

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

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**Submission to the Parliamentary Committee on  
the Independent Commission Against Corruption**

***“Review of the Inspector’s Report to the Premier:  
The Inspector’s Review of the ICAC”***

Department of Premier and Cabinet

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## Introduction

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### The Committee's Inquiry

The joint statutory Parliamentary Committee on the Independent Commission Against Corruption (**ICAC**) (**Committee**) is currently conducting an inquiry examining the report of the Inspector of the ICAC, which was delivered on 12 May 2016 (**Inspector's Report**).<sup>1</sup>

The terms of reference for the inquiry<sup>2</sup> require the Committee to have particular regard to:

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;
2. the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform;
3. the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;
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; and
5. any other related matters.

The Committee's terms of reference expressly direct the Committee to take into account recent reports of the Hon Murray Gleeson AC, QC and Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, dated 30 July 2015 (**Gleeson Report**),<sup>3</sup> the report of Mr Andrew Tink AM, *Review of Police Oversight*, dated 31 August 2015 (**Tink Report**),<sup>4</sup> as well as any other report of the ICAC Inspector recommending changes to the ICAC's practice and procedure.

As part of this inquiry, the Committee has written to the Department of Premier and Cabinet (**Department**) by letter dated 6 June 2016 inviting the Department to make a Submission to the inquiry.

The Department has prepared this Submission in response to the Committee's request.

### Structure of this Submission

For convenience, the Department has structured this Submission into four sections, adopting the categories referred to in paragraphs 1 to 4 of the Committee's terms of reference set out above – albeit in a different order. The structure and governance of the ICAC (paragraph 2 above) has been considered first, followed by the categories referred to in paragraphs 1, 3 and 4 of the Committee's terms of reference.

It is important, however, to be mindful of the inter-dependencies between those categories and to consider the issues holistically, rather than in isolation.

Matters pertaining to the overall structure and governance of the ICAC, including the institutional machinery through which it makes decisions about the potential exercise of any particular power will, for example, have a bearing on the question of whether the ICAC should have such a power at all and, if it does, what limits or process rules ought to apply to its exercise.

Put another way, an institutional structure and governance framework that is conducive to the proper and objectively reasonable exercise of a power, and that is inimical to its inappropriate or idiosyncratic exercise, will affect the degree to which policy makers and the public can have confidence in the conferral of such a power. Similarly, a power that is exercisable only within a

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<sup>1</sup> Available at: <[www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf](http://www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf)>

<sup>2</sup> Available at: <[www.parliament.nsw.gov.au/committees/DBAssets/Inquiry/TOR/2397/Terms%20of%20Reference.pdf](http://www.parliament.nsw.gov.au/committees/DBAssets/Inquiry/TOR/2397/Terms%20of%20Reference.pdf)>

<sup>3</sup> Available at: <[www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0003/173235/Independent\\_Panel\\_Review\\_of\\_the\\_Jurisdiction\\_of\\_the\\_Independent\\_Commission\\_Against\\_Corruption\\_Report.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0003/173235/Independent_Panel_Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption_Report.pdf)>

<sup>4</sup> Available at: <[www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/review-police-oversight-q+a.pdf](http://www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/review-police-oversight-q+a.pdf)>

general institutional environment of robust internal checks and external oversight might require fewer prescriptive process limitations than one which is not.

### **Purpose of this Submission**

The primary purpose of this Submission is to assist the Committee by providing factual historical and comparative material.

Given its status and functions, the Department in this Submission has not sought to express a view on each of the particular recommendations that have been made by the Inspector in his report. Where it might be useful to the Committee, however, we have taken the opportunity to draw to the Committee's attention to relevant historical and comparative information, as well as identifying where views have been expressed on similar issues in other reports (such as the Gleeson Report). In some cases (for example, the Inspector's comments regarding the continued public availability of adverse ICAC findings following subsequent legal proceedings), the Department has provided in this Submission advice of an administrative nature as to how reforms might practically be implemented.

A significant focus of this Submission is the structure and governance of the ICAC (Part 1).

In part, this reflects the comments made above about the interdependency and importance of these matters to the other questions that the Committee must examine under its terms of reference.

It also reflects a recognition that the fundamental structure of the ICAC has remained largely unchanged since its establishment over twenty years ago. At that time the ICAC was unique in many respects. To some extent it remains so. Since that time, however, much has been learned. As well as the experience of the ICAC itself, there have also been established bodies with similar functions in a number of different jurisdictions, such as the Victorian Independent Broad-based Anti-Corruption Commission (**IBAC**). In addition, within New South Wales, there has been the establishment, review and reform of a number of bodies that operate in different fields from the ICAC but that have certain similarities of features and functions, such as the proposed new Law Enforcement Conduct Commission<sup>5</sup> (**LECC**) and the recently reformed NSW Electoral Commission.

Accordingly, and noting that the Committee's terms of reference expressly require it to have regard to "best practice models adopted by other integrity institutions", the Department in this Submission outlines a number of the models that have been adopted in respect of those other bodies, indicates the features that might now be considered current 'best practice', and provides a model for how such features could potentially be applied in the case of the ICAC.

### **Additional material**

Given the potentially broad scope of the Committee's inquiry, the Department's Submission has necessarily sought to focus on what we understand to be the key matters referred to in the Committee's terms of reference.

The Department would be happy to assist the Committee by providing further factual material to the Committee if requested.

## **Background to the establishment and operation of the ICAC**

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The *Independent Commission Against Corruption Act 1988* (**ICAC Act**) commenced on 13 March 1989, on which date the ICAC came into existence.

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<sup>5</sup> The proposed new LECC and LECC Inspectorate will replace the Police Integrity Commission, the Police Division of the Ombudsman's Office, the Inspector of the Crime Commission and the Inspector of the Police Integrity Commission.

The establishment of an anti-corruption agency in NSW was an election commitment of the then incoming Coalition Government. As stated in the Second Reading Speech for the Bill by the then Premier, the Hon. Nick Greiner, the ICAC's 'very specific purpose' from its outset was to 'prevent corruption and enhance integrity in the public sector'.<sup>6</sup>

In line with this statement, the Principal Objects of the ICAC Act are:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:*
  - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and*
  - (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and*
- (b) to confer on the Commission special powers to inquire into allegations of corruption.*<sup>7</sup>

In addition to setting out the Principal Objects of the Act, the ICAC Act contains provisions that, among other things:

- constitute the Commission, including providing for the appointment of a Commissioner and Assistant Commissioners;<sup>8</sup>
- set out the functions of the ICAC, including in relation to investigations, compulsory examinations, public inquiries and search warrants;<sup>9</sup>
- define corrupt conduct (which effectively founds the jurisdiction of the ICAC);<sup>10</sup>
- establish the office of the Inspector of the ICAC;<sup>11</sup>
- establish the Committee;<sup>12</sup>
- allow the Parliament to refer matters to the ICAC;<sup>13</sup>
- provide for the reporting to Parliament by the ICAC and by the Inspector on certain matters;<sup>14</sup>
- set out the means by which the ICAC may refer a matter for investigation or other action to another person or body;<sup>15</sup>
- set out offences under the Act<sup>16</sup> and punishments for contempt of the ICAC;<sup>17</sup> and
- provide for the appointment of staff, delegation, protection from liability, secrecy and privacy, the handling of evidence in criminal proceedings, the prohibition of disclosures that may prejudice criminal investigations, disciplinary proceedings following a finding of corrupt conduct and proceedings for offences.<sup>18</sup>

Essentially, the ICAC's principal functions are to investigate corrupt conduct in the NSW public sector, and to prevent corruption and promote the integrity and good repute of public administration, including through education, advice, assistance and the review of laws, practices and procedures.

<sup>6</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 674 (Nick Greiner, Premier).

<sup>7</sup> ICAC Act, section 2A (inserted by the *Independent Commission Against Corruption Amendment Act 2005*).

<sup>8</sup> ICAC Act, Part 2 and Schedule 1.

<sup>9</sup> ICAC Act, Part 4.

<sup>10</sup> ICAC Act, Part 3.

<sup>11</sup> ICAC Act, Part 5A and Schedule 1A.

<sup>12</sup> ICAC Act, Part 7.

<sup>13</sup> ICAC Act, Part 8.

<sup>14</sup> ICAC Act, Part 8.

<sup>15</sup> ICAC Act, Part 5.

<sup>16</sup> ICAC Act, Part 9.

<sup>17</sup> ICAC Act, Part 10.

<sup>18</sup> ICAC Act, Part 11.

The functions of the Commission are exercisable by the Commissioner.<sup>19</sup> Since the ICAC's establishment, there have been five Commissioners, each serving for five years.<sup>20</sup> The term of the current Commissioner, the Hon. Megan Latham, commenced on 28 January 2014 and is due to expire in January 2019.

The ICAC Act has been amended a number of times since its commencement. Two of the most significant sets of reforms to the Act have been made in response to substantive, independent reviews of the Act.

The *Independent Commission Against Corruption Amendment Act 2005* followed a comprehensive report of a review of the Act undertaken by Mr Bruce McClintock SC (**McClintock Report**).<sup>21</sup>

Most recently, the *Independent Commission Against Corruption Amendment Act 2015* implemented the recommendations of the Gleeson Report, following a review by an Independent Panel appointed in 2015 to review the jurisdiction of the ICAC. That Panel, comprising the Hon. Murray Gleeson AC as Chair and Mr Bruce McClintock SC (**Gleeson Panel**), made four formal recommendations for legislative reform, all of which were adopted by the Government.

In conducting its inquiry, the Gleeson Panel considered the ICAC's powers and recommended no changes, except that the ICAC's power to make findings of corrupt conduct should be exercised only in the case of serious corrupt conduct (which was one of the recommendations implemented by the *Independent Commission Against Corruption Amendment Act 2015*). The Panel also identified an issue in relation to the ICAC's power to initiate criminal prosecutions, which was addressed in the *Courts and Other Justice Portfolio Legislation Amendment Act 2015*.

The Inspector's Report dated 12 May 2016 has made sixteen recommendations, including that ICAC examinations should only be conducted in private, legislation should be introduced to facilitate an exoneration process, and the role and resources of the ICAC Inspector should be expanded.

The ICAC responded to the Inspector's Report in May 2016 in its *Submission to the Premier of NSW on the ICAC Inspector's Report on his Review of the ICAC*,<sup>22</sup> in which the ICAC stated that it does not support fourteen of the Inspector's sixteen recommendations.

Following the Premier's referral of the Inspector's Report to the Committee on 1 June 2016, the Committee is now undertaking an inquiry regarding the Inspector's Report as described above.

## Part 1: The structure of the ICAC

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

For the reasons outlined in our introduction, the Department considers that this aspect of the Committee's inquiry warrants particular attention.

The structure of the ICAC has not been the subject of specific review since its establishment over twenty years ago.

More importantly in the context of this particular Committee inquiry, the organisational design of the ICAC, as with any organisation, will inevitably affect the manner in which it goes about exercising its functions. Organisational design therefore has a potential bearing on all of the matters currently under consideration by the Committee, including the question of the appropriate limits and extent of the ICAC's powers and the procedures by which it exercises them. This may be particularly important in the context of the ICAC where, for reasons that have been extensively examined in previous reports, seeking to prescriptively control the exercise of the ICAC's powers through

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<sup>19</sup> ICAC Act, section 4(3).

