

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

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DATE

29 July 2016

Damien Tudehope, MP
Chair
Joint Committee on the ICAC
Parliament House,
6 Macquarie Street,
SYDNEY NSW 2000

Dear Mr Tudehope,

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

Thank you for your letter dated 6 June 2016 inviting me to make a submission to the above Inquiry. I have set out my response to the terms of reference below.

[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.

Public hearings

The ICAC has the power to conduct both private compulsory examinations and public inquiries. Section 31, *Independent Commission Against Corruption Act 1988* ("ICAC Act 1988") sets out the following factors the ICAC should consider when determining whether or not to conduct a public inquiry:

- (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The ability of the ICAC to conduct public inquiries is an important power that enables the ICAC to fulfil its functions to investigate, expose and prevent corruption involving or affecting public authorities and public officials.

Conducting inquiries in public also helps to ensure the accountability of the ICAC in its conduct in investigating corrupt conduct.

Potential reputational damage is a factor which the ICAC must take into account when exercising its discretion to conduct a public inquiry. It is an important factor, but should not be the overriding factor when determining whether it is in the public interest to conduct a public inquiry.

In relation to Recommendation 4, of the Inspectors Review that:

In the event that “public” inquiries are retained... there should be a requirement that ICAC when determining whether or not the public interest is served, to have regard to and to specify the elements of the public interest to be served and to consider whether the public interest would be better served by referring the matter to another public authority or to the DPP. ’:

- *The ODPP is not an investigative agency.*
- *A referral of a matter to the ODPP by the ICAC should generally not occur until after the conclusion of an investigation by the ICAC.*

I do not recommend any amendment to the power of the ICAC to conduct public inquiries.

Enhancement of power of the ICAC to investigate after a matter is referred to the ODPP

During the course of an investigation the *ICAC Act 1988* gives the ICAC power to obtain information from a public authority or public official (s 21), require any person to produce documents (s 22), enter premises of a public authority or public officer to inspect or copy documents (s 23) and issue and execute search warrants (ss 40-41). When an investigation is concluded these powers cannot be used by the ICAC.

Typically it is only after an investigation has concluded that advice is sought from the ODPP in relation to the prospect of commencing a criminal prosecution.

This causes a problem when the ODPP issues requisitions that might require the use of one of these powers. For example, if the ODPP requested bank documents or telephone call charge records the ICAC would be unable to obtain these requisitions as they would involve a breach of privacy in the absence of a search warrant or a notice to produce.

The ICAC should have investigative powers that are exercisable when a matter has been referred to the ODPP. These would have to be slightly different from the ICAC’s initial investigation powers as they should not contain an option for a person to produce items under objection (s 26, *ICAC Act 1988*).

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

Any changes to the structure and governance of the ICAC should not impact the ability of the ICAC to perform its current functions under the *ICAC Act 1988* nor its ability to do so independently.

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

The ICAC Inspector should be provided sufficient resources to perform the role of Inspector. Any changes to the oversight of the ICAC should not impact the ability of the ICAC to perform its current functions under the *ICAC Act 1988* nor its ability to do so independently.

[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.

A prosecution for a criminal offence arising after an ICAC investigation is conducted using admissible evidence in accordance with the rules of evidence applicable to a criminal trial. The prosecution must prove any offence beyond reasonable doubt.

A finding of corrupt conduct made by the ICAC is based on the civil standard – on the balance of probabilities. A finding of corrupt conduct may be based on evidence not admissible in a criminal trial, including evidence subject to a declaration made under s 38, *ICAC Act 1988*.

Having regard to the above differences it does not follow that because an accused is acquitted of a criminal offence that a prior finding of corrupt conduct by the ICAC was invalid or should be reviewed.

If Parliament wishes to introduce a form of merit review in relation to findings of corrupt conduct by the ICAC, it should not be connected to the result of any criminal prosecution.

Thank you for the opportunity to make a submission to this inquiry. If you have any further questions please contact the Director on (02) 9285 8888 or Johanna Pheils on (02) 9285 8669.

Yours faithfully,



Keith Alder

Acting Director of Public Prosecutions