Submission No 27

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

Organisation:

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Position:

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Committee on the Independent Commission Against Corruption

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

Submission

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Introduction

The Independent Commission Against Corruption (ICAC) has been and continues to be a vital part of the integrity and accountability system for the administration of the NSW public sector since its establishment in 1989.

In concert with other integrity and accountability agencies in NSW it is an invaluable check on the management and administration of public functions.

The size and breadth of NSW's integrity sector[1] is not inconsiderable. In 2016-17, that sector has a total budget of $175.9 million and a full time staff complement of around 934[2].

However, review, reform and renewal in the integrity system is rare, piecemeal and too often driven by a need to immediately address crisis and controversy.

These incremental changes often change the nature and culture of the affected agencies – albeit in an unintended manner.

External reviews, when they occur, usually focus on legislative and broad structural issues, and are unable – by absence of purpose or failure of design - to meaningfully drill down to organisational and cultural matters.

The major agencies with the broad remit of corruption and maladministration in the NSW public sector have a long record of achievement. However, they perhaps have not been subject to the sort of meaningful review that should accompany their place in the integrity arrangements for NSW.

The ICAC is approaching the thirtieth anniversary of its creation. The Audit Office, in its incarnation provided for by the *Public Finance and Audit Act 1983*, marked three decades of operation in 2014. The Ombudsman's Office has recently passed the fortieth anniversary of its establishment.

Much has changed in those organisations in that time, as with the public sector they are tasked to oversight.

The systems for integrity and accountability are continuing to change. To name but a few recent developments of relevance:

- The Crime Commission has undergone extensive change in all facets of its legislative arrangements, management, and culture.
- The imminent establishment of a stand alone Law Enforcement Conduct Commission to take on the role and functions of the Police Integrity Commission and the police jurisdiction of the Ombudsman's Office.
- The oversight and investigative function given to the Electoral Commission with regards to certain electoral matters.
- The mooted establishment of a Parliamentary Standards Commissioner to investigate relatively minor breaches of standards for Members of Parliament.

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1 I define the integrity sector as those agencies with an auditing, complaints and/or investigative function with respect to corruption, organised crime, serious misconduct and maladministration. These are the Audit Office, the Crime Commission, the Health Care Complaints Commission, the Information and Privacy Commissions, the Judicial Commission, the Ombudsman's Office, the Police Integrity Commission as well as the ICAC.

2 Figures from 2016-17 Budget. Staff numbers are from 2016-17 Budget, with exception of Audit Office which has no staff figures in the Budget. Audit Office staff figures are from the Audit Office website, and are as at 30 June 2015.

Similarly, the public sector itself has undergone significant structural and cultural change since the inception of the ICAC. To name just a few trends: increased professionalisation of the public service, increasing reliance on merit selection; the effective elimination of the patronage model of appointment and promotion; improved business practices from the adoption of technology and business practices introduced from the private sector.

Corporatisation and devolution of functions and service provision (such as in health and community services) to non-government providers have also significantly changed the nature and culture of the public sector.

Put simply, if you set out to design a system of oversight and accountability for the current public sector would you design it along present lines? What are the corruption risks and integrity issues in the contemporary public sector? What is the best means of detecting and investigating corruption in this era?

Too often these questions have been left to the agencies responsible for undertaking these tasks – leaving an exact and complete assessment subject to complacency and comfort with the status quo.

The Inspector's Review notes that it was a task beyond his capacity to undertake a thorough going review of the ICAC since its inception. It is unfortunate that there is no sustained review or assessment of the ICAC's work outside of the ICAC itself, the Committee on the ICAC, which has undertaken periodic reviews of ICAC's functions and capacity, and the Inspector, in recent years.

In the life of the ICAC, there has not been a major external *organisational* review of the type periodically taken of the equivalent bodies in other states. By their nature, and their terms of reference, the 2005 ("McClintock") and 2015 ("Gleeson and McClintock") Reviews of the ICAC Act approached the task of a *legislative* review.