<sup>20</sup> With the exception of the Hon David Ipp AO QC, who retired before the expiration of his five year term.

<sup>21</sup> Available at: <[www.dpc.nsw.gov.au/data/assets/pdf\\_file/0020/11369/icac.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0020/11369/icac.pdf)>

<sup>22</sup> Available at: <[www.icac.nsw.gov.au/images/Submission\\_to\\_the\\_Premier\\_May2016.pdf](http://www.icac.nsw.gov.au/images/Submission_to_the_Premier_May2016.pdf)>

statutory limitations and detailed process rules may be either impractical or would unduly interfere with the ICAC's ability to fulfil its functions.

In this section of our Submission, we outline the current structure of the ICAC and provide relevant factual information regarding organisational models adopted by or proposed for other Australian integrity agencies. A best practice model that could be adopted by the ICAC is outlined on the basis of these examples.

## The current structure of the ICAC

The ICAC is constituted by section 4 of the ICAC Act. Effectively, the Commission is established as a single person – the Commissioner.

The ICAC Act allows for the appointment of the Commissioner by the Governor.<sup>23</sup> The functions of the ICAC are exercisable by the Commissioner.<sup>24</sup> A proposed Commissioner appointment must be referred to the Parliamentary Committee, which may veto the proposed appointment.<sup>25</sup>

Assistant Commissioners may (but are not required to) be appointed by the Governor, but only with the concurrence of the Commissioner. Assistant Commissioners are required to assist the Commissioner, as the Commissioner requires.<sup>26</sup>

A person is not eligible to be appointed as Commissioner or Assistant Commissioner or to act in either of those offices unless the person is qualified to be appointed as a Judge of the Supreme Court of the State or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of Australia, or a former Judge or Justice of any of those courts.<sup>27</sup>

Section 104 of the ICAC Act provides that the Commissioner may appoint, as members of staff of the ICAC, such persons (including a Director of Operations and a Director of Administration) as may be necessary to enable the ICAC to exercise its functions.

The ICAC Act contains no other statutory provisions governing how the ICAC is to be structured, the qualifications of its staff, or how its staff are to be organised and managed. ICAC staff are appointed directly under section 104 of the ICAC Act, outside of the *Government Sector Employment Act 2013 (GSE Act)*.

In practice, the ICAC has established an 'Executive Team', which comprises:

- the Commissioner;
- a person appointed as a permanent Assistant Commissioner whom the Commissioner designates as "Deputy Commissioner"; and
- a number of Executive Directors of the following divisions: Investigation, Corruption Prevention, Corporate Services and Legal.

The current structure of the ICAC is depicted below.

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<sup>23</sup> ICAC Act, section 5.

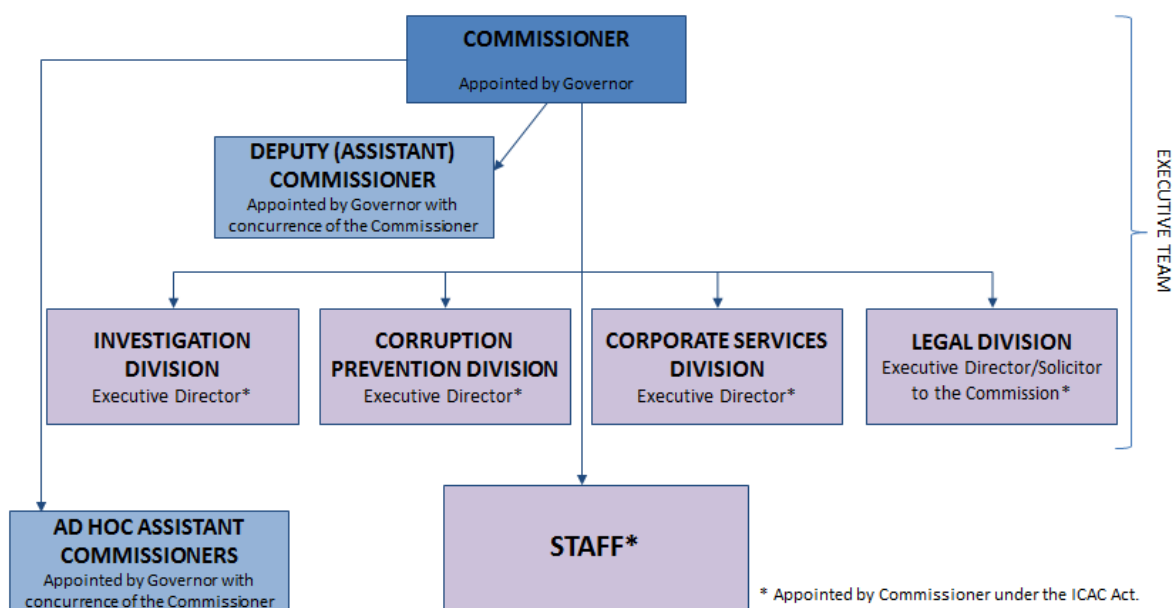
<sup>24</sup> ICAC Act, section 4.

<sup>25</sup> ICAC Act, sections 5A and 64A.

<sup>26</sup> ICAC Act, section 6.

<sup>27</sup> ICAC Act, Schedule 1(1).

Diagram 1: Current Structure of the ICAC



## Recent structural reforms to integrity institutions

New South Wales has led the way in the development of independent integrity agencies, having been the first Australian jurisdiction to establish an Independent Commission Against Corruption in 1989. New South Wales also established a dedicated police anti-corruption body, the Police Integrity Commission, in 1996, with its powers and functions modelled on those of the ICAC. In 2014, the Electoral Commission was reconstituted with a clear mandate to independently investigate and regulate campaign finance and expenditure.

These oversight bodies have wide-ranging statutory powers and functions which can be invoked to investigate matters within their jurisdiction. They operate independently of the executive, not being subject to the control or direction of any Minister in the exercise of their functions.

Given the similarities in their role, functions and powers, recent structural reforms adopted or proposed for other integrity institutions in New South Wales, and the structure of comparable integrity agencies in other Australian jurisdictions, provide an indication of current best practice models for institutional design of oversight bodies.

Up-to-date institutional design will help support the effective exercise of ICAC's powers and functions.<sup>28</sup>

In New South Wales, the establishment of a Law Enforcement and Conduct Commission to replace the Police Integrity Commission is currently being considered by the NSW Government in response to recommendations made in the Tink Report. The NSW Electoral Commission (**NSWEC**) has also undergone recent structural changes, as described further below.

### NSW Electoral Commission

The NSWEC was reconstituted in 2014 by creating a three-person body, established by the *Parliamentary Electorates and Elections Act 1912 (PE&E Act)*. The three members comprising the NSWEC are:<sup>29</sup>

<sup>28</sup> For an historical assessment of the capacity of Australia's integrity systems, see AJ Brown et al, *Chaos or Coherence? Strengths, Challenges and Opportunities for Australia's Integrity Systems*, 2005, National Integrity Systems Assessment Final Report, Transparency International Australia & Griffith University, Melbourne.

<sup>29</sup> *Parliamentary Electorates and Elections Act 1912*, section 21B.

- an Electoral Commissioner;
- a former Judge as Chairperson of the Commission; and
- a third member who has financial or audit skills and qualifications relevant to the functions of the Commission.

These appointments are made by the Governor.<sup>30</sup> The NSW Electoral Commissioner is also separately responsible for administering elections in NSW.

The NSWEC has the functions conferred or imposed on it by, or under, the PE&E Act, the *Election Funding, Expenditure and Disclosures Act 1981* (**EFED Act**) and the *Lobbying of Government Officials Act 2011* (**LOGO Act**).

These functions include:

- Under the PE&E Act – providing assistance for the conduct of elections by the Electoral Commissioner; instituting proceedings for offences against the PE&E Act, the EFED Act or the LOGO Act; conducting, promoting and publishing the results of research into electoral matters and other matters that relate to its functions; and promoting public awareness of electoral matters that are in the general public interest.<sup>31</sup>
- Under the EFED Act – administering and enforcing the election funding, expenditure and disclosure scheme under that Act; and registering electoral participants for the purposes of that scheme.<sup>32</sup>
- Under the LOGO Act – maintaining the Register of Third-Party Lobbyists and Lobbyists Watch List; and enforcing the obligations relating to lobbying.<sup>33</sup>

The staff employed to enable the Electoral Commissioner and the NSWEC to exercise their functions are employed in a separate public service agency pursuant to the GSE Act.<sup>34</sup> This agency, the NSW Electoral Commission Staff Agency, 'sits under' the NSWEC and the Electoral Commissioner.

The structure of the NSW Electoral Commission is set out in the following diagram:

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<sup>30</sup> *Parliamentary Electorates and Elections Act 1912*, sections 21B and 21AA.

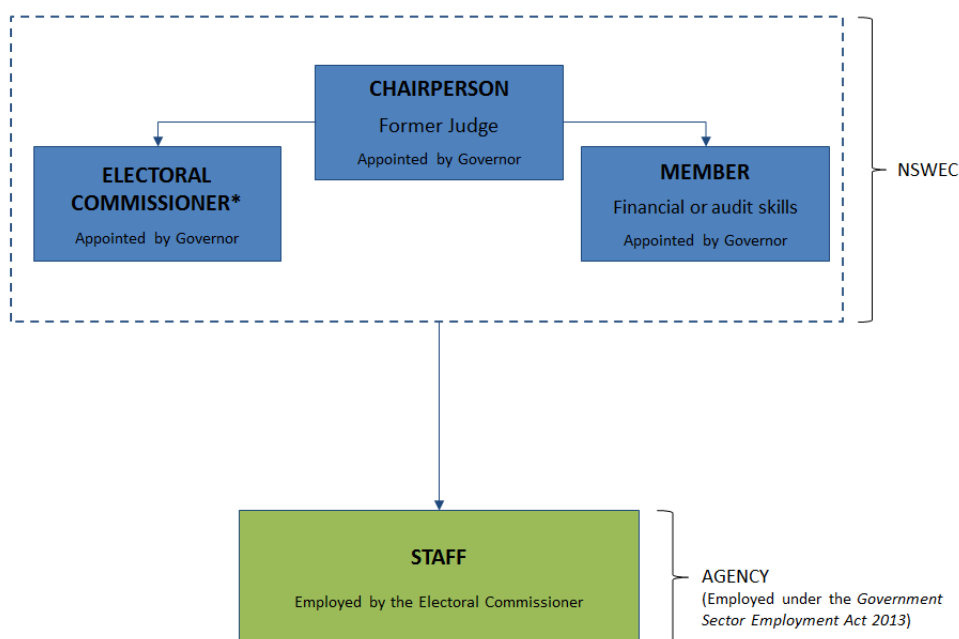
<sup>31</sup> *Parliamentary Electorates and Elections Act 1912*, section 21C.

<sup>32</sup> EFED Act, section 22.

<sup>33</sup> LOGO Act, sections 8-13.

<sup>34</sup> *Parliamentary Electorates and Elections Act 1912*, section 21D.

Diagram 2: Structure of the NSW Electoral Commission



\* Separately responsible for administering elections in NSW.

## Law Enforcement and Conduct Commission

In New South Wales, the Police Integrity Commission established in 1996 has in the past employed a similar structure to the ICAC and exercised similar functions.

