

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

Organisation:

Name: The Hon Peter Hall

Position:

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SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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

- 1 There is presently no proposal or suggestion that the *Independent Commission Against Corruption Act 1988* (the "ICAC Act") requires substantial overhaul or that there is a perceived need for an entirely new anti-corruption statutory regime. Submissions to the Parliamentary Joint Committee in relation to the ICAC Act have been largely confined to the matters that are the subject of the present inquiry by the Committee following the report of the Inspector of the ICAC delivered on 12 May 2016.
- 2 The terms of reference in respect of the Committee's inquiry require it to have regard to:
 - (1) The extent, nature and exercise of the ICAC's current powers and procedures including the rationale 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 conduct findings is adequately reflected on the public record; and possible options for reform; and
 - (5) Any other related matters.

- 3 I have previously made a written submission to the Committee dated 26 July 2016 in relation to specific matters arising from the Inspector's Report with additional observations upon the Commission's power to conduct public inquiries under s 31 of the ICAC Act.
- 4 I have subsequently been invited to attend before the Committee on 23 September 2016.
- 5 Since my written submission, I have been provided with a copy of the written submission made by the Department of Premier and Cabinet dated 29 July 2016. I have had the benefit of examining that submission.
- 6 Since the ICAC commenced operations in or about March 1989, there has arisen a well developed jurisprudence concerning the ICAC's jurisdiction, functions and powers. The relevant case law authorities include the decisions of the High Court in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; and *Independent Commission Against Corruption v Cuneen* [2015] HCA 14 (15 April 2015) and of the New South Wales Court of Appeal in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Cuneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014); and in *Duncan v Independent Commission Against Corruption* [2016] NSWCA, and at the first instance in *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018 (McDougall J). Any consideration for change in the provisions of the ICAC Act in relation to the Commission's jurisdiction, functions and powers should take into account that jurisprudence.
- 7 The Report of the Independent Panel - Review of the jurisdiction of the Independent Commission Against Corruption, 30 July 2015 by the Hon Murray Gleeson AC (Chair) and of Mr Bruce McClintock SC represents the most recent independent review of particular powers and procedures of the Commission (including the power to conduct public inquiries under the ICAC Act). The recommendations made in the Report, including Recommendation 4: Section 74B, as to a restriction on the Commissioner's power to make

findings of corrupt conduct (restricting findings of corrupt conduct to cases of serious corrupt conduct) also assume significance in considering proposals for reform.

- 8 Further, any proposals for change should also be consistent with the accepted rationale for the establishment of the ICAC in the State of New South Wales and the reasons and objectives for its establishment. These were discussed at some length by the Independent Panel at 4.2.5 to 4.2.10 of its Report.
- 9 That, however, does not mean that original policy considerations that informed the ICAC's jurisdiction precludes consideration by the Parliamentary Committee of developments in modern anti-corruption legislation now in place in other States. To the contrary, new anti-corruption models in existence in other jurisdictions may contain elements that have potential utility in the existing statutory regime in New South Wales. Any such proposals that draw on other anti-corruption legislation should meet a compatibility test in terms of the New South Wales ICAC Act and possess the capacity to both enhance the investigative capacity of the ICAC to expose serious corrupt conduct and also to safeguard against the creation of an unduly oppressive investigative regime that unfairly disregards privacy and reputational rights.
- 10 The specific issues discussed below are:
 - (1) Jurisdiction of the ICAC in terms of "corrupt conduct".
 - (2) Public inquiries.
 - (3) The appropriate model – sole commissioner or a panel of commissioners.
 - (4) Commission procedures.

1. Jurisdiction

The concept of corrupt conduct is central to the ICAC provisions concerning the Commission's functions and powers. Unlike anti-corruption models in other States (as for example in Victoria and South Australia) the concept of "corrupt conduct" in the ICAC Act is not confined to conduct that could constitute a criminal offence. The provisions of s 9(1) of the ICAC Act in paragraphs (b), (c) and (d) of that section go beyond criminal offences referred to in paragraph (a). Paragraph (b), for example, extends to disciplinary offences. The *Independent Commission Against Corruption Act 2012* (SA) draws a distinction between "*corruption in public administration*" and "*misconduct in public administration*". The latter includes "contravention of a code of conduct" by a public officer that constitutes "a ground for disciplinary action against a public officer": s 5(3). Conduct of that kind may be seen as being consistent with ordinary concepts of "misconduct" rather than being "corrupt" in the ordinary sense of that word.

In the Independent Panels Report there is discussion of the width and uncertainty of the definition of corrupt conduct in the NSW ICAC Act: at 4.2.10. The Independent Panel observed at 4.2.11:

Reports of the Parliamentary Committee on the ICAC have reflected concerns with the width of the definition. There were some suggestions that, for the purpose of public findings, the expression "corrupt conduct" might be replaced with "misconduct" or "improper conduct". Suggestions such as this were never taken up, but they reflect an unease with the definition of corrupt conduct where the public would assume that a finding of corrupt conduct meant what it said, and was not based on some artificial construct.

The need for a separate category of conduct such as "misconduct" or "improper conduct" may be said these days to be less pressing now than in former times. The provisions of s 12A require the ICAC as far as practicable to direct its attention to *serious corrupt conduct* and *systemic corrupt conduct* and the Commission is required to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct. These provisions tend to indicate that conduct that could involve a disciplinary offence simpliciter (as distinct from a criminal offence), such as a breach of a prescribed code of conduct, are unlikely to result in an investigation by way of a public inquiry by the ICAC. Additionally, s 74BA now limits the Commission's power to make findings of corrupt conduct. It may not

make a finding or express an opinion that a specified person's conduct is corrupt conduct *unless the conduct is serious corrupt conduct.* s 74BA(1).