In the past decade in NSW there has been nothing of the nature of the Proust review of Victoria's integrity and anti-corruption system[3], the Callian and Aroney review of the Queensland Crime and Misconduct Commission[4] (let alone the five year reviews undertaken by the Parliamentary Crime and Corruption Commission) or the reviews undertaken by the WA Corruption and Crime Commission in 2014-15 resulting in the "Misconduct Intelligence Assessment" and the "Repositioning Statement".[5]

In 1999-2000, in considering the performance of the ICAC, the Committee on the ICAC considered engaging consultants to undertake a major performance review of the ICAC. To ensure some control over the process, by managing the process as the client, the ICAC itself undertook a number of significant organisational and cultural reviews. The Committee was briefed and had input into this process, and were eventually provided with the reports on an *in camera* basis.

These reviews included a management review undertaken by former ASIC Commissioner (and now NSW Law Reform Commissioner) Alan Cameron and an investigative capacity review undertaken by the then Special Crime and Internal Affairs unit of the NSW Police.

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[3] E. Proust & P. Allen (2010) *Review of Victoria's Integrity and Anti-Corruption System,* Melbourne, Public Sector Standards Commissioner, State Services Authority.

[4] I. Callinan & N. Aroney (2013) *Review of the Crime and Misconduct Act 2001*. Queensland.

[5] Corruption and Crime Commission (2015) *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the "Corruption and Commission Act 2003" ("the Repositioning Report")*. Western Australia.

These were significant undertakings, and resulted in substantial changes in structure, management and personnel.

It is my understanding that nothing of a comparable nature has been undertaken, either internally or externally, since – another 15 years having elapsed since their completion. The organisational changes effected in response to those reviews have pretty much remained in force since that time.

While I appreciate the remit of the Committee is limited to the ICAC and its Inspector, I submit that consideration of the ICAC's future needs to be considered against the broader picture of oversight of the public sector, and the appropriate arrangements to carry this into the future.

It is my submission that there is a need for a comprehensive review of the appropriate integrity arrangements for the broad oversight of the NSW public sector, particularly as it relates to the ICAC and the Ombudsman's Office.

This would include a scoping study serving as a needs analysis for what in needed in the oversight of the NSW public sector in modern era, and how best to implement a system for investigating corruption and maladministration, and for handling complaints and protected disclosures.

This would entail examining the future direction of the Ombudsman's Office after the police jurisdiction has been subsumed into the Law Enforcement Conduct Commission. By steady accrual of responsibilities for Aboriginal programs, reportable conduct in respect of child-related employment, the community and disability services jurisdiction, and the child death review function, the original remit of the Ombudsman's Office has been significantly affected.

To give just one example, the system of oversight for local government has become fragmented, and dissipated in focus and impact. It reflects poorly on the ongoing jurisdictions of the ICAC and the Ombudsman that increasing recourse has to be had to Special Inquiries for councils such as Auburn and North Sydney.

The extent to which significant, resource intensive investigations of the nature of ICAC's Operations Credo/Spicer and Acacia/Indus/Jasper or the Ombudsman's Operation Prospect can distract, and almost bring to a halt, any other significant work should also be cause for concern.

I do not underestimate the difficulty of considering, let alone giving effect to a wholesale review of the appropriate remit and structure of the ICAC. Even with bipartisan support, it can (and I daresay, would) easily be portrayed as the political class looking after its own interests.

Yet the difficulty of the task does not diminish the necessity for it, and nor should it prevent it from happening.

Term of Reference 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:

Establish a primary function of criminal investigation towards prosecution

It should not be forgotten or fail to be appreciated just what a revolution the ICAC model of investigating and exposing corruption was to the system of public administration and justice in NSW.

ICAC was the response to a perception that corruption was intractable and the corrupt were untouchable.

As the Second Reading Speech of the then Premier noted:

> *In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.*

Traditional methods of investigation and prosecution were argued to be inadequate to the task. Yet there was much happening at the same time that might have put paid to the downbeat assessment that exposing and prosecuting corruption was impossible without an organisation like the ICAC.

Among the positive institutional changes to the administration of justice in New South Wales instituted or taking full effect around the time of the inception of the ICAC were:

- The passage of the *Local Courts Act* in 1982, which placed the magistracy on a firm footing as part of an independent judiciary and removed it from its adjunct status as an arm of the public service and the police;
- The establishment of the State Drug Crime Commission (later the NSW Crime Commission) in 1986, which became an effective bulwark against organised crime in NSW;
- The passage of the *Judicial Officers Act* in 1986, which in part guaranteed the independence of the judiciary – including the magistracy - and establishing the Judicial Commission as an oversight body to address complaints and allegations of misconduct and incapacity;
- The establishment of an independent prosecution office in the form of the DPP in 1986.