### Tink Report Recommendations

By Letters Patent dated 20 May 2015, Mr Andrew Tink AM was commissioned to review police oversight in New South Wales. By report to the NSW Government dated 31 August 2015 entitled *Review of Police Oversight*, the Tink Report recommended a new model of police oversight for New South Wales under which a new body would exercise the functions currently carried out by the Police Integrity Commission (**PIC**), the Police Division of the Ombudsman's Office and the Inspector of the Crime Commission (Recommendation 1).

The Tink Review recommended that the new body should have a Commissioner's Council – a governing council comprised of the Commissioner and two Deputy Commissioners (Recommendation 9). The Council should be chaired by the Commissioner and meet regularly to consider matters such as which matters are to be investigated, which matters to proceed to a private hearing, and which matters are to proceed to a public hearing (Recommendation 18).

### Proposed Structure of the Law Enforcement and Conduct Commission

The NSW Government is currently preparing legislation to give effect to the outcomes of the Tink Report. Similar to the NSWEC, it is proposed that the LECC will be constituted by a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight (Draft *Law Enforcement Conduct Commission Bill 2016* ('Draft LECC Bill'), section 18(1)).

A person will not be eligible to be appointed as Chief Commissioner or to act in that office unless the person is a Judge of the Supreme Court of the State or of any other State or Territory, a Judge

of the Federal Court of Australia or a Justice of the High Court of Australia, or a former Judge or Justice of any of those courts.<sup>35</sup>

The two other Commissioners will be Australian legal practitioners of at least seven years standing.<sup>36</sup> The Chief Commissioner and other Commissioners will be appointed by the Governor.<sup>37</sup> The Governor may, with the concurrence of the Chief Commissioner, appoint one or more Assistant Commissioners for the Commission.<sup>38</sup>

The decision-making process that is proposed for the LECC with respect to investigations, examinations and public hearings is as follows:

- A decision to investigate conduct that is (or could be) serious misconduct must be decided by at least two of the Commissioners, one of whom is the Chief Commissioner.<sup>39</sup>
- A decision to hold a private examination of conduct that is (or could be) serious misconduct must be decided by at least two of the Commissioners, one of whom is the Chief Commissioner, or potentially by unanimous decision.<sup>40</sup>
- A decision to hold a public examination of conduct that is (or could be) serious misconduct requires a unanimous decision of all three Commissioners.<sup>41</sup>

The staff of the LECC will be employed in a separate public service agency under the GSE Act to enable the Commission and the Commissioners to exercise their functions.<sup>42</sup> The Chief Commissioner will not be the head of the staff agency. Instead, the staff agency will be run by a public official employed under the GSE Act. The Executive Manager/CEO of that public sector agency will be responsible for running the corporate and governance aspects of the LECC.<sup>43</sup> The Executive Manager/CEO may also support the Chief Commissioner and other Commissioners in the execution of their statutory functions.

The LECC will be overseen by the Inspector of the LECC who will be appointed by the Governor.<sup>44</sup> The Inspector of the LECC will replace the Inspector of the PIC, and will be separate from the Inspector of the ICAC. The principal functions of the Inspector will be to:

- audit the operations of the LECC for the purpose of monitoring compliance with the law of the State;
- deal with (by reports and recommendations) conduct amounting to agency maladministration on the part of the LECC and conduct amounting to officer misconduct on the part of officers of the LECC; and
- assess the effectiveness and appropriateness of the procedures of the LECC relating to the legality or propriety of its activities.<sup>45</sup>

The Inspector's powers, functions and requirements will be akin to those of the current Inspectors of the PIC, Crime Commission and ICAC.

A Parliamentary Joint Committee will have a range of functions in relation to the LECC, including monitoring and reviewing the exercise by the LECC and the Inspector of their functions.<sup>46</sup>

The precise format of the LECC, including its structure and powers, is still being determined, but this summary is consistent with the general direction of the LECC as currently proposed.

The proposed structure of the LECC is set out in the following diagram:

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<sup>35</sup> Draft LECC Bill, section 18(3).

<sup>36</sup> Draft LECC Bill, section 18(4).

<sup>37</sup> Draft LECC Bill, section 18(1).

<sup>38</sup> Draft LECC Bill, section 20.

<sup>39</sup> Draft LECC Bill, section 19(2).

<sup>40</sup> Draft LECC Bill, section 19(3).

<sup>41</sup> Draft LECC Bill, section 19(3).

<sup>42</sup> Draft LECC Bill, section 21(1).

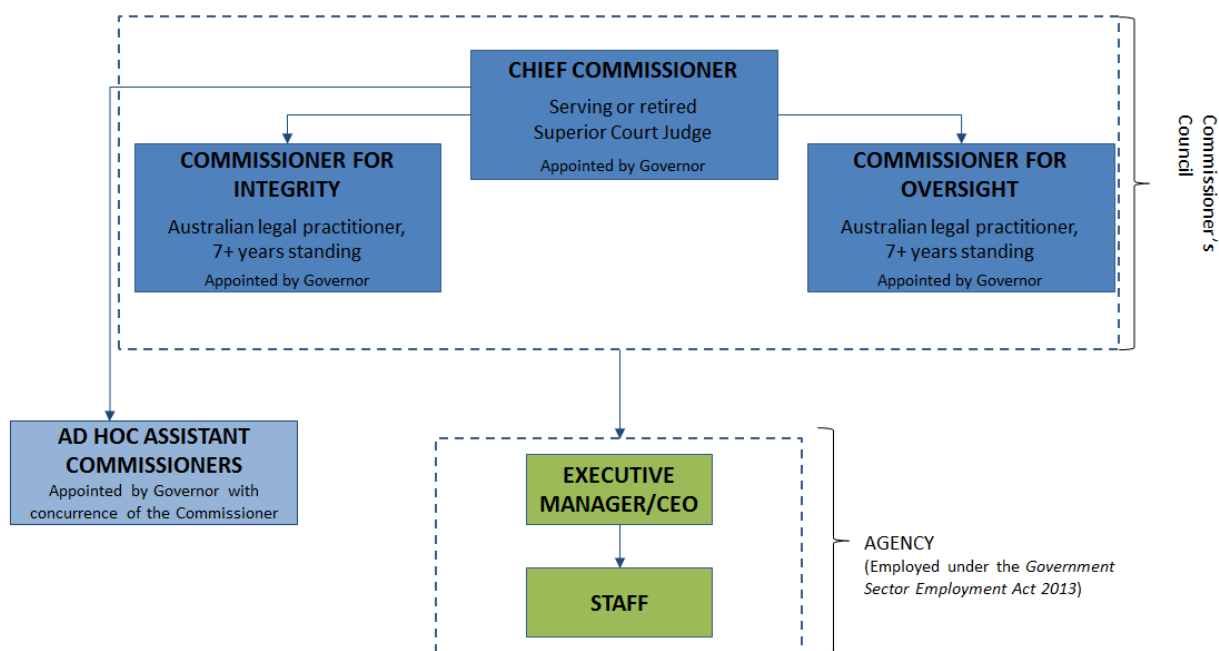
<sup>43</sup> Draft LECC Bill, section 21(1).

<sup>44</sup> Draft LECC Bill, section 118.

<sup>45</sup> Draft LECC Bill, section 120.

<sup>46</sup> Draft LECC Bill, section 129.

Diagram 3: Proposed structure of the Law Enforcement and Conduct Commission



## Integrity institutions in other jurisdictions

### Crime and Corruption Commission (Queensland)

Established under the *Crime and Corruption Act 2001* (Qld) (**Crime and Corruption Act**), the Queensland Crime and Corruption Commission (**CCC**) comprises five Commission members (although the CCC website currently lists only three<sup>47</sup>), a Chief Executive Officer and staff. It is overseen by a Parliamentary Crime and Corruption Committee and a Public Interest Monitor.

The CCC has many functions, including investigating cases of corrupt conduct, particularly more serious cases of corrupt conduct and cases of systemic corrupt conduct within Queensland public sector agencies (units of public administration).<sup>48</sup>

The CCC's structure consists of a Commissioner who is the Chairperson, a Commissioner who is the Deputy Chairperson and three other Commissioners.<sup>49</sup> The CCC must have a Chief Executive Officer.<sup>50</sup> The Chairperson and Deputy Chairperson must have served as, or be qualified for appointment as, a judge of the Supreme Court of Queensland or another State, the Federal Court of Australia or the High Court of Australia.<sup>51</sup> Officers are appointed by the Governor in Council.<sup>52</sup>

The Chairperson may appoint sessional Commissioners to help the Chairperson to perform the CCC's functions or exercise the CCC's powers.<sup>53</sup> The CCC may employ senior officers and staff necessary to enable the CCC to perform its functions.<sup>54</sup>

The Parliamentary Crime and Corruption Committee has particular responsibility for monitoring and reviewing the CCC's performance.<sup>55</sup> The Parliamentary Crime and Corruption Commissioner is an

<sup>47</sup> Available at: <[www.ccc.qld.gov.au/about-the-ccc/accountability-and-leadership](http://www.ccc.qld.gov.au/about-the-ccc/accountability-and-leadership)>

<sup>48</sup> Crime and Corruption Act, section 35.

<sup>49</sup> Crime and Corruption Act, section 223.

<sup>50</sup> Crime and Corruption Act, section 223A.

<sup>51</sup> Crime and Corruption Act, section 224.

<sup>52</sup> Crime and Corruption Act, section 229.

<sup>53</sup> Crime and Corruption Act, section 239.

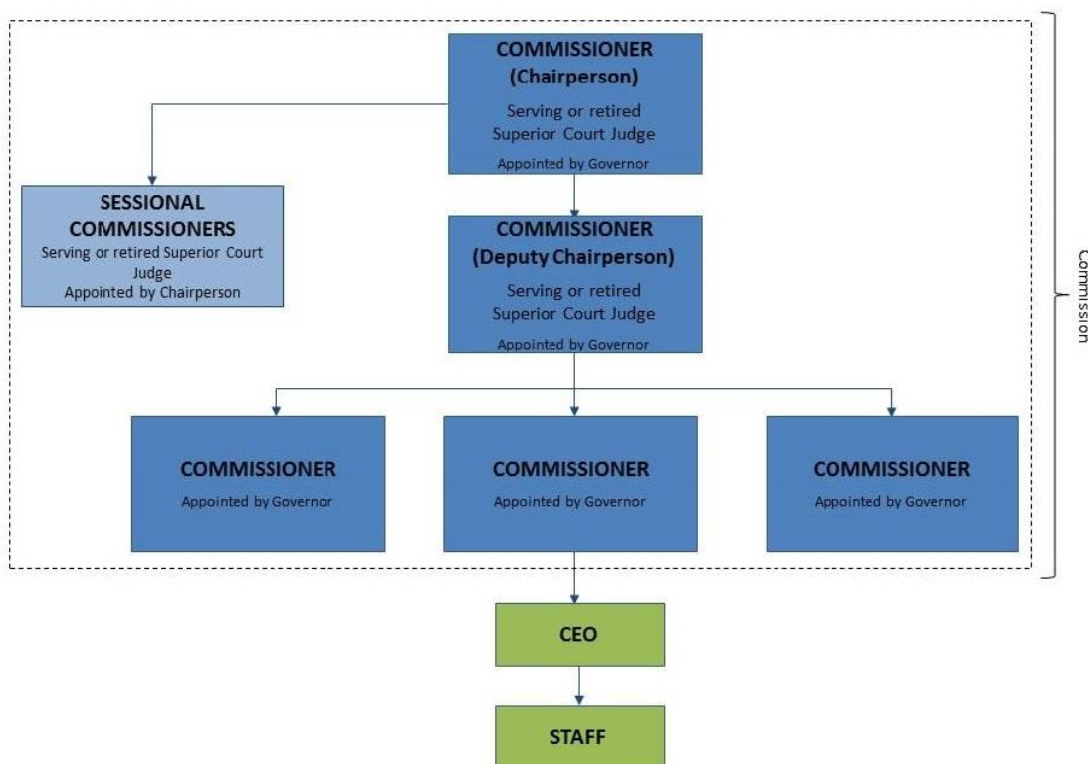
<sup>54</sup> Crime and Corruption Act, sections 245 and 254.