2. Public Inquiries

The Independent Panel observed that a significant power granted to the ICAC is the power to continue or conduct its investigations by a public inquiry under s 31 of the Act: at 9.4.1.

The Report also noted that the Independent Panel accepted that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also were said to have an important role in disclosing the ICAC's investigative processes: 9.4.6. The Panel added that it was not attracted to the idea that the powers of the ICAC should all be exercised in private: at 9.4.6.

The Independent Panel noted that there had in fact been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted: at 9.4.8.

It is of fundamental importance that public inquiries held by the Commission are conducted in a procedurally fair manner according to a standard that is consistent with the provisions of the Act and the functions and powers conferred in the Commission.

Section 31 provides, in effect, a threshold test which must be met before the Commission conducts a public inquiry. In my earlier written submission to the Committee I referred to the provisions of s 31 that empowers the Commission, for the purposes of an investigation, if it is satisfied that it is in the public interest to do so, to conduct a public inquiry: s 31(1).

Section 31(2) provides, without limiting the factors that may be taken into account in determining whether or not it is in the public interest to conduct a public inquiry, that the Commission is to have regard to the matters set out in s 31(2)(a), (b), (c) and (d).

In the earlier written submission I referred to the comparable provisions contained in the IBAC Act (s 117) which, in my opinion, establishes a higher threshold requiring, inter alia, that the IBAC consider on reasonable grounds, that “...*there are exceptional circumstances*”.

Provisions such as s 31 of the ICAC Act and s 117 of the IBAC Act effectively create controls or constraints upon the exercise of the power to conduct public inquiries or examinations. They impose an obligation upon the Commissioner to carefully evaluate the available information for the purposes of the proper exercise of the discretionary power referred to in provisions such as s 31(2) and s 117.

Such decisions would be amenable to judicial review. The success of judicial review proceedings, however, would, of course, depend upon particular matters that may and must be considered, in accordance with the relevant legislative provisions, the nature of any allegations or complaints and the information already available to the particular Commission.

3. The Appropriate Model – Sole Commissioner or a Panel of Commissioners

A question or proposal has been raised in the submission of the Department of Premier and Cabinet as to the possibility of substituting a panel of commissioners for the present sole Commissioner of the ICAC.

This is not a proposal that I would support. The matter has been discussed by the Department of Premier and Cabinet in its submission dated 29 July 2016 in Pt 1 at pp 6-8 and 14-16. The submission refers to “*A possible best practice model for the ICAC Act*”. However, caution should be exercised in determining whether a panel of commissioners would be an appropriate model for the ICAC. In that respect I note:

- (i) The ICAC since March 1989 has consisted of a sole Commissioner (and on occasions Assistant Commissioners). There has been no criticism of such a model. Further, no material has been advanced which suggests or establishes any deficiencies or problems associated with the sole Commissioner model. Appointments to the position of

Commissioner are made under Part 2 of the ICAC Act, *Constitution of Commission*.

- (ii) There is no material that supports the proposition that a commission comprised of a panel of commissioners is, or is likely to be, beneficial or superior to the model of the sole commissioner. Certainly no need or requirement for a number of commissioners to supplant the existing sole commissioner model has been suggested.
- (iii) The ICAC is not an agency, like some, that processes a high level of volume work. The Commission is necessarily selective in the performance of its principal functions, in particular, its investigative functions in accordance with s 13 of the Act.

There is a need to question any suggestion that the special powers of the Commission under the ICAC Act would be better controlled or exercised by a different “organisational design” involving a panel of commissioners rather than by any other approach.

In particular, any suggestion that the substitution of a panel of commissioners as the preferred model should be adopted as a means of or in order to ensure appropriate decision making in the exercise of the powers of the Commission is questionable. It assumes that decision making by a single commissioner is in some way less secure or desirable.

No material has been identified that suggests or supports any such assumption. The appointment of a sole commissioner with appropriate qualifications and experience has proven over many years to be an appropriate means of ensuring sound decision making in the exercise of the special powers vested in the ICAC.

4. Commission Procedures

As to the procedures adopted in the course of conducting a public inquiry, and the requirement for procedures that comply with procedural fairness requirements, it is important for persons affected to have full and early

opportunity to respond, at least on a preliminary basis, to allegations made against them. In that respect, I note the Joint Panel in its report stated:

“The practice at public inquiries is for counsel assisting to open by stating, sometimes in terms that attract extensive publicity, the allegations the subject of the investigation. The responses which are contained in the written submissions on behalf of persons whose conduct is in question are made the subject of suppression orders. Their counsel do not ordinarily have an opportunity to make oral responses to the opening address of counsel assisting. The result is an imbalance which may be both unfair and inconsistent with the public nature of the hearings. This does not appear to the Panel to be a matter to be dealt with by legislation, but the ICAC’s practices in relation to suppression orders are worth of reconsideration by the Commission.”

The procedures adopted by the ICAC in public inquiries in a particular investigation may vary depending upon the nature of the investigation. They should, of course, be directed towards efficiency and avoiding unfairness. The type of imbalance referred to by the Independent Panel in the above extract should be avoided. The Fitzgerald Special Commission of Inquiry adopted a procedure whereby affected persons were provided with an early opportunity to publicly respond to adverse matters raised in submissions. Such a matter may be appropriately dealt with in Standard or other Directions.

Peter M Hall

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