Put simply, in the years before the ICAC Act, there was an evident lack of confidence in the ability and integrity of the institutions of judicial administration to impartially and effectively investigate and prosecute corruption.

There are few grounds, if any, to think that such an institutional incapacity – in the prosecution or judicial functions - exists today.

The policy response that was ICAC was, in part, a reaction to a system thought incapable of the independence and strength of purpose to adequately investigate and prosecute corruption in the NSW public sector.

The early work of the ICAC in identifying and exposing corruption in policing, local government, regulation, licensing and development approvals was like cleaning the Augean stables of public life. These investigations did much to uncover corruption “hard wired” intro institutions and processes, and by doing so, lead to reforms and improved confidence in the integrity of those systems.

The drivers of corruption have changed significantly over the life of the ICAC. Many of the institutional factors behind the culture of corruption in NSW up to the 1980s revolved around the irregular “regulation” of markets in illegal and illicit activities such as liquor, gambling, and sex work.

With much of these sectors now legalised and/or subject to much more transparent regulation, the “underworld” influences that may have warranted the design of the ICAC model no longer have the stranglehold over segments of public life that they may once have had.

However, the argument that the use of royal commission powers, public hearings and abrogation of once fundamental legal defences, such as the right against self incrimination, is the only way to expose public sector corruption is as flawed as it is redundant.

The major systemic corruption risks, as far as the jurisdiction of ICAC is concerned, presently seem to be in the areas of licensing and regulation; procurement and contract administration; and planning and development regulation.

Generally, these are areas with substantial record keeping that, as past and current ICAC investigations have shown, lend themselves to thorough documentation of decision making.

The investigative techniques available to the modern day ICAC would have been almost inconceivable to the organisation commencing business in 1989. The routine electronic capture of day to day administration on computers, electronic devices and servers, email trails, call charge records and electronic management of funds at corporate and personal levels.

That’s not to say it is not without new challenges, but these techniques demonstrate the potential to capture significant evidence at an investigative stage that would be better directed towards prosecution rather than simple exposure by way of being canvassed at public hearing.

An examination of exhibits presented to recent public inquiries demonstrates the realm of information retrieved by ICAC investigators. However, as indicated in the case study “R v Obeid” (on the next page of this submission) there are instances on the public record where ICAC has failed to fully utilise the evidence it has had to hand.

Case Study – R v Obeid (No. 7)

Should the Committee need to consider the need for a review of ICAC's investigative capacity, perhaps one example from the recent criminal trials of the former Minister, The Hon. Eddie Obeid, may suffice

On February 24, 2016, Justice Beech-Jones discharged the jury in the first trial, as a result of new evidence that had come to light in the preceding days. These were spreadsheets located by a Crown witness, on his own initiative, from a hard drive previously seized, (presumably) "mirrored", examined and returned to the witness by the ICAC.

These spreadsheets apparently contained evidence that was capable of contending that Mr Obeid had received material payments at a time material to the Crown case.

As Beech-Jones J notes in his judgment in **R v Obeid (No 7) [2016] NSWSC 132,**

> 14. In the meantime, an ICAC officer, that is Mr Berry, who was also a Crown witness, spoke to Mr Maroon shortly after he gave evidence. Mr Berry obtained the file names of the spreadsheets that Mr Maroon referred to. Mr Berry performed a search of the copy of the hard drive that had been retained by ICAC. His search revealed a number of spreadsheets with names similar to those nominated by Mr Maroon. The spreadsheets appear to commence on 17 July 2007 and continue up until at least July 2008 and perhaps into 2009. In the time available to him, Mr Berry printed screen-shots of some of these spreadsheets. They include a spreadsheet entitled "Sunday 09/09/07" which includes a reference to what appears to be a payment against the description "mum and dad".
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> 15. As I understand it the Crown wishes to contend that this is evidence of a cash payment made for the benefit of the accused in September 2007. It follows from what I have said earlier that that evidence is potentially of real significance to the Crown case, hence the Crown applied to lead the additional material located by Mr Berry and to re-call Mr Maroon.
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> 16. At this point I should note certain other matters concerning Mr Berry, ICAC and the Crown. In doing so I indicate that it has not been necessary or possible to conduct any detailed investigation as to ICAC's knowledge of the additional material. **Mr Berry stated that although he was aware that the hard drive had been copied and held by ICAC, he was clear that he was not aware that they contained any spreadsheets of the kind referred to by Mr Maroon.**[1] There was no challenge to that aspect of his evidence.