<sup>55</sup> Crime and Corruption Act, section 9.

officer of the Parliament who helps the Parliamentary Crime and Corruption Committee in the performance of its functions.<sup>56</sup>

The Governor in Council may also appoint a person (the Public Interest Monitor) to monitor the CCC's applications for, and the use of, covert search warrants and surveillance warrants.<sup>57</sup>

Diagram 4: Structure of the Crime and Corruption Commission



### Independent Broad-based Anti-corruption Commission (Victoria)

Established under the *Independent Broad-based Anti-corruption Commission Act 2011* (VIC) (**IBAC Act**), the Victorian IBAC is concerned with serious corruption in the public sector and police misconduct. It comprises a Commissioner, one or more Deputy Commissioners, a Chief Executive Officer and staff. It is overseen by the Victorian Inspectorate and the IBAC Parliamentary Committee.

The IBAC's structure includes one Commissioner, appointed by the Governor in Council,<sup>58</sup> who must be, or have been, a judge of the High Court, Federal Court or the Supreme Court of Victoria or another State or a Territory.<sup>59</sup> The Governor in Council may appoint one or more persons as Deputy Commissioners.<sup>60</sup> Deputy Commissioners must be Australian lawyers within the meaning of the *Legal Profession Act 2004* (VIC).<sup>61</sup>

The IBAC must appoint a person as a Chief Executive Officer of the IBAC.<sup>62</sup> Any employees that are necessary for the purposes of the IBAC Act are employed under Part 3 of the *Public Administration Act 2004* (VIC).

<sup>56</sup> Crime and Corruption Act, section 10.

<sup>57</sup> Crime and Corruption Act, sections 11 and 324.

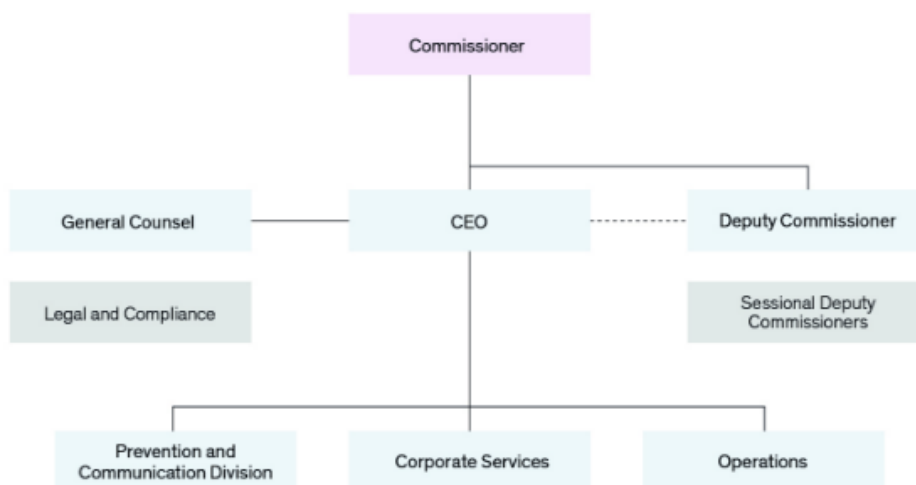
<sup>58</sup> IBAC Act, section 8.

<sup>59</sup> IBAC Act, section 14.

<sup>60</sup> IBAC Act, section 17(1).

<sup>61</sup> IBAC Act, section 17(2).

<sup>62</sup> IBAC Act, section 27.

Diagram 5: Structure of the IBAC<sup>63</sup>

The IBAC is subject to scrutiny by the Victorian Inspectorate and the IBAC Parliamentary Committee. The Victorian Inspectorate is established under the *Victorian Inspectorate Act 2011* (VIC) and has a number of functions including:<sup>64</sup>

- to monitor the compliance of the IBAC and IBAC personnel with the IBAC Act and other laws;
- to assess the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of the IBAC's activities;
- to receive complaints under the IBAC Act in accordance with the Act;
- to investigate and assess the conduct of the IBAC and IBAC personnel in the performance or exercise or purported performance or purported exercise of their duties, functions and powers; and
- to report on, and make recommendations as a result of, the performance of its duties and functions.

The Victorian Inspectorate consists of one Inspector appointed by the Governor in Council.<sup>65</sup> Any employees that are necessary for the purposes of the Victorian Inspectorate Act may be employed under Part 3 of the *Public Administration Act 2004* (VIC).

The IBAC Parliamentary Committee is constituted under section 12A of the *Parliamentary Committees Act 2003* (VIC). The functions of the Committee are, among other things, to monitor and review the performance of the duties and functions of the IBAC and the Victorian Inspectorate, other than those in respect of Victorian Auditor-General's Office (**VAGO**) officers or Ombudsman officers.

### A possible “best practice” model for the ICAC

The structure of the NSWEC and the proposed LECC, and comparable integrity agencies in other Australian jurisdictions, suggest a number of features that could now be considered to be best practice for the organisational design of oversight bodies.

There are two core features of such a model.

The first is a decision-making body, invested with the statutory powers of the Commission, constituted by a panel of Commissioners (or a Commissioner and Deputy Commissioners), rather than by a single Commissioner. In the LECC example, it is proposed that there will be three

<sup>63</sup> ‘Our People’, Independent Broad-Based Anti-Corruption Commission, 2016, viewed on 8 July 2016, <http://www.ibac.vic.gov.au/about-us/our-people>

<sup>64</sup> Victorian Inspectorate Act, section 9.

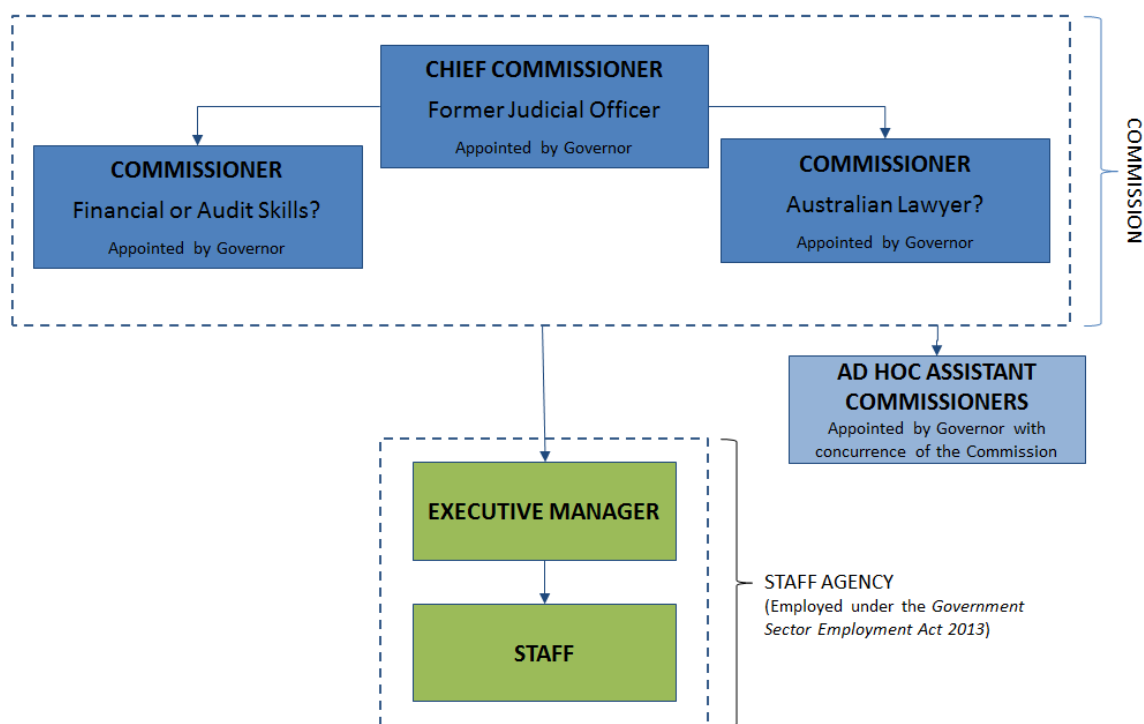
<sup>65</sup> Victorian Inspectorate Act, section 8.

Commissioners, one of whom is designated the “Chief Commissioner”. The Electoral Commission has a Chair and two other Commissioners, one of whom is the Electoral Commissioner. Importantly, members of the Commission are appointed by the Governor, and so are not in any direct employment relationship between each other. Rather, they are peers, albeit that one of them may, in respect of decision-making, be designated as chair or chief in the sense of being the ‘first among equals’.

The second core feature is structural separation between the members of that decision-making body, and the operational organisation. In the examples given, this separation may be more or less complete. In the NSWEC, one of the members of the Commission, the Electoral Commissioner, also serves as (effectively) the manager of the operational organisation. However, it is increasingly common, and in the context of an integrity agency such as the ICAC would seem more appropriate, to have a separate organisational manager distinct from each of the Commissioners. The day-to-day business and management of the organisation would be a matter for the organisation itself, managed by a manager, subject to the oversight of and policies set by, the panel of Commissioners. To ensure organisational alignment, the manager should be appointed by, or on the recommendation of, the Commissioners.

Adapting these core features to the ICAC, a possible structure is set out in the diagram below:

Diagram 6: Possible Structure of the ICAC



### Benefits of best practice model structure

The potential benefits of such a structure include:

- The model does not require a sole Commissioner (typically a senior Judge appointed directly from the bench) to have or to quickly develop the skills, experience or interest in managing the organisational aspects of the organisation.
- By having multiple Commissioners, a more diverse set of skills and experiences may be brought to bear on Commission deliberations. For example, while judicial experience may be of particular importance to the conduct of the Commission’s examinations and public inquiries, and the exercise of its other legal powers, other skills, such as policy, financial investigation

and audit skills may be important to other aspects of the Commission's work or to its educational and corruption prevention functions.

