Submission No 16

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

Organisation:

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Position:

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Response To Inspector's Report To The Premier

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Primary Comment

1) There are two basic streams running through the inspector's report. Firstly, he is ideologically fundamentally opposed to ICAC's powers of investigation. Secondly, he seeks to alter the character of ICAC significantly, in ways that would make it ineffective, and would place the office of inspector over ICAC as controller and censor of its operations.
2) Accordingly, I will not comment on every one of his recommendations. If the Committee is in principle in agreement with the inspector, there is little point in discussing every issue he raises. I will, however, comment on the most egregious recommendations. As to the others I think they are entirely unnecessary.
3) The Gleeson/McClintock Panel put forward none of the inspector's recommendations. The members of that panel were eminent persons, very experienced in the field, and whose recommendations (which were made after an exhaustive review) were adopted by Parliament. It would be most unfortunate if they were to be second-guessed at this stage.

Is there a need for change?

4) ICAC was created in 1988. There has been more than one commission of inquiry into ICAC, apart from the Gleeson/McClintock review. None of the commissions has recommended anything like the far-reaching changes proposed by the current inspector.
5) Apart from the High Court delivering an unexpected majority judgment in *Cunneen* that reduced ICAC's jurisdiction, nothing material has changed since the various parliamentary inquiries that have taken place in the past.
6) Since 1988, there have been several commissioners and several inspectors. None of them has recommended such changes. The current relationship between the commissioner and the inspector is malignant. This unfortunate state of affairs has never happened before. It suggests that the problem is personal and not structural in nature.
7) The inspector in his report speaks of ICAC "trashing" reputations. He impliedly suggests that ICAC has undeservedly trashed the reputations of many people. Who are these people?
   (a) Ms Cunneen cannot be classed as one of them. No inquiry was held into her conduct. ICAC failed before the High Court on a jurisdictional point having nothing to do with whether she was guilty of corrupt conduct or not. Ms Cunneen did everything in her power to prevent the allegations made against her being investigated in a public hearing. She succeeded. The detail of those

allegations only surfaced when they were raised before this Committee.

(b) Many politicians have resigned because of evidence of breaches of the electoral legislation led at a public hearing. The consequential report has not yet been published. How then could it be said that their reputations were *undeservedly* harmed? That, after all, depends on the merits of the forthcoming report, or any legal action that might follow it. The very fact that they resigned suggests that there were grounds for their departure

(c) Murray Kear, the former SES Commissioner, has alleged that his reputation was undeservedly trashed. He failed to disclose or explain why Ms Tara McCarthy, the whistleblower who reported him, was paid over $900,000 in damages for wrongful dismissal and why he was the subject of a damning report by the Public Service Commissioner, following which he resigned

(d) Mr Kinghorn had his corrupt conduct finding set aside by a single judge of the New South Wales Supreme Court. ICAC appealed against this but because of the High Court decision in Cunneen, later abandoned their appeal. Subsequently, in *Duncan v ICAC*, the Court of Appeal held that the Supreme Court judge concerned had erred.

(e) No one else springs to mind.

8) The only time that ICAC has had one of its decisions set aside by the courts is when the High Court limited its jurisdiction in *Cunneen.*

9) The notion that ICAC was exceeding its powers first surfaced in *Cunneen* during argument in the Court of Appeal when it was raised – and then adopted - by two judges acting, as it were, of their own accord. Their reasoning, however, was not followed by the majority in the High Court. The majority held (without the point having been raised by Ms Cunneen's counsel) that, under the ICAC Act, corrupt conduct could only exist if the conduct could adversely affect the *probity* of public officials. It is their insertion of this word that has resulted in the removal of ICAC's power to investigate where a dishonest person deceives innocent public officials. Strangely, in argument in the High Court, no one, not even Ms Cunneen's counsel, mentioned the word "probity". Three of the nine judges involved in the Cunneen proceedings would have upheld ICAC's jurisdiction.

10) Between 1990 and 2004, no one thought that the numerous investigations ICAC conducted concerning third parties who had deceived or tried to deceive innocent public officials fell outside ICAC's powers. Not ICAC, nor the persons being investigated, nor their lawyers, nor any of the courts before whom cases involving ICAC were brought, and not even Parliament. Parliament has from time to time in the past amended the ICAC Act. On those occasions, Parliament did not regard it necessary to interfere with ICAC's jurisdiction as it had been construed over many years.

11) How ICAC, in these circumstances, could be criticised for believing that it had the jurisdiction to investigate Ms Cunneen, is difficult to understand.