So despite having seized and examined the hard drive in question, the ICAC had not been able to locate evidence of payments received by Mr Obeid (a question material to its own investigation) until advised of the file names by the Crown witness who had been able to retrieve them himself from a drive seemingly "damaged" by the ICAC in the course of its investigation (see paragraph 12 of the judgment).

The ICAC's inability to locate this material and subsequently provide it the DPP surely affected the quality of the initial brief to it, and certainly resulted in the aborting of the first trial, after nine days, so as to be able to introduce this evidence in a seemly fashion to a new jury.

There has long been a tendency in ICAC to "work up" investigations to the stage of public hearings on a regular basis to ensure that it is constantly in the public eye. This is a perhaps inevitable consequence of its history and culture, and the public (and media) perception of it, as much as anything else.

However, to use several random examples, it is debatable whether one needed the equivalent of a Royal Commission to investigate the use of public resources in building an air conditioned dog kennel suite for private use (Operation Corsair); how a relatively low level manager misused his authority to, among other things, obtain lavish bathroom and kitchen fittings and car upgrades (Operation Jarah) or corruption in the supply of snack packs to the Rural Fire Service (Operation Vika).

Of course ICAC has done more significant work. But the fact that these kinds of matters are worked up to the level of public inquiry and reporting demonstrates the tendency (and perceived need) for ICAC to be seen to be continually and regularly carrying out its work in public.

The consistent response of ICAC over the years to concerns that findings of corrupt conduct are not matched by subsequent prosecutions and convictions is that it is not required to focus on the latter as a primary function.

The success of the current model has resulted in a situation where there is a widespread public expectation that those exposed by ICAC will be prosecuted where criminal offences are available. That this is subject to certain constraints on the use of the evidence gathered using the ICAC-specific powers or the remit of ICAC investigations is often lost in the coverage and perception of the ICAC's work.

There is no reason, given the health and vigour of the systems for the administration of justice, for the ICAC not to be given a primary function of investigating corruption with the view to criminal prosecution.

This should be "back ended" by the ability to hold public hearings on significant systems issues of concern where the evidence may not sustain prosecution of individuals.

There will be instances where there may not be the admissible evidence to enable prosecution, and where there are grounds to believe that there is serious or systemic corruption, then there should be the option of using the existing powers up to and including public hearings.

But this should be a "fallback" position, tantamount to the equivalent of a Royal Commission or similar inquiry in circumstances where there is sufficient concern as to warrant public exposure.

Should the ICAC retain its inquisitorial model in either instance, consideration should be given to an external review of ICAC investigative procedures, particularly its practice directions. The practice of requiring a "positive case" to be advanced to test witnesses or evidence should be reviewed.

A review should also focus on ICAC's capacity to proactively identify significant corruption. An assessment of the origins of ICAC's recent major investigations reveals that their origins lie in a Parliamentary reference under section 73 of the ICAC Act (mandating an investigation after ICAC had reportedly declined to pursue similar allegations referred to it earlier), while other matters appear to derive from references from other organisations or investigative journalism.

It is of some concern that it is difficult to identify any major significant investigation in recent times that derived from ICAC's own identification of the relevant conduct.

Transfer the corruption prevention and education functions to the Public Service Commission and the research function to the Bureau of Crime Statistics and Research

As with much of the original concept of the ICAC, the corruption prevention, education and research functions were borrowed from the Hong Kong incarnation. The introduction of the ICAC Act was accompanied by the rather pious hope that it would one day supplant ICAC's investigative focus as evidence of the success of the latter function.

However, it just seemed another aspect of adopting the off-the-shelf (albeit slimmed down) structure of the Hong Kong organisation.

In hindsight, the Hong Kong model of corruption prevention was an unlikely fit for NSW, with differing cultural and institutional settings.

Research on moral education shows that the ICAC is seriously regarded as one of the formative moral influences on the Hong Kong populace – extending its reach into the primary schools. There can be no pretence that the NSW iteration has anything like that function; and nor should it.