- Multiple Commissioners also provide a peer group and a check against 'agency capture' – they are an internal and confidential resource for each other to discuss ideas and issues, and a check against idiosyncratic decision-making.
- Different decisions can be made the subject of different approval requirements. For example, relatively routine decisions in the conduct of an investigation might be able to be made with the authority of the single Commissioner having carriage of that investigation. A decision to investigate a matter at all (or to discontinue an investigation) may require the decision of at least two Commissioners. Other important decisions (for example, to proceed to a public inquiry) may require unanimous approval by the three Commissioners.
- Although a panel structure does involve the potential for disagreement between the Commissioners, this is an important aspect of their role. Provided the decision-making outcomes are clear (i.e. there is no potential for a 'deadlock' resulting in paralysis), the requirement for majority, or in some cases even unanimous, agreement on important decisions raises no necessarily intractable problem. Judges on appeal courts are routinely expected to make decisions as a panel, and continue to maintain professional and collegiate relationships even though they may dissent in respect of particular matters.
- On the other hand, the constitution of the Commission as a panel of Commissioners (together with similar proposals in respect of the Inspector, discussed in Part 3 below) may assist in alleviating tensions that can arise between a single Commissioner and a single Inspector. A panel structure reduces the extent to which the entire Commission or Inspectorate is identified with a particular individual.
- By separating the statutory decision-makers (the Commissioners) from the organisation itself (the Executive Manager/CEO and staff), there is less risk of the decision-makers being 'captured by' the organisation. This structure positions the decision-makers above and at a distance from the day-to-day business and management of the organisation, allowing for greater focus on decision-making.
- This separation also allows for the better use of the particular skill sets of each person to be aligned with particular functions. For example, former judicial officers would be responsible for making legal decisions based on submissions, while an Executive Manager/CEO with management and administrative skills would be responsible for the day-to-day running of the organisation.

Importantly, such a structure appears to be consistent with the Government's commitment to the maintenance of a strong and effective Commission.

### **Bringing the ICAC within the Government Sector Employment framework**

If reform along the lines described above were to be considered, then consideration could also be given to the introduction of legislative amendments to bring the staff agency of the ICAC within the Government Sector Employment framework.

Again, this would follow the approach taken by other integrity oversight bodies such as the proposed LECC,<sup>66</sup> the NSW Ombudsman<sup>67</sup> and the NSW Electoral Commission.<sup>68</sup>

Section 5 of the GSE Act currently provides that the GSE Act does not apply to staff of the ICAC employed under the ICAC Act, except to the extent the GSE Act expressly so provides.<sup>69</sup>

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<sup>66</sup> Draft LECC Bill, section 21.

<sup>67</sup> *Ombudsman Act 1974* (NSW), section 32.

<sup>68</sup> *Parliamentary Electorates and Elections Act 1912* (NSW), section 21D.

<sup>69</sup> Schedule 1[2] of the *Government Sector Employment Legislation Amendment Act 2016* omits the Inspector of the ICAC from section 5 of the GSE Act.

Instead, section 104 of the ICAC Act provides that the Commissioner may appoint, as members of staff of the ICAC, such persons (including a Director of Operations and a Director of Administration) as may be necessary to enable the ICAC to exercise its functions.

Section 5 of the GSE Act (noted above) would need to be addressed if the above structural reform option were adopted to facilitate the employment of the ICAC staff and Executive Manager/CEO under the GSE Act.

Also the Public Service Commission (**PSC**), which has certain functions under the GSE Act including to make Rules that are binding on agencies and to conduct investigations, is itself subject to the jurisdiction of the ICAC. Accordingly, if the ICAC were to be brought within the scope of the GSE Act consideration would need to be given to amendments to ensure that its independence (both in actuality and appearance) is preserved, including in respect of its jurisdiction to investigate and make findings about the conduct of the PSC. For example, it may be necessary to provide that the ICAC is not required to comply with any provision of the GSE Act if it reasonably considers that to do so would prejudice an investigation.

## Part 2: The ICAC's powers and procedures, including public inquiries

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The Committee is required to examine 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.

This aspect of the inquiry arises following the recommendation of the Inspector of the ICAC that future examinations only be permitted to be conducted in private. Accordingly, this Submission focusses on the ICAC's power to conduct public inquiries and the manner in which decisions are made whether to exercise that power in a particular case.

### Power to conduct public inquiries

The power to conduct inquiries in public has been seen as an essential feature of the ICAC since its establishment. Indeed, the original legislation provided that “[a] hearing shall be held in public, unless the Commission directs that the hearing be held in private”, suggesting that public hearings were envisaged at that time to be the default manner of conducting an inquiry.<sup>70</sup>

When introducing the original legislation into Parliament, the then Premier explained in the Second Reading Speech:<sup>71</sup>

*“Hearings are to be held in public unless the commission is satisfied it is in the public interest that the hearing be held in private for reasons connected with the subject-matter of the investigation, or the nature of the evidence to be given.”*

Following a recommendation of the McClintock Report, the power to conduct a “public hearing” was replaced with a power to conduct instead a “public inquiry”. This change was considered important for the following reasons:

*“The change in nomenclature emphasises the inquisitorial nature of the investigation. It may, over time, encourage those involved in such inquiries, such as counsel assisting and other legal practitioners, to discard inappropriate adversarial tactics and techniques.*

*The hearing is the culmination of the investigation. The presiding Commissioner is the chief investigator. The point being to determine whether corrupt conduct has occurred and, if so,*

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<sup>70</sup> *Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act)*, section 31(1). This was later amended to provide that hearings could be conducted either in private or in public, or partly in private and partly in public: *Independent Commission Against Corruption Amendment Act 1991*.

<sup>71</sup> Independent Commission Against Corruption Bill, Second Reading Speech, Mr Greiner (Ku-ring-gai), Legislative Assembly, 26 May 1988. Available at: < <https://api.parliament.nsw.gov.au/api/hansard/search/daily/searchablepdf/HANSARD-290296563-1264>>

*what needs to be done about it, not whether ICAC can prove beyond reasonable doubt that a person is guilty of a corruption offence. [McClintock Report 6.5.27-6.5.28]*

...

*[T]he important point is to move away from the term 'hearing' which carries the erroneous connotation that ICAC investigation is akin to the hearing process undertaken by a Court of law." [6.5.38]*

### Inspector's Recommendation

Recommendation 1 of the Inspector's Report recommends that examinations conducted by the ICAC should be in private. This is because *"[a]ll interests safely can be protected by such a process and the not uncommon criticism of public hearings as theatre and the cause of disproportionate reputational damage will be eliminated"* [3].

### The ICAC's Response

The ICAC's Submission to the NSW Premier disagrees with the Inspector's recommendation to conduct examinations in private. The ICAC considers adoption of the recommendation:

*"...would seriously weaken the Commission's proven effectiveness in exposing and preventing corrupt conduct. The recommendation also overlooks that the Commission's accountability is enhanced by having public inquiries."*

The ICAC considers that public inquiries are important to the ICAC's effectiveness in exposing and preventing corrupt conduct because they:

- *"widely expose serious corrupt conduct and systemic corrupt conduct*
- *deter corrupt conduct – public officials and others are less likely to engage in corrupt conduct if they know they will be subject to public exposure*
- *disrupt corrupt conduct that is ongoing*
- *hold public officials and others engaged in corruption publicly accountable for their actions*
- *hold public authorities and public officials publicly accountable for ensuring relevant policies and procedures not only adequately address corruption risks but are enforced*
- *encourage others to come forward with information relevant to the investigation*
- *encourage the reporting of other suspected corruption*
- *educate the public about corruption.*

*Public inquiries also:*

- *provide transparency to the Commission's fact-finding and investigative processes*
- *enhance public confidence in the Commission's operations*
- *enable the public to assess the evidence for themselves*
- *provide an opportunity for those against whom unfounded allegations have been made to publicly clear their reputations or to publicly dispel rumour and speculation about corruption."* [2]

### Independent Reviews of the ICAC

The 2015 Gleeson Panel's view was that public inquiries, properly controlled:

*"...serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private."* [9.4.6]

To similar effect, in the 2005 McClintock Report, Mr McClintock stated:

*"I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public*

*investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.” [6.5.25]*

## The decision to conduct a public inquiry

As Mr McClintock observed in his 2005 statutory review of the ICAC Act:

*“Undoubtedly, this [the decision to conduct a public inquiry] is one of the most controversial decisions that ICAC may make.” [6.5.3]*

Nevertheless, decisions of the ICAC to conduct public inquiries had generally attracted little criticism or adverse comment until relatively recently.<sup>72</sup>

In deciding whether to proceed to a public inquiry, the ICAC must take into account, among other things, the risk of undue prejudice to a person's reputation.<sup>73</sup> This must be balanced with other public interest considerations, including but not limited to:

- the benefit of exposing to the public, and making it aware, of corrupt conduct;
- the seriousness of the allegation or complaint being investigated; and
- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Section 31 of the ICAC Act provides generally that the ICAC must be satisfied that it is in the public interest to conduct a public inquiry to do so.

These guidelines on the exercise of the discretion to conduct a public inquiry were enacted in response to the 2005 McClintock Report. In that Report, Mr McClintock considered but rejected a proposal to include in the legislation a definition of the circumstances in which a public inquiry may be held, adding that:

*“Once the power to conduct a private interview is separated from the power to hold a public inquiry, it may be appropriate for the Act to provide guidance on when a public inquiry may be held. This will avoid creating a return to the presumption that all investigations should be conducted in public.*

*I do not recommend that an exhaustive list of considerations be included in the Act on the basis that this would be an unnecessary fetter on ICAC's discretion. Such a prescriptive list may prove inadequate and may invite litigation (which would be undesirable given the purpose and role of hearings).*

*In my view, public inquiries should only be held for the purpose of an investigation where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. This is in general agreement with what I understand to be ICAC's current practice in holding public hearings, and reflects similar provisions that apply to the Corruption and Crime Commission in Western Australia.” [6.5.32-6.5.34]*

<sup>72</sup> See, for example, ICAC investigations in Operations Credo and Spicer, available at:

<<https://www.icac.nsw.gov.au/investigations/current-investigations/investigationdetail/203>>. See also ICAC investigations in Operation Hale, in which a decision to conduct a public inquiry was later held by the High Court to have been commenced under a misapprehension by the ICAC about its jurisdiction, because the alleged conduct proposed to be examined was not of a kind that would fall within the definition of “corrupt conduct”: *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14. The definition of “corrupt conduct” was later amended, following the Gleeson Review: *Independent Commission Against Corruption Amendment Act 2015*.

<sup>73</sup> ICAC Act, section 31(2).

## Other States

The legislation governing the anti-corruption bodies broadly equivalent to the ICAC in Victoria and Queensland each contain non-exhaustive considerations of a similar nature to guide the decision as to whether it is in the public interest to hold a public inquiry.<sup>74</sup>

## The proposed Law Enforcement Conduct Commission

It is proposed that the new LECC will be able to hold examinations in the form of public or private hearings for the purpose of an investigation.<sup>75</sup> These examinations will only be held in relation to conduct that the Commissioners have decided is (or could be) serious misconduct and if they have unanimously decided that it is appropriate to hold an examination. Proposed guidance is provided as to the factors to be taken into account in determining whether to investigate serious misconduct (including by holding an examination).

## Internal decision-making processes and oversight

The ICAC Act currently specifies no particular procedural requirements for making a decision to commence a public inquiry. It provides only that “[t]he Commission may conduct a public inquiry”,<sup>76</sup> and:

*“[t]he functions of the Commission are exercisable by the Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by the Commissioner, or with the authority of the Commissioner, shall be taken to have been done by the Commission”.*<sup>77</sup>

Accordingly, the decision whether to conduct a public inquiry is for the Commissioner, and the Commissioner alone. An Assistant Commissioner may determine to conduct a public inquiry with the concurrence of the Commissioner unless the Commissioner might have a conflict of interest in relation to the matter.<sup>78</sup>

In practice, the ICAC has advised that a decision by the Commissioner to conduct a public inquiry:

*“...can be made through the SIG [Strategic Investigation Group] or by minute to the Commissioner or Deputy Commissioner from the Case Lawyer submitted through the Executive Director, Legal and after consultation with the relevant investigation team members”.*<sup>79</sup>

There is, under the Act, no obligation on the ICAC to notify the Inspector (or any other person) prior to making or announcing its decision to conduct a public inquiry.

