ Details concerning this investigation have been removed from the Commission's website at the request of the DPP pending finalisation of certain prosecution proceedings.

APPENDIX 1: LIST OF THE ICAC INSPECTOR'S RECOMMENDATIONS

Recommendation 1

The Examinations conducted by the ICAC should be in private.

Recommendation 2

There should be a provision (even if based to some extent on the model of Victoria or South Australia) which requires that: only in exceptional circumstances should a person not be informed before the commencement of a Compulsory Examination or Private (Public) Inquiry as to the nature of the allegation or complaint being investigated. Amendments to ss. 30, 31 and 35 would be required (as well as other sections within Div. 3).

Recommendation 3

There should also be a provision which requires that in a summons to a person to appear before the ICAC for a Compulsory Examination or Private (Public) hearing, the nature of the complaint or allegations being investigated shall be set out unless to disclose such information would be likely to prejudice the conduct of the investigation or would be contrary to the public interest. Further the Commission where it has determined not to disclose the nature of the allegations or complaint being investigated must notify the Inspector in writing within three days of the issue of the Summons with details of the Summons, the witness, and the reasons upon which the ICAC relies for its conclusion as to prejudice to the conduct of investigations or it being contrary to the public interest.

Recommendation 4

In the event that "public" inquiries are retained, or even if private examinations replace them, there should be a requirement that ICAC when determining whether or not the public interest is served, to have regard to and to specify the elements of the public interest to be served and to consider whether the public interest would be better served by referring the matter to another public authority or to the DPP.

Recommendation 5

Section 112 of the Act be amended to reflect the provisions of both Victorian and Queensland legislation to enable persons to complain to the Inspector without fear of breaching s.112 or any other cognate suppression order.

Recommendation 6

Section 74BA(2) should be repealed.

Recommendation 7

Section 22 be amended whereby the form of any notice that requires production of documents or other things to exclude a requirement for production "forthwith". Amendments should be made where appropriate to ensure that a Notice to Produce allows a reasonable time for the

production according to the terms of the Notice which must specify a time and place otherwise than "forthwith" and before which no production need occur. Further amendments to s.22 suggested are:-

- 1) That a notice under s.22 of the ICAC Act should only be granted by:*
 - a) by a Commissioner or Assistant Commissioner in circumstances where a particular investigation is nominated; for example: "Operation Smithsonian";*
 - b) in circumstances where the nominated document or thing might reasonably be regarded as to leading to a chain of inquiry that might advance the nominated inquiry;*
 - c) the party upon whom the s.22 Notice to Attend and Produce is served be provided with a reasonable time to respond to the requirements as set out in the Notice.*
- 2) That a reasonable time also includes a sufficient time for the party upon whom the Notice to Attend and Produce is served to obtain relevant legal advice and initiate setting aside procedures.*

Recommendation 8

I further recommend that a new s.22A be introduced into the ICAC Act providing that if a document or thing has been produced to the Commission pursuant to a s.22 Notice to Attend and Produce:

- 1) Where documents or other things are produced to ICAC the person nominated to produce the documents or other things should be given a receipt identifying each of the documents or things produced.*
- 2) The Commission may retain the document or other thing if and for so long as its retention by the Commission is reasonably necessary for the purposes of the investigation nominated in the Notice to Produce.*
- 3) If retention of the document or other thing by the Commission is not or ceases to be reasonably necessary for such purposes, the Commission shall cause it to be delivered to:*
 - a) The person who appears to the Commission to be entitled to possession of the document or other thing, or*
 - b) The Attorney General or Director of Public Prosecutions with a recommendation as to what action should be taken in relation to the document or other thing; provided that any such delivery must be notified to the person who appears to the Commission to have been otherwise entitled to possession of the document or thing before or at the time of any such delivery.*

Recommendation 9

Section 57B should be amended to provide a new function to the Inspector namely an expanded role to assess the appropriateness of the Commission's determination not to investigate a complaint or a matter referred to it by another public authority or the DPP.

Recommendation 10

Either by amendment to the Memorandum of Understanding or otherwise by agreement the Inspector should be informed of all assessments made by the ICAC, outcomes thereof and the reasons therefor.

Recommendation 11

The Independent Commission Against Corruption (Commissioner) Act 1994 should be repealed and all matters relevant to the appointment of the Commissioner should be within the ICAC Act 1988.

Recommendation 12

If there is to be a Deputy Commissioner that should be a statutory appointment under the ICAC Act 1988 of limited duration (5 years).

Recommendation 13

Contingent upon whatever advice the Crown Solicitor has given to the Parliament, s.64 of the Act should be considered for the purposes of amendment to ensure that subject to safeguards as to purely operational matters both the ICAC and its Inspector are answerable on all matters to the Parliament of New South Wales.

Recommendation 14

The Office of the Inspector should be a full time position and Assistant Inspector(s) part time. The Inspector should have power to employ staff similar to the powers provided to ICAC by s. 104. The present position of principal legal advisor should be upgraded to Solicitor to the Inspector.

Recommendation 15

Exoneration Protocol: Consideration should be given to the introduction into the legislation of something with such a title. It should provide that in circumstances where there is an absence of a criminal conviction arising from any prosecution based upon the same or similar or cognate facts as warranted the making by the ICAC of a finding of corrupt conduct, the person against whom the finding was made may make an application to the Supreme Court for an expunging of the records of the ICAC or to have the findings set aside. The ICAC would of necessity be a party to such proceedings.

Recommendation 16

By legislation or other means such as the creation of relevant Regulations, the conduct of proceedings by ICAC, whether in public or in private, be embodied in a Code or set of Rules.