With rare exceptions (for example, in the area of driver licensing) the anti-corruption message to the broader public has perhaps not had the same reach and impact as within the public sector.

The critical perspective of the corruption prevention and education function in the Queensland CMC in the 2013 Callinan and Aroney review has something to commend it.[6]

> *Continuing proactive "education", as opposed to reminders about fundamental duties of honesty, openness and fairness, should not be necessary in any reasonably managed department of government. We are satisfied that too much tends to be made of any such need. We have also noticed that little or no attention seems to have been paid in the debate to the close association of diligence with honesty, openness and fairness in the performance of public service.*
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> *The inculcation of diligence historically, and we think currently also, is best done by a Public Service Commissioner who most consistently and efficiently can do the same with "integrity". In a well-run department, such reminders, or reinforcement of such values as may be useful or necessary, should be provided by managers. That would not prevent the CMC, but only as a proper incident of other functions, from drawing attention to, and assisting managers and other staff to rectify, departures from good practices.*

There is duplication – and on occasions, inconsistency or conflict - in good governance messages and education being delivered from the likes of the Audit Office, the Ombudsman, the Information and Privacy Commissioners, increasingly, the Public Sector Commission, and (to a lesser extent) the Police Integrity Commission, as well as the ICAC.

A cohesive and consistent strategy might be to give the function of developing and promoting strategies for good governance to the Public Sector Commission, requiring it to draw on the findings of the bodies constituting the integrity sector.

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[6] I. Callinan & N. Aroney (2013) *Review of the Crime and Misconduct Act 2001 pp 55-6.*

This would give the PSC a leading role in developing strategies and resources for good governance and positive organisational cultures across the broad gamut of its responsibilities.

This model has been adopted in Western Australia following the passage of the *Corruption and Crime Commission Amendment (Misconduct) Act 2014*

As originally conceived, the research function of the ICAC anticipated that it would carry out research on corruption issues and trends. Unfortunately, through its history, this has not been the focus, with research now largely confined to periodic surveys of perceptions of corruption and ICAC's standing in the community. There has been little meaningful research generally for at least the past decade, and very little drawn from ICAC product in its history.

It may well be that a research function might be better performed by BOCSAR, using the resources and expertise it has at hand, with access to ICAC data on a similar basis as that provided by NSW Police. Given the quality of BOCSAR research over its history, this might well result in meaningful insights drawn from the vast repository of data and information holdings built up by ICAC over its history.

Such research and analysis might better inform the ICAC in developing a more effective analytical insight in identifying trends and issues in corruption, and inform strategic planning.

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

Executive Structure:

There is nothing in the history of the ICAC that warrants reconsidering the length of the term of office for Commissioner.

The recent practice that, in addition to the criteria set out in the Act, the Commissioner be a judge or former judge of some standing is a welcome one, and no doubt will be continued for the foreseeable future.

However, this does mean that the Commissioner will, more likely than not, have little or no experience in management – inside or outside the public sector. There is a need for a senior management position, held by a person with substantial experience in day to day management.

To a significant extent, this role has been performed by the Deputy Commissioner role since its establishment under Commissioner Moss. As the Inspector notes, the decision to appoint a Deputy Commissioner was an administrative one, with no statutory basis.

At the time, it was intended that the role have a primarily management function, with the advantage of providing support as an Assistant Commissioner at the preliminary stages of an investigation.

Over time, the position has grown to take on more significant functions, including the conduct of public hearings. While the reports to Parliament issued from public hearings conducted by the Deputy Commissioner in the past appear under the signature of the Commissioner, and are couched in terms of "the Commission" making findings, they presumably amounted to the findings of the Deputy Commissioner. The fact that this is a matter of some opacity warrants clarification if the position is to be maintained.

However, in light of the Inspector's comments, and recent practice with regards to the appointment of Commissioners, it might be better to do away with the position of "Deputy Commissioner", and institute a structure where the ICAC is headed by a Commissioner, with a Chief Executive Officer holding the primary internal management function.

This would entail the recruitment of a senior executive with substantial management skills and experience.

Recruitment of the CEO should be undertaken with the involvement of the Commissioner, with a nominated candidate subject to consideration (and potential veto) by the Committee on the ICAC under provisions equivalent to s.64A of the ICAC Act.