The powers of the Inspector include that the Inspector may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission’s operations or any conduct of officers of the Commission.<sup>80</sup> It appears that the Inspector could impose a standing requirement that the ICAC notify him of any decision to proceed to a public inquiry, although there would be no power to delay the ICAC’s announcement of that decision while the Inspector considers it. Nor, if the Inspector disagreed with a decision to proceed to a public inquiry, would the Inspector have any power to prevent the Commissioner from doing so.

<sup>74</sup> *Crime and Corruption Act 2001 (QLD); Independent Broad-based Anti-corruption Commission Act 2011 (VIC); Corruption and Crime Commission Act 2003 (WA).*

<sup>75</sup> Draft LECC Bill, Part 6, Division 3.

<sup>76</sup> ICAC Act, section 31.

<sup>77</sup> ICAC Act, section 4(3).

<sup>78</sup> ICAC Act, section 31(3).

<sup>79</sup> Operations Manual, Procedure No. 5, *Procedures for Conduct of Public Inquiries and Compulsory Examinations*, 2010, p. 2, in the ICAC Committee public hearing to examine the report of the ICAC Inspector regarding Operation Hale, *ICAC Response to ICAC Committee questions in letter dated 15 January 2016*, 2016. Available at: [www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/8729/ICAC%20Response%20to%20Questions%20on%20Notice.PDF](http://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/8729/ICAC%20Response%20to%20Questions%20on%20Notice.PDF)

<sup>80</sup> ICAC Act, section 57C.

## Operations Review Committee

When the ICAC was first established, until 2005, decisions to commence any investigation would have been required to be reviewed by the Operations Review Committee. The nature and functions of this Committee were considered in the 2005 McClintock Report:

*“The Operations Review Committee is an advisory committee established under Part 6 of the Act. The Operations Review Committee consists of eight members, being the ICAC Commissioner; an Assistant ICAC Commissioner; the Commissioner of Police; a person appointed by the Governor on the recommendation of the Attorney General, with the concurrence of the Commissioner; and four persons appointed by the Governor on the recommendation of the Premier, with the concurrence of the Commissioner, to represent community views.*

...

*The functions of the Operations Review Committee are set out in section 59 of the Act:*

*(1) The functions of the Operations Review Committee are as follows:*

- (a) to advise the Commissioner whether the Commission should investigate a complaint made under this Act or discontinue an investigation of such a complaint,*
- (b) to advise the Commissioner on such other matters as the Commissioner may from time to time refer to the Committee.*

*(2) The Commissioner shall consult with the Committee on a regular basis, and at least once every 3 months.*

*Before deciding whether to discontinue or not to commence an investigation of a complaint, ICAC must consult with the Operations Review Committee in relation to the matter.*

*ICAC is not obliged to seek the advice of the Operations Review Committee before discontinuing an investigation commenced on its own motion or reported from another agency. In practice, ICAC seeks the advice of the Operations Review Committee on these matters. ICAC has also broadened the role of the Operations Review Committee to advise whether ICAC should continue an investigation that is underway.*

*The Operations Review Committee is able to bring to the attention of the Commissioner any matter relating to the operations of ICAC which the member considers important.”*  
[7.3.48-7.3.53]

Mr McClintock recommended the abolition of this Committee and its replacement with a permanent Inspector, on the basis that the capacity of the Committee to perform an effective review function was limited by the volume of the material it was required to examine, by its lack of powers, its inability to report and the fact that its members were the subject of secrecy provisions, and its lack of structural independence from the ICAC itself.

The replacement of the Operations Review Committee with an Inspector of the ICAC, with structural independence and statutory powers, has clearly improved the external oversight of ICAC's operations. However, the Committee's internal role as a kind of peer group to provide a confidential sounding board and a check on routine decisions (to commence or not to commence and to continue or discontinue an investigation) was effectively lost to the Commissioner. To the extent that this role has been replaced at all, it is now performed by senior executives of the ICAC, which comprise a group of ICAC 'insiders', all of whom are in a direct hierarchical relationship with the Commissioner.

In 2015, the Gleeson Panel considered a proposal by the Bar Association for the re-establishment of some sort of body, akin to the Operations Review Panel, to scrutinise decisions to proceed to a public hearing. The Panel rejected the proposal:

*“A decision to hold a public inquiry is a discretionary decision of the Commission, and to that extent could be subject to judicial review.*

*Before amendments to the Act made following the 2005 Report, there was an Operations Review Committee (“ORC”). The principal work of that body was considering and approving decisions not to pursue investigations either at all or further. For reasons given in the 2005 Report, which recommended the creation of the office of Inspector, once the Inspector came into existence the function of the ORC was no longer necessary.*

*The Panel has considered whether some corresponding body ought to be created for the specific purpose of providing oversight of decisions to conduct public inquiries, or decisions about public inquiries, such as what witnesses to call. The Inspector performs important functions of audit and of oversight, including examining complaints, but is at arm’s length from the Commission and is not a participant in the investigative process. Decisions to hold public inquiries can, no doubt, be difficult. Nevertheless, the Panel does not see merit in adding a further layer of decision-making to the process.*

*The New South Wales Bar Association proposed that there should be an oversight body that can review a decision to hold a public inquiry. Such a body, it was suggested, should be small, and made up of people not associated with the executive or legislative arms of government.*

*In the days of the ORC, it came into the process at an early stage. By the time a decision is made to hold a public inquiry, an investigation is likely to be well advanced and there will be a substantial body of material to be evaluated. To introduce an outside oversight body at that stage would not be practical.” [3.5]*

It may be that the type of structural reforms suggested by “best practice models” (see Part 1 above) could help to address both, on the one hand, the concerns raised by the Bar Association and others about the lack of an effective ‘check’ on the Commissioner’s decision to proceed to a public hearing and, on the other hand, the Gleeson Panel’s observation that the re-establishment of some sort of external review committee may be impractical for this purpose.

### Part 3: Oversight arrangements

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The Committee inquiry will include consideration of the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform.

#### The Inspector of the ICAC

##### Role and functions

The ICAC is overseen by an Inspector, who may be appointed by the Governor.<sup>81</sup> A proposed Inspector appointment must be referred to the Parliamentary Committee, which may veto the proposed appointment.<sup>82</sup>

The Governor may, with the concurrence of the Inspector, appoint an Assistant Inspector.<sup>83</sup>

The principal functions of the Inspector are:<sup>84</sup>

- (a) to audit the operations of the ICAC for the purpose of monitoring compliance with the law of the State;

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<sup>81</sup> ICAC Act, section 57A.

<sup>82</sup> ICAC Act, section 64A.

<sup>83</sup> ICAC Act, section 57AA.

<sup>84</sup> ICAC Act, section 57B(1).

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or officers of the ICAC;
- (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or officers of the ICAC; and
- (d) to assess the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities.

### Background and rationale

The establishment of the role of an independent Inspector of the ICAC was recommended by the Parliamentary Committee, in its 2000 report entitled *ICAC: Accounting for Extraordinary Powers*,<sup>85</sup> and supported by the 2005 McClintock Report. In that Report, Mr McClintock provided his rationale for supporting the introduction of an independent Inspector as follows:

*“The advantages of the Inspector, over existing accountability mechanisms that apply to ICAC, are that:*

- *The Inspector can review complaints from members of the public (rather than just from public officials) concerning abuse of power, impropriety or other forms of misconduct on the part of ICAC.*
- *The Inspector can proactively audit the operations of ICAC and assess the effectiveness and appropriateness of ICAC’s procedures. [7.5.37]*

*The Inspector would not exercise an appellate role in relation to the decisions and findings of ICAC. He or she would not be able to direct ICAC, but rather would make reports and recommendations to the Parliament.*

*Although the Inspectorate will create an additional layer of review with attendant expenses, as the ultimate source of accountability of ICAC is neither the Government nor Parliament, this additional bureaucracy is not only justifiable, but necessary to secure public confidence in the legality and propriety of ICAC’s actions.*

*If my recommendations are followed, there will also be savings. The proposal will put an end to the time and expenses associated with the Operations Review Committee. These include the resources expended by ICAC in preparing reports, the costs associated with the involvement of community members, and the time spent by senior bureaucrats in attending and preparing for meetings.” [7.5.37-7.5.40]*

Mr McClintock noted that the ICAC has extensive powers and that accountability regarding the exercise of these powers is critical:

*“Parliament has entrusted ICAC with extensive coercive powers. These powers are essential for ICAC to carry out its investigative functions effectively. However, these powers have the potential to infringe the fundamental liberties, privileges and immunities of citizens. Whilst it is important that ICAC should be able to make use of these powers for the purposes of an investigation into alleged corrupt conduct, ICAC should not be able to exercise those powers unchecked. Many submissions to the review, including those from ICAC itself, have stressed the importance of ensuring that ICAC is accountable for the exercise of its coercive powers.*

*Parliament has vested in ICAC significant discretion in the exercise of its functions. Whilst this broad discretion enhances ICAC’s capacity to investigate, expose, and prevent corrupt conduct, it is equally important that ICAC is not permitted to exercise this broad discretion with impropriety and the possibility that it might do so is minimised.*

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<sup>85</sup> Available at:

[www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5466/Committee%20Report%2001%20May%202000%20-%20Inquiry%20into%20Genera.pdf](http://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5466/Committee%20Report%2001%20May%202000%20-%20Inquiry%20into%20Genera.pdf)

*Due to the nature of ICAC's functions and jurisdiction, Parliament has given ICAC statutory independence from the Executive, and to a lesser extent, from Parliament itself. Unlike most other public authorities, ICAC is not subject to Ministerial direction and control. As a consequence, no Minister is responsible to Parliament for the exercise of ICAC's functions.*

*ICAC's status as an independent agency charged with the responsibility of improving the integrity of public administration makes it even more important for ICAC to follow good administrative practice and to be accountable for the discharge of its functions. External scrutiny enhances the public's confidence in ICAC and helps to ensure that ICAC is properly responsive to the public interest."* [7.2]

The McClintock Report recommended that the ICAC Act be amended to provide for the establishment of an independent Inspector of the ICAC to:

- *"Audit the operations of ICAC and assess the effectiveness and appropriateness of its procedures; and*
- *Deal with complaints of misconduct by ICAC or its officers."* [Recommendation 7.1]

These recommendations were implemented in the *Independent Commission Against Corruption Amendment Act 2005*.

### **Resources and structure of the Inspector's office**

Until recently, the role of Inspector has been a part-time position, supported by a small contingent of staff formally employed by the Department of Premier and Cabinet and assigned to assist the Inspector.

Up until 2013, the offices of the Inspector of PIC and the Inspector of ICAC were required to be occupied by two different people.

In September 2013, the *Police Integrity Commission And Independent Commission Against Corruption (Inspectors) Act 2013 (Inspectors Act)* amended the ICAC Act and the PIC Act to allow for the two roles to be performed by the same person.<sup>86</sup>

A key reason for this change was to seek to increase the overall size of the (joint) office to achieve a critical mass of work and staff that would make the office viable and provide for improved administrative resources.

