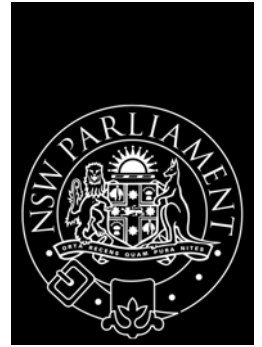


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission Against Corruption

Review of the 2008-2009 Annual Report of the Inspector of
the Independent Commission Against Corruption

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Functions of the Committee

Independent Commission Against Corruption Act 1988

64 Functions

- (1) The functions of the Joint Committee are as follows:
 - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
 - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

- (2) Nothing in this Part authorises the Joint Committee:
 - (a) to investigate a matter relating to particular conduct, or
 - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

Chair's foreword

This inquiry is the Committee's final annual report review with the Office of the Inspector of the ICAC during the current Parliament. During this review, we focused on the Inspector's reporting provisions in the *Independent Commission Against Corruption Act 1988* (ICAC Act) and the Inspector's proposals for amendments to NSW and Commonwealth legislation.

The Committee's first recommendation relates to the reporting powers of the Inspector. The ICAC Act provides for the Inspector to report to Parliament on matters relating to his functions. The ICAC Inspector, Mr Harvey Cooper, and the Police Integrity Commission (PIC) Inspector have pointed to difficulties with the interpretation of these provisions, which are identical in the ICAC and PIC Acts. The Committee considers that the Inspector should have the discretion to report on any of his functions and has recommended that the reporting provisions be clarified so that there is no ambiguity about the Inspector's power to report to Parliament and to other parties.

Another area of concern to the Committee is that the Inspector is able to properly carry out audits, as intended under the ICAC Act. The Inspector's functions include auditing the Commission's operations to monitor compliance with the laws of the state. Given the wide-ranging coercive powers the ICAC can use to investigate corruption allegations, this audit function is particularly important. The Inspector has drawn the Committee's attention to difficulties with auditing the ICAC's applications for, and use of, listening devices and telephone intercepts, due to legislation which prevents him from accessing material to conduct the audits. Consequently, the Committee has recommended that the NSW Attorney General pursue the amendments proposed by Mr Cooper, so that he is able to access the required material for future audits.

I wish to express the Committee's appreciation to Mr Cooper and his staff for their co-operation throughout the review and during the current Parliament. I also extend my thanks to my fellow Committee members for their contribution to the work of the Committee during this Parliament, and to acknowledge the contribution of the former Chair, Mr Frank Terenzini. Finally, I thank the staff of the Committee secretariat for their support and assistance.



The Hon Richard Amery MP
Chair

List of recommendations

RECOMMENDATION 1: That the Premier, as Minister with responsibility for the administration of the *Independent Commission Against Corruption Act 1988*, consider bringing forward amendments to the Act, to clarify that:

Reports to Parliament

- The Inspector of the Independent Commission Against Corruption may report to Parliament, as he considers necessary, on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.
- The Inspector may report to Parliament on any of his statutory functions, as considered necessary and, in doing so may utilise the special reporting provisions at section 77A of the Act.

Reports to other parties

- Reports made by the Inspector under sections 57B(1)(b) and (c) in relation to complaints or matters that are not of a sufficiently serious or systemic nature to warrant being made to Parliament, can be provided to complainants, affected parties and other relevant individuals, as considered necessary by the Inspector for the purpose of resolving the complaint or matter in question..... 10

RECOMMENDATION 2: That the Attorney General write to the Commonwealth Attorney General to request an amendment to the *Telecommunications (Interception and Access) Act 1979* (Cth) that would enable the Inspector of the Independent Commission Against Corruption to access telecommunications interception material for audit purposes, consistent with his functions under the *Independent Commission Against Corruption Act 1988*. 17

RECOMMENDATION 3: That the Attorney General, as Minister with responsibility for the administration of the *Surveillance Devices Act 2007*, consider bringing forward amendments to the Act to clarify that the prohibitions on the communication or publication of protected information should not be deemed to restrict the powers of the Inspector of the Independent Commission Against Corruption, as contained in the *Independent Commission Against Corruption Act 1988*. 17

Commentary

Introduction

- 1.1 The functions of the Committee on the Independent Commission Against Corruption include examining each annual report and other report of the Inspector and reporting to both Houses of Parliament on any matter appearing in, or arising out of, such reports.
- 1.2 As part of the review, the Committee held a public hearing on 27 August 2010 with the Inspector of the ICAC, Mr Harvey Cooper AM. Prior to the hearing, the Inspector was provided with questions on notice on matters arising out of the Office's Annual Report. The full text of answers to questions on notice and the transcript of evidence from the public hearing are reproduced as Appendices to this report.
- 1.3 The Committee's review has focussed on issues concerning:
 - the way in which the Inspector reports on complaints and audits
 - proposed amendments to the current reporting provisions in the ICAC Act
 - proposed amendments to Commonwealth and NSW legislation that would allow the Inspector to access records to conduct audits of ICAC's applications for telecommunications interception and surveillance devices warrants.

Reporting on complaints

- 1.4 Under s 57B of the ICAC Act, the Inspector's principal functions include dealing with complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or its officers.
- 1.5 During the Committee's review, the Inspector raised the issue of how he should report on complaints received by his office, seeking the Committee's view on the level of detail he should provide on complaints:

In my annual report I refer to complaints I have received, indicated various categories, and gave one or two examples of each. That was a departure from the practice of the prior Inspector, who included a summary of all of the complaints received. I would appreciate some guidance as to whether my abbreviated form is satisfactory.¹
- 1.6 The ICAC Act does not prescribe the details to be included in the Inspector's annual reports. Section 