To maintain a clear demarcation in the exercise of the Commission's powers, this position should not be permitted to take on the functions and powers of an Assistant Commissioner as provided for in the ICAC Act.

To allow for continuity in management over terms of successive Commissioners, the position should be limited to a term of no more than seven years, with no option of renewal.

Similarly, consideration should be given to term limits for the positions of Directors of Investigation and Legal, in the nature of seven year terms, with the option of an extension of up to a year to allow for the carriage of a significant investigation through to conclusion.

Staffing

Consideration should also be given to a return to the system of contract positions for investigators and lawyers. The ICAC culture is one resistant to change and critical self-analysis; a culture enabled by a relatively small staff cohort and a tendency for staff across all divisions to stay in the organisation for long periods of time.

Some long serving staff respond to proposals for change by believing that it is only necessary to see out a term-limited Commissioner, or to assume that the term is so short that they will not be able to spend much time on management

This culture can be attributed to a number of factors, including the permanent status of most staff and the comparatively attractive remuneration. Historically, in the establishment phase of the Commission, the ICAC offered staff on then term limited contracts a significant loading on remuneration as compensation for lack of job security.

Very soon (at the commencement of the term of the second Commissioner), the staff mounted an argument that their knowledge and experience in building the organisation should be recognised by permanent employment, with retention of existing pay and conditions.

With these pay and conditions operating under separate legislation to that of the rest of the public sector, they have generally stayed well ahead of comparable positions elsewhere.

Today, that sees nearly 80 percent of the non-SES workforce at the ICAC earning more than $80,997 in 2014-15.

Using the staffing profile and the mid point of each pay band[7] for the non-SES ICAC officers average annual remuneration was over $106,086 in 2014-15. Even using the lowest pay level in each of the reported pay bands, average remuneration at ICAC is $95,233.[8]

This compares to median remuneration in the NSW public service in 2015 of $78,437, and with the NSW Police Service of $81,470.[9]

When ICAC was established, and for some time thereafter, there was an argument that the nature of the work was of such a specialist nature that it was difficult to attract suitably qualified applicants and desirable to retain existing staff for as long as possible.

This is hardly the case now: with a substantial number of directly comparable peer organisations and anti-corruption bodies in every state, and comparable bodies at the Commonwealth level.

Furthermore, in recent years there has been a number of significant Royal Commissions and commissions of inquiry requiring comparable skills sets. This is to say that there are opportunities to introduce new and fresh approaches to the work of the ICAC which is denied by an entrenched culture of promotion from within and extended duration of employment.

[7] A reasonable assumption given the length of service of many Commission officers.

[8] Figures obtained from Appendix 8 – Table 50 ("Workplace diversity in 2014–15") of the ICAC *Annual Report 2014-15* p.119

[9] Figures obtained from the Public Sector Commission's *Workforce Profile Report 2015* p. 37.

Term of reference 3) the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;

Inspector

The Inspector model for the ICAC was introduced in response to the recommendations of the 2005 McClintock Report. It was intended to replace the major operational oversight mechanism of the Operations Review Committee (ORC), which was perceived to be of limited effect as a check on the ICAC's powers.

The Inspector is entrusted with various functions with respect to auditing, dealing with complaints, and conducting inquiries into ICAC's functions and operations. It has done so with some success over the period of its existence.

The problem with the Inspector model, as presently designed and given effect, is that the approach depends very much on the holder of the office. With a single office holder, and a small personal staff, this is perhaps unavoidable

As evident in the experience of the ICAC Inspector and similarly in the past with the PIC Inspector, the manner and tenor of the office seems to take on the characteristics of its holder. There appears to be no settled perspective on how the role should operate, with it having varied from formal auditing against a checklist of legislative obligations to a more qualitative, inquisitorial method of operation.

There is a place for each of these methodologies, and the constraints on them being exercised simultaneously seems to be a combination of resources and the particular approach of the individual holding the office.

The present Inspector has taken a very proactive role, which has brought him into conflict with the Commission and Commissioner. While this is to be expected, it has at times taken on a personal hue – to the detriment of the reputations of both the Commission and the Inspector, and the relationship between them.

Similar discord in the relationship between the Police Integrity Commission and its Inspector during the term of Peter Moss QC occasionally served to draw focus away from significant findings from the Inspector.

