

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

Organisation:

Name: Mr Bruce McClintock SC

Position:

Date Received: 22 July 2016

Dear Mr Tudehope

Thank you for your letter dated 16 June 2016 and for giving me the opportunity to comment on the important issues before Parliament's ICAC Committee.

As I have already expressed my views (jointly with the Honourable A M Gleeson AC QC) in the Report we prepared last year and because that Report is referred to in the Committee's Terms of Reference, any extended submission by me is unnecessary. In addition, I dealt with many of the issues now before the Committee in my Final Report on the *Independent Review into the Independent Commission against Corruption Act 1988* which I prepared in 2005. See http://www.dpc.nsw.gov.au/data/assets/pdf_file/0020/11369/icac.pdf

I will refer to these reports as the 2005 Report and the 2015 Report respectively.

References to Recommendations are to the numbered recommendations in the ICAC Inspector's Report to the Premier dated 12 May 2016.

Recommendation 1: Private Examinations

I disagree—see para 6.5.25 of the 2005 Report and section 9.4 of the 2015 Report

Recommendations 2 & 3: Informing Persons as to nature of Enquiry

I disagree— the ICAC Act and the common law already impose substantial “due process” obligations on the ICAC. These appear to me to be sufficient.

Recommendation 4: Specify Public Interest

I do not understand what this recommendation would achieve.

Recommendation 5: Complaints to Inspector

I support this recommendation.

Recommendation 6: Repeal section 74BA(2)

I do not support this recommendation. It depends to some extent on the Inspector's reading of the 2015 Report. It would be inappropriate for me to engage in any present explanation of what was intended by the relevant part of that Report, section 9.6, which is available for anyone to read. Moreover, it was a joint report. That said, I have read ICAC's May 2016 response to the Inspector's Report and it seems to me there is force in what appears there concerning this recommendation.

Recommendations 7 & 8

I do not wish to make any submission on these recommendations.

Recommendation 9: Decisions not to Investigate

I disagree with this recommendation, which appears to me to have no utility. First, the Inspector's existing powers under section 57B extend to investigating any unjustified refusal to investigate by the ICAC. Secondly, if it were felt that there was some systemic issue (e.g. the ICAC was failing to investigate a particular category of complaint or complaints from a particular category of

complainant) or if the ICAC's processes for deciding what matters to investigate or not were deficient, section 57B(1)(a) enables the Inspector to audit the operations of the ICAC so as to ensure compliance with the law.

These powers should be more than sufficient to deal with any problematic failure to investigate.

On this point, it should be noted that the office of ICAC Inspector was created and section 57B inserted in the Act as a result of a recommendation in the 2005 Report. The Inspector's audit function was intended to be significant and designed to ensure that the ICAC in all aspects of its activities not merely complied with the law but engaged in best practice. It is a matter of concern that no Inspector's audits have been carried out for some years, so I understand.

Recommendations 10-13

I do not wish to make any submission on these recommendations.

Recommendation 14: Full time Inspector

I do not support this recommendation although I agree with ICAC's submission that this, ultimately, is a policy matter for Parliament and the Government. That said, on my knowledge of the functions and operations of ICAC and the Inspector, it should be possible for the Inspector to do his or her job in no more than 90-100 days per annum, that is, an average of about two days per week. Moreover, there is something incongruous in appointing a full time watchdog to a watchdog! *Quis custodiet ipsos custodes?* I would also point out that if there is to be a full time Inspector he or she will be in a notionally superior position to the ICAC Commissioner and would presumably expect a salary higher than, or one at least commensurate with, that of the Commissioner. Substantial expenditure would be involved as a result, particularly if the remainder of this recommendation concerning staffing were adopted.

Recommendation 15: Exoneration Protocol

I do not agree with this recommendation which seems to me to reveal a misunderstanding of ICAC's role, its purpose, the Act itself and, indeed, of our criminal justice system.

When the Greiner Government created the ICAC it consciously avoided making one of its principal purposes the securing of criminal convictions and that has remained the situation since then. The matter arose during the 2005 review and I said, in paras 3.4.25–3.4.26 that ICAC's should remain as a fact finding investigative body and that its principle task should remain to investigate corruption and reveal it by its findings. I recommended against the securing of criminal convictions being made a principle function of ICAC. I also pointed out (para 3.4.31):

Neither prosecution nor, still less, conviction, will necessarily follow from a finding of corrupt conduct. This is because ICAC's coercive powers, while available to it to facilitate its investigation of corrupt conduct, do not necessarily or even probably produce information which is admissible in criminal proceedings. Thus, it is inevitable that a proportion of cases where ICAC finds corrupt conduct will not result in any prosecution, even [though] its findings were appropriate on the information available to ICAC.

The point is that ICAC makes findings on the balance of probabilities and on material that is not admissible in criminal proceedings. An obvious example is material obtained against someone

subsequently charged in a compulsory examination. Such material is not admissible against the person in any subsequent civil, criminal or disciplinary proceedings—see section 37(3) ICAC Act.

As a result there will necessarily be some different results in subsequent criminal proceedings—the evidence will be different and the standard of proof, beyond reasonable doubt, much more difficult to achieve. That does not mean that the person in question did not engage in corrupt conduct still less that the person is “innocent”. To illustrate, there have been examples (in disciplinary proceedings at least) where, at a compulsory examination, the person in question has admitted corrupt conduct but because that admission is not admissible, the subsequent proceedings failed. It would be ludicrous to assert that such a person has been exonerated by an acquittal or by a decision by the DPP not to prosecute because of awareness that the evidence is not admissible.

In any event, in our system of justice, acquittal of a criminal charge does not mean the defendant is innocent or has been exonerated. It merely means that the relevant tribunal, usually a jury, has not been satisfied beyond reasonable doubt on the evidence actually admitted that the person committed the crime charged, a very different thing.

I would also point out that the Recommendation would lead to considerable litigation that would be expensive and detract from the proper functioning of the ICAC.

Recommendation 16: Hearing Code

I see no utility in this Recommendation.

I should add that I am happy to appear before the Committee to expand or explain any of these views if thought desirable.

I would appreciate it if Committee staff could acknowledge receipt of this submission.

Respectfully submitted

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