12) ICAC has a national and international reputation as a leader in the

field of fighting-corruption. Rarely does a month go by without delegations from different countries in Asia, Africa and the South Pacific (including New Zealand) visiting ICAC for training courses and general educational purposes. ICAC officers are invited all over the world to address anti-corruption conferences. While I was Commissioner, I received a communication from the deputy director of the department of financial affairs and public procurements of the French National Assembly. The deputy director was seeking advice on an administrative aspect relating to the management of anti-corruption agencies. She prefaced her remarks by saying:
The New South Wales system is often quoted as a model.

13) These matters are testament to the world-wide reputation that ICAC enjoys, and great care should be taken not to damage it. In my submission, the inspector's recommendations, if accepted, would indeed cause irreparable damage to ICAC.

14) I respectfully submit that there are no circumstances that at this stage warrant a change in the ICAC Act.

The notion that examinations should be carried out in private

15) Our system of democratic government demands open justice, justice that occurs in public, with appropriate media access.

16) The argument could not be better put than in the words of Sir Anthony Mason, former chief justice of Australia, in *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97, when discussing a possible restraint on the public hearings of a Royal Commission. He said:

> *However, this restraint, limited though it is, 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. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. ....*
> *The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ... , lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.*
> *... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.*

17) Operation Jasper, which involved, amongst others, Edward Obeid, is a prime example of what was being said by Mason J (as he then was). Had the proceedings been held in secret, the public would have had no idea of the extraordinary detail of the corrupt machinations of those involved. Day after day, over a period of some three months, the media published reports that enthralled the public as the highly complex story unfolded through the series of witnesses who were called. This had an enormously beneficial effect on public attitudes.

Requests by bureaucratic departments and agencies for educational classes on how to avoid corruption flooded ICAC. The need to be careful and aware began to permeate the consciousness of public officials. Had the proceedings been held in secret, with no media reporting, the only means of knowledge the public would have had would be the 172-page report issued by ICAC which, by necessity, contained only a summary of the massive detail of the evidence that had been led over many months. The report would have been the subject of scrutiny by the media for a few days and the public would have been advised of the findings in further summarized form by a few relatively brief reports during this time period. The drama of the gradual revelations and the powerful impact of the investigation would not have exited and the single impact would have dissipated very quickly. The principal statutory object of ICAC, namely to expose corruption, could not have been achieved.

18) The notion that ICAC could properly expose corruption by secret proceedings is absurd. To paraphrase Mason J, the ultimate worth of ICAC is bound up with the publicity that its hearings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.

The need to inform persons before a hearing of the nature of the complaint being investigated

19) Procedural fairness at a trial should not be confused with what amounts to procedural fairness at an investigation constituted by an ICAC investigation.

20) It must be borne in mind that, by the ICAC Act, the hearing is a form of *investigation* (such as that carried out by the police). It is not a judicial hearing. ICAC cannot find a person guilty of a crime. Its task is to discover corruption and expose it. This is recognized in several sections of the ICAC Act. See for example ss 30(3), 30(4), 31(6) and 31(7). There is no need to expand upon or change these provisions.

21) Of course, before making findings ICAC is required to inform a person of the complaint being investigated and the corrupt conduct alleged. ICAC needs to do this in sufficient time to give persons a fair opportunity to defend themselves. That is the present state of the law.

22) It would be harmful to introduce more rigid provisions as suggested by the inspector. As the hearing is an investigation, often – especially during the early stages of a hearing - ICAC does not know all the facts relevant to the corrupt conduct being investigated. The discovery of those facts is an important purpose of the hearing. To force ICAC, in absolute terms, to disclose the nature of the complaint being investigated at the beginning of a hearing, and then to penalize it in some way if it does not, could seriously compromise an investigation and prejudice what it is trying to achieve. Imagine if the police were obliged to make the kind of disclosure suggested each time they interviewed a person in connection with a suspected crime!

The abolition of the requirement to produce documents "forthwith" (Recommendation 7)

23) The need for a person to produce documents forthwith is necessary for the smooth running of a hearing. Often during a hearing it is learned that relevant documents are in a person's possession and those documents are needed to be put to a witness who is in the witness box or soon to be called. If the documents are not produced forthwith, the hearing may have to be adjourned until they are produced. This, on the inspector's proposal, could take days. Imagine the expense and inconvenience if these kinds of delays ensue. In Operation Jasper over 50 barristers were involved. A three-day adjournment while a witness took time to produce documents could cause hundreds of thousands of dollars costs to be wasted.

The "Exoneration Protocol"

24) Nowhere is the inspector's failure to understand the practical and legal operation of the ICAC Act more apparent than in Recommendation 15. This proposes an opportunity to persons found to have been corrupt to "expunge" findings of corrupt conduct where there is no 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".