It may be worth considering how such conflict may be better managed, and whether there is a role for the Committee in managing the relationship on those occasions where it becomes unseemly or unproductive.

Alternatively, consideration might be given to a model similar to the Queensland Parliament, where a Parliamentary Commissioner undertakes an auditing, inspection and complaints role on behalf of the Parliamentary Crime and Corruption Committee. This might serve to operate the role and function on a more institutional basis, rather than relying on the personal approach applied to the role by any particular Inspector.

In any event, the suggestions in the Review and in the report on Operation Hale that the Inspector take on some sort of "real time monitoring" role with regards to the ICAC, where the Inspector is continually updated on internal operations as a matter of course, seems to be both impracticable and undesirable.

Parliamentary Joint Committee

As with other features of the ICAC Act, the prohibition in s.64 on the Committee on the ICAC reconsidering matters must be seen in light of both its original intent and subsequent developments.

The constraints on the Committee were placed on it at a time when the permanent Committee system in the NSW Parliament was relatively new, and certainly not required to deal with the type of contentious matters that might be the subject of ICAC's work.

It might reasonably be seen that the intent of prohibition was an appropriate bar to the Committee seeking to direct or influence the conduct of ICAC's investigations, or alternatively, effectively re-investigate matters that had been the subject of an ICAC inquiry.

However, in practice, it has had the effect of thwarting legitimate inquiries on the part of the Committee as to how the ICAC has gone about its work in particular instances, and prevented it from doing so in circumstances where there is a legitimate Parliamentary and public interest in having such matters canvassed and explored.

There are occasions, as with the conduct and management of Operation Hale, where Parliamentary scrutiny of a particular investigation is warranted. That the Committee has been hamstrung in doing so is most unsatisfactory.

It is an anachronism that the Committee charged with oversight of the ICAC, and possessing the knowledge and expertise that comes from that role – is prevented by an Act of the Parliament's own making from looking into particular conduct or reconsidering matters - where another Committee of the Parliament, such as a General Purpose Standing or a Select committee, would face no such prohibition.

This was evident in the Select Committee inquiry into the conduct of the Ombudsman's "Operation Prospect" and the subsequent General Purpose Standing Committee inquiry, which were able to canvas matters that would have been outside the lawful purview of the Committee given specific responsibility for oversight of the Ombudsman

This should be subject, however, to the proper restraint in not having matters currently under investigation by the ICAC subject to examination by the Committee.

Term of reference 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;

This question is rendered nugatory if the suggestion is adopted of giving ICAC a primary function of investigation towards prosecution replaces the present conception of investigation, with prosecution as a secondary function.

However, should the existing system remain substantially in place, perhaps consideration might be given to a protocol where the electronic versions of an investigative report held on the ICAC's website is periodically updated with relevant developments as they arise.

Where ICAC has made a Report to Parliament containing findings against a person, and recommended particular courses of action, this report represents the sole stand-alone record of the investigation and its findings and recommendations.

The effect of this might be best contemplated with the scenario of an internet search of the public record for a particular person.

ICAC's standing generally means that search results relating to a person, particularly where that person has no significant public profile beyond their involvement in an ICAC investigation, often feature the ICAC report among the first results.

A search of a person's name using widely available search engines (such as Google) that results in links to an ICAC report is complicated by the fact that direct links to subsequent court decisions – either favourable or adverse to an individual – generally do not appear in the results.

This is due to the practice of NSW Caselaw (the Government online repository of NSW case law) excluding search engine robots from indexing judicial decisions[10]; a practice followed by similar widely accessible commercial and non-profit case law databases.

Even where a person searches NSW Caselaw, or similar sites, not all decisions in the lower courts (the District Court and Local Court, which handle many of the ICAC related prosecutions), are available in a timely fashion, if at all.

This might be addressed by either ICAC updating its investigation report to take into account subsequent developments, or alternatively, adopting a similar practice to NSW Caselaw, whereby there would be no direct links to investigation material available by means of search engines.

The latter proposal would not prevent a person, having knowledge of an investigation, accessing the ICAC website to research the investigation.

Term of reference 5) any other related matters

This is addressed by the matters raised in the introduction.

[10] See https://www.caselaw.nsw.gov.au/policy at "Linking"