On 10 February 2014, Mr David Levine was appointed as the Inspector of the ICAC whilst simultaneously holding the office of the Inspector of the PIC.

In the Second Reading Speech of the Inspectors Act,<sup>87</sup> the Hon. David Clarke MLC noted that the powers and functions of the PIC and the ICAC were substantively similar and that:

*"As with the institutions themselves, the powers and functions of the respective Inspectors of the Police Integrity Commission and the Independent Commission Against Corruption are comparable."*

He considered that a key benefit of the amendments would be in *"allowing one individual to take on both highly specialised roles"* as well as potentially *"enhancing the effectiveness of the Inspector positions"*.

The Office of the Inspector advises that it is currently comprised of an Inspector, an Assistant Inspector and a Principal Legal Advisor, each of whom are employed on a part-time basis, and a full-time Executive Support Officer.<sup>88</sup> The Principal Legal Advisor and the Executive Support Officer are formally employees of the Department of Premier and Cabinet under the GSE Act.

<sup>86</sup> This was achieved by inserting section 57AB into the ICAC Act and section 88B into the PIC Act.

<sup>87</sup> Available at:

[www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/1156/2R%20for%20PIC%20and%20ICAC.pdf](http://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/1156/2R%20for%20PIC%20and%20ICAC.pdf)

<sup>88</sup> Office of the Inspector of the Independent Commission Against Corruption, 'Report to the Premier: The Inspector's Review of the ICAC', 12 May 2016, [6]. Available at: <http://www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf>.

## The Inspector's concerns about resourcing

The Inspector's Report states that the resources provided to the Office of the Inspector are inadequate, as follows:

*"There is, it can be stated at this point, an extraordinary lack of proportion between the resources of the Inspector and the powers of the ICAC over which the Inspector seeks to exercise oversight. The Inspector should have the power to employ his or her own staff, similar to the powers provided to the Commission in s.104 of the ICAC Act. Further, the position of the Principal Legal Advisor should be elevated to that of Solicitor to the Inspector, in keeping with the role, duties and importance of the position. It may be necessary to also employ other legal officers to assist the Inspector and Solicitor to the Inspector."* [6]

On 17 February 2016, Mr John Nicholson, SC was appointed as an Assistant ICAC Inspector to assist the current Inspector of the ICAC.

It is to be expected, of course, that the scale of the Inspector's office will not match the scale of the ICAC which it oversees. An oversight body will always be a small fraction of the size of the body or bodies that it oversees; the ICAC itself is orders of magnitude smaller than the entire public sector over which it exercises its jurisdiction.

Aside from relativities, however, the small absolute size of the Inspector's office does raise potential issues in terms of its governance, capacity to obtain effective administrative support, the exercise of work health and safety responsibilities, and the ability to respond to surges in workload (including as has happened in recent times). These are discussed further below.

## Incoming LECC reforms

In the proposed new LECC, the Inspector of the LECC will have increased responsibilities when compared with the office of the Inspector of the PIC. In particular, the new Inspector of the LECC will oversee the LECC's oversight of police complaints, as well as police misconduct.<sup>89</sup> Oversight of police complaints is currently undertaken by the Ombudsman, who is not currently overseen by an Inspector.

The draft LECC Bill currently provides that the Inspector of the new police oversight body is to be a separate officeholder from the person who holds office as Inspector of the ICAC. Accordingly, if the Bill is passed in its current form, the recent practice of appointing a single person to hold office as both the Inspector of the PIC and the Inspector of the ICAC will cease.

## Options for structural reform of the office of the Inspector of the ICAC

Some change to the organisational design of the Office of the Inspector will be inevitable with the establishment of the LECC.

The concerns raised by the Inspector about resourcing and capacity suggest, however, that there may be an opportunity for a more considered reform to the structure of both Inspectorates.

Approaching the issue in a similar way to the discussion in Part 1 above concerning the structure of the ICAC, one option may be to consider the 'best practice model' that was developed there and seek to adapt it (with necessary modifications) to the Inspector's office.

If that approach were taken, it could be possible to envisage the creation of a unified "Office of the Inspectorates" that would cover the functions of the LECC Inspector and the ICAC Inspector. The key features of this model, aligned to the best practice approach developed earlier, would be a panel of perhaps three Inspectors, sitting above a separate GSE Act agency that would support them and be headed by a professional executive manager.

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<sup>89</sup> Draft LECC Bill, Part 9.

In some respects this could be seen as a scaled-down version of the suggested ICAC structure described above, and could offer similar potential benefits:

- The model frees the Inspectors from the day-to-day function of running the administrative management of the office, which instead becomes the responsibility of a qualified executive manager.
- A panel of inspectors means that important decisions (such as to publish a report on an investigation) can be reviewed and subject to approval by that internal peer group.
- There may be opportunities to consider broadening the skill sets across the panel of Inspectors. While judges and former judges will continue to be expected to comprise the majority, if not all, of the panel of Inspectors, consideration could be given to the mix of particular skills and experiences across the Panel including, for example, performance auditing.
- By combining the two offices (and noting the increased functions associated with the LECC), the office may be able to develop the scale needed to engage a critical mass of its own support staff and supporting infrastructure, without needing to have staff assigned to it from the Department of Premier and Cabinet.
- Human resources, including work health and safety responsibilities, for office staff will be more clearly defined than at present.
- Use of Assistant Inspectors could continue to bolster the capacity of the Inspectorate on an ad hoc basis when required.

In short, an Office of the Inspectorates as modelled above could deliver resource synergies as well as complementing the organisational design of the bodies (the LECC and the ICAC) which the Inspectors oversight.

Of course, if this change were to be pursued, care would need to be taken to ensure that the functions of the Inspectors were compatible with being supported by a single Office, and that any potential conflicts could be avoided.

## Part 4: Public record of the outcome of subsequent legal action

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### Background

The inquiry's terms of reference require the Committee to have particular regard to 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.

This particular term of reference has been raised in the context of the Inspector's Report and a number of recent high-profile cases in which it has been suggested that the outcome of court cases has been directly inconsistent with, or at least has raised doubts about the correctness of, earlier findings in relation to the same or related matters by the ICAC.

To understand this claim, it is necessary to understand the functions of the ICAC and the nature of its findings, and their relationship with subsequent criminal proceedings.

### The relationship between ICAC investigations and subsequent criminal proceedings

The ICAC is, like bodies such as the NSW Police Force and the NSW Crime Commission, an investigatory agency.<sup>90</sup> Formally, it is part of the Executive branch of Government, although it has also been suggested that it is more usefully thought of as part of a distinct "Integrity branch", which comprises a group of agencies distinguishable from other Executive agencies by their functions and the fact that they operate independently of the day-to-day direction and control of Ministers and instead report directly to the Parliament.<sup>91</sup> The important point is that the ICAC is, however conceived, categorically not part of the judicial branch of Government, and it does not exercise

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<sup>90</sup> ICAC Act, section 13.

<sup>91</sup> James J. Spigelman AC 'The Integrity Branch of Government', AIAL National Lecture Series on Administrative Law, Sydney, 29 April 2004, p. 2. Available at: <[http://www.supremecourt.justice.nsw.gov.au/Documents/spigelman\\_speeches\\_2004.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/spigelman_speeches_2004.pdf)>

judicial power.

The ICAC is empowered to hold public inquiries,<sup>92</sup> to make findings<sup>93</sup> and to publish certain reports.<sup>94</sup> Further, although it is not bound by the rules of evidence,<sup>95</sup> it has duties of procedural fairness,<sup>96</sup> which, in the context of the serious nature of the findings it can make, mean that its investigations can, in the mind of the public at least, often take on the appearance of a quasi-judicial proceeding.

One of the most important findings the ICAC may make is a finding that a person has engaged in, or is engaging in, corrupt conduct.<sup>97</sup> Such a finding may now only be made if the ICAC is satisfied that the conduct in question constitutes *serious* corrupt conduct.<sup>98</sup>

“Corrupt conduct” has a complex definition, but one aspect is that, in order to constitute corrupt conduct, the relevant conduct must constitute or involve:

- (a) a criminal offence;
- (b) a disciplinary offence;
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official; or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.<sup>99</sup>

Paragraph (a) above indicates that, in some circumstances, it may be necessary for the ICAC to form a view that conduct would constitute or involve a criminal offence before it can make a finding of corrupt conduct. The ICAC is, however, prohibited from making a formal finding or expressing an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).<sup>100</sup> This prohibition is consistent with the ICAC not being a judicial body and not exercising judicial power.

The ICAC can form and express opinions as to whether the advice of the Director of Public Prosecutions (**DPP**) should be sought in relation to the commencement of proceedings against particular persons for criminal offences against the law of the State, or whether consideration should or should not be given to the taking of other action against particular persons.<sup>101</sup> The ICAC also has a role in preparing a brief of evidence for the DPP and may have a role in the laying of charges, but it is always a matter for the independent DPP to determine whether proceedings are to be commenced or be continued.<sup>102</sup>

### Effect of ICAC’s findings

A finding by the ICAC, whether of corrupt conduct or otherwise, generally has no direct *legal* effect or consequence. The circumstances revealed by an investigation may, of course, lead to other proceedings (such as criminal proceedings) that will have significant legal consequences. In any ensuing court proceedings, however, all relevant facts will need to be proved, by the adducing of admissible evidence, to the relevant criminal standard of proof. That the ICAC has previously made particular findings in relation to the relevant factual situation has no bearing, and the usual presumption of innocence applies.

The ICAC Act does, however, permit disciplinary action to be taken against a public official in reliance upon an ICAC finding of corrupt conduct, without requiring a further investigation to be

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<sup>92</sup> ICAC Act, section 31.

<sup>93</sup> ICAC Act, section 74A.

<sup>94</sup> ICAC Act, section 74.

<sup>95</sup> ICAC Act, section 17.

<sup>96</sup> ICAC Act, Part 4.

<sup>97</sup> ICAC Act, section 13.

<sup>98</sup> ICAC Act, section 74BA, inserted by the *Independent Commission Against Corruption Amendment Act 2015*.

<sup>99</sup> ICAC Act, section 9.

<sup>100</sup> ICAC Act, section 13(4) and section 74B.

<sup>101</sup> ICAC Act, section 13(5)(b).

<sup>102</sup> ICAC Act, section 14; *Director of Public Prosecutions Act 1986* (NSW), section 7.

undertaken as to whether the conduct occurred.<sup>103</sup> The only prescribed requirement is that the relevant public official be given an opportunity to make a submission in relation to any proposed disciplinary or other action.<sup>104</sup>

There is also no doubt that a finding by the ICAC of corrupt conduct can have significant consequences for a person's reputation with, among other things, real consequences for their future employment or prospects in elected office. Even before any findings have been made, and as soon as it becomes known that a public official is under investigation for suspected corrupt conduct by the ICAC, there may be an expectation that the public official will stand aside or be stood down from their office pending the finalisation of the investigation.

### Effect of subsequent court proceedings on earlier ICAC findings

The potential for subsequent court proceedings (or their absence) to be perceived as suggesting some fault with findings that have previously been made by the ICAC is not new.

The observation that ICAC investigations do not always or even routinely lead to criminal prosecutions was addressed in both the McClintock Report and the Gleeson Report.