25) The basic problem with this recommendation is that, by the ICAC Act, a finding of corrupt conduct does not depend on a finding that the person has committed a criminal offence. In fact, ICAC is prohibited from making such a finding. The point was put by Basten JA in the recent decision of the Court of Appeal in *Duncan v ICAC* as follows:

> *.It is clear from the legislative scheme identified above that s 13(3A) does not impose an obligation [on ICAC] to be satisfied that an offence has in fact been committed. Rather, that as to which the Commission must be satisfied is the capacity of the facts found to constitute an offence, if proved by admissible evidence to the satisfaction of the appropriate court.*

26) In other words, to make a corrupt conduct finding, ICAC must find that the facts proved in a public hearing would constitute a criminal offence if those facts were to be proved by admissible evidence in a criminal court. The point to bear in mind is that ICAC - in making findings of fact leading to corrupt conduct findings – may, subject to one condition, rely on evidence not admissible in a criminal trial. That condition is that those facts – assuming they are proved by other, notional, evidence led at the criminal trial (which evidence need not be known or identified by ICAC) – must, together, constitute a criminal offence.

27) For example, ICAC – subject to that condition - may find corrupt conduct by relying on admissions by a witness that are not admissible in a criminal trial. To reiterate the point, the condition is that those facts, if they were to be proved by other, different evidence at the criminal trial (which ICAC need not know of or identify), must constitute a criminal offence.

28) In practice it can occur that other different admissible evidence does not exist. In those circumstances, no prosecution would be launched. But that does not affect ICAC's power to make a legitimate finding of corrupt conduct. That is because at the stage that ICAC finds corrupt conduct, the existence of that other evidence is assumed – it is purely hypothetical.

29) I will provide another example which may illustrate this approach which, although rather complex, has for many years been part and parcel of the ICAC Act and has worked without difficulty. Sometimes it occurs that the DPP believes that a particular witness will give other, admissible, evidence of facts earlier proved before ICAC by admissions by the person accused. Those admissions are admissible before ICAC but are usually not admissible in a criminal trial. The DPP may, because he considers that the witness concerned will be believed, launch a prosecution. But at the criminal trial the jury may in fact not believe that witness and the accused will not be convicted. But the failure to convict in those circumstances would say nothing about the cogency of the different evidence on which ICAC relied (namely, the accused's own admissions) to make the corrupt conduct finding.

30) Accordingly, it is an absurd proposition that a person should be allowed to expunge a corrupt conduct finding properly made simply because there is no evidence admissible in a criminal court to support a finding of a criminal offence. This would truly be a case of testing the quality of apples by reference to oranges.

31) It should also be borne in mind that criminal cases are conducted by the DPP, not ICAC and ICAC may have conducted the criminal trial entirely differently. In these circumstances it is quite unfair to saddle ICAC with responsibility if a criminal trial is unsuccessful.

Placing the inspector in charge of ICAC and creating an inspectorate bureaucracy

32) Recommendations 9, 10,and 14 have the effect of the above sub-heading. For the sake of the future of ICAC these recommendations should be consigned to oblivion.

33) ICAC contains very many provisions that enable it to act as a corporate body with the commissioner in effect the chief executive officer. In practice the Commissioner never makes an important decision without consulting the board, and the internal procedures of ICAC are designed to ensure that this occurs. There is a great deal of expertise and experience of management and fighting corruption within the agency. The inspector has generally been a senior lawyer without any past experience in fighting corruption. This may to a degree apply also to the commissioner when first appointed, but the commissioner learns very quickly by being on the job every day and working intimately with the experts. The inspector is divorced from all of this and is simply not qualified, acting on his own accord, to override the Commissioner in regard to policy and operational decisions.

34) In any event giving the inspector the powers sought would destroy the morale of the agency which will object strongly to being controlled by

an outside person. ICAC is s a tightly knit body which operates generally in a hierarchical but nevertheless consultative and intimate manner. The proposal is a grossly inefficient way of running an anti-corruption agency.

35) Previous inspectors have recognized this state of affairs and have been content with the powers now conferred upon them by the ICAC Act. Nothing that has occurred during the tenure of the current inspector justifies the expansion of powers he seeks.

36) The Gleeson/McClintock Panel considered the appointment of a committee to supervise the Commissioner, but rejected the idea. The recommendation now is to place the inspector, not a committee, over the Commissioner. The proposal should likewise be rejected.

37) An important issue is: who is going to inspect the inspector? Past history relating to the current inspector suggests that a censor of the inspector's conduct would be appropriate.

38) In addition, the inspector wishes to increase his staff with the concomitant increase in costs. This at a time when there has been serious reductions in ICAC's budget, leading to several retrenchments all down the line, including able officers of long-standing authority. I need say nothing further about this really egregious suggestion; the facts speak for themselves.

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