In the 2005 McClintock Report, Mr McClintock SC stated:

*"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 that its findings were appropriate on the information available to ICAC. Nonetheless, and despite efforts in recent years, the number of criminal convictions secured as a result of ICAC's investigations remains somewhat low. I do not consider that this reflects the inappropriateness of ICAC's findings... [3.4.31-3.4.32]*

*The number of criminal prosecutions is...an imperfect indicator of the performance of ICAC. The principal function of ICAC is to investigate and expose corrupt conduct, not to obtain criminal convictions. ICAC was established because of the difficulties with obtaining criminal convictions for corruption offences. Its focus generally will, and should be, on those matters where **it is more important to ascertain what happened than to obtain a criminal conviction.**" [3.4.22] [emphasis added]*

This view was reiterated by the Gleeson Panel in the 2015 review of the jurisdiction of the ICAC, which stated:

*"The Panel has considered the issue of the proportion of corrupt conduct findings that are ultimately reflected in criminal convictions. It is relatively low and underlines the differences between an investigative process and the administration of criminal justice. The Panel has also considered the time involved in commencement of prosecutions. The Panel does not recommend any legislative change to address these matters.*

...

*The result of the matters mentioned in paragraphs 12.2.8 [the privilege of self-incrimination is abrogated by the ICAC Act] and 12.2.9 [ICAC is not bound by rules of evidence] above is that the ICAC may well be making its findings, including those of corrupt conduct under section 13 of the Act, on material different from that which will be available to a criminal court subsequently determining the guilt or innocence of the person in question. It is obvious that the results must, in some circumstances, be different and that there will be fewer findings of guilt than there will be of corrupt conduct.*

*The discrepancy between convictions and findings of corrupt conduct, in fact, provides an eloquent demonstration of the fundamental distinction between an ICAC investigation and its function and the criminal justice system and its purpose and that of the criminal trial. The observations in paragraph 2.8.8 [reference from Gleeson Report] also are of relevance to*

<sup>103</sup> ICAC Act, section 114A.

<sup>104</sup> ICAC Act, section 114(3)(c).

*this point.*

*The Panel does not recommend any legislative change in relation to this matter.” [12.2.10-12.2.12]*

Where criminal proceedings do follow an ICAC investigation, different concerns have been raised when those proceedings have then resulted in an acquittal.

In those circumstances, those against whom the adverse findings were made have sought to argue that the acquittal constitutes a “vindication” or their “exoneration” from the ICAC’s findings.

It has been suggested, therefore, that those who are subject to an adverse finding but who are never actually charged or brought to trial, are in a worse position than those who are charged, as they will have no forum in which to seek such vindication or exoneration and therefore no avenue to clear their name.

However, as noted in the McClintock and Gleeson Reports above, there are fundamental differences of purpose, nature and procedures between ICAC investigations and criminal trials.<sup>105</sup> The latter will never entirely be on all fours with the former.

Even if a person is acquitted at a criminal trial that is dealing with the same conduct that gave rise to an adverse ICAC finding, all that can be said as a matter of necessary implication is that the person was found not guilty of the particular criminal offence for which they were charged, based on the evidence that was admissible and that was in fact admitted at their trial, and having regard to the relevant criminal standard of proof (beyond reasonable doubt). It does not *necessarily* follow that the original ICAC findings must have been wrong in the sense of not being an accurate statement of “what happened”.<sup>106</sup> Those findings may still be a correct statement of what actually happened; certainly they remain an accurate statement of what the ICAC itself believed (and presumably still believes)<sup>107</sup> happened.

Of course, this observation cuts both ways. The fact that subsequent criminal proceedings (even an acquittal) can never necessarily overrule or undermine the veracity of the ICAC’s earlier findings of fact means that those subject to adverse findings, even if they are subsequently acquitted by a court, may continue to suffer the stain of the adverse ICAC findings and their reputational impact without any effective avenue to correct the earlier error or the damage that has flowed from it.

## Current position

Past ICAC investigation reports are currently published on its website.<sup>108</sup>

The website also contains information regarding ‘Prosecution briefs with the DPP and outcomes’.<sup>109</sup> This information includes the outcome of court proceedings, including when persons are acquitted or found not guilty of charges laid against them.

However, these two pieces of information – the ICAC reports and the information about subsequent prosecutions – are not currently published together or in ways which make for easy cross-referencing. There is also no statutory obligation on the ICAC to publish, or to keep updated, this information.

<sup>105</sup> See paragraph 2.4.4 of the 2005 Independent Review where the main differences between ICAC’s investigations and Courts of law are described.

<sup>106</sup> To borrow from the McClintock Report, above. There is an asymmetry here, in the sense that, while an acquittal does not necessarily imply that the ICAC findings were wrong, a criminal conviction will (if premised on identical facts) necessarily imply that the ICAC findings were right. Nevertheless, even where a conviction is secured, there may be important differences in the evidence relied upon, and the facts found, by the Court and by the ICAC: see for example the successful prosecution of Eddie Obeid arising out of Operation Cyrus.

<sup>107</sup> If subsequent evidence (including evidence adduced during court proceedings) were to come to the ICAC’s attention after a finalised investigation, which causes ICAC itself to doubt the veracity of its previous findings, then it would be open to the ICAC of its own initiative to commence a new investigation with a view to correcting the record: see ICAC Act, section 20. If ICAC doubted whether it had power to do this, then consideration could be given to whether legislative amendment is necessary to give it that power.

<sup>108</sup> ‘Past Investigations’, Independent Commission Against Corruption New South Wales, 2016, viewed on 8 July 2016, <https://www.icac.nsw.gov.au/investigations/past-investigations>

<sup>109</sup> ‘Prosecution briefs with the DPP and outcomes’, Independent Commission Against Corruption New South Wales, 2016, viewed on 8 July 2016, <https://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>

## Inspector's Recommendation

The Inspector has recommended that consideration be given to introducing legislation that provides for an exoneration process in certain circumstances. Relevantly, his Report states:

*"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 finding set aside."* (Recommendation 15)

The Inspector described a number of recent investigations undertaken by the ICAC, including the investigations concerning Mr John Booth in Operation Cavill<sup>110</sup> and Mr Murray Kear in Operation Dewar,<sup>111</sup> as matters in which "exoneration" was received in Court but the findings in the relevant ICAC reports remained on the record [49].

## ICAC response

The ICAC, in its Submission to the Premier, disagreed with this recommendation. The ICAC's Submission states:

*"The recommendation ignores the fact that Commission investigations are separate from criminal proceedings and demonstrates an apparent misunderstanding on the part of the Inspector of the basis upon which corrupt conduct findings are made under the ICAC Act. It also fails to take into account relevant case law.*

*Criminal courts do not operate as a mechanism for review of Commission findings. The fact that a person found to have engaged in corrupt conduct is not prosecuted for a criminal offence or, if prosecuted, not convicted does not "exonerate" that person from a corrupt conduct finding. In any event, criminal proceedings do not "exonerate" a person from a criminal offence. In a criminal court persons are "acquitted" or found "not guilty". They are not found "innocent" or "exonerated".*

...

*Findings of corrupt conduct made on the basis that, for the purposes of s 9(1)(a) of the ICAC Act, the conduct could constitute or involve a criminal offence are not dependent on a person being prosecuted or convicted of that offence."*

## Previous proposals for Merits Review

It appears that what the Inspector recommends is, in effect, a form of merits review of ICAC findings, distinct from any criminal process which may (or may not) follow an ICAC investigation.

Such a proposal has previously been considered by both the 2015 and 2005 Independent Reviews of the ICAC. Both reviews recommended that the proposal should not be adopted.

The McClintock Report questioned the benefit of such a proposal, stating:

*"I am not persuaded that the proposal for merits review of findings by ICAC should be accepted. To give effect to it, it would be necessary for another independent body of greater standing than ICAC to re-examine findings of fact made by ICAC. Were this right to be exercised routinely, it could prove to be a costly proposal of dubious benefit, given the capacity of the Supreme Court to review findings of ICAC on the administrative law grounds of illegality, irrationality, or procedural unfairness, the ability of the proposed Inspector to investigate allegations of misconduct by ICAC and the capacity of ICAC itself to review its own findings." [7.7.6]*

The Gleeson Panel said such a course of action would confuse administrative and judicial powers:

<sup>110</sup> Investigation into the conduct of certain City of Ryde councillors and others, June 2014.

<sup>111</sup> Investigation into the conduct of the Commissioner of the NSW State Emergency Service, May 2014.

*“The question whether provision should be made in the [ICAC] 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.”*

## Implementation of reform

If the Committee were to recommend that steps be taken to ensure that those accessing past ICAC investigation reports are also made aware of any legal actions taken (and any associated outcomes), then one approach to implementing that recommendation would be to amend the ICAC Act to require the ICAC to continue to make available on its website all past reports, and to include on the front of any such report (and to continue to update) a notation indicating what legal action has (or has not been) taken and the outcome of that action.

While past investigation reports of the ICAC cannot and should not be amended or removed from the public domain after their presentation to Parliament, it would appear to be practicable for such notations to be added to the front of reports (including, where relevant, a link to any relevant judgment). There could be an obligation on ICAC to table the notated report in Parliament. These actions would assist in ensuring that the outcome of legal action taken in response to the ICAC's corrupt conduct findings is adequately reflected on the public record.

There are examples in other jurisdictions of integrity agencies similarly publishing information to ensure the accuracy of the public record. For example, in May 2012 the Office of Police Integrity (OPI) in Victoria published a document to clarify for the public record the results of an OPI investigation into aspects of a previous investigation.<sup>112</sup> More broadly, this type of practice is consistent with the ethical obligations of professional publishers and journalists to correct the public record.<sup>113</sup>

## Conclusion

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The Department in this Submission has sought to bring to the Committee's attention recent and proposed reforms to the design of integrity institutions as there may be opportunities to update the structure of ICAC in line with these reforms to support the more effective exercise of its functions and powers.

The Department recognises that an institution's structure and governance framework will affect the degree to which policy makers and the public can have confidence in the proper and objectively reasonable exercise of its powers. By focusing on matters pertaining to the overall structure and governance of the ICAC, this Submission reflects the interdependent nature of these matters to the other questions that the Committee must examine under its terms of reference.

The Department in this Submission has not sought to express a view on each of the recommendations that have been made by the Inspector in his report. It has, however, taken the opportunity, where potentially useful for the Committee, to draw attention to relevant historical and comparative information and in some cases to provide advice of an administrative nature as to how reforms might practically be implemented.

The Department would be happy to assist the Committee by providing further factual material to the Committee if requested.

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<sup>112</sup> Available at: <<http://www.ibac.vic.gov.au/docs/default-source/reviews/opi-investigations/opi-investigation-into-a-2004-victoria-police-rape-investigation---correcting-the-public-record.pdf?sfvrsn=4>>

<sup>113</sup> For example, the Australian MEAA Journalist Code of Ethics states that journalists must do their utmost to achieve fair correction of errors: Available at: <[www.meaa.org/resource-package/meaa-code-of-ethics/](http://www.meaa.org/resource-package/meaa-code-of-ethics/)>. The UK based Committee on Publication Ethics (COPE) has also published Retraction Guidelines which state that journal editors should consider issuing a correction if a small portion of an otherwise reliable publication proves to be misleading: available at: <<http://publicationethics.org/files/retraction%20guidelines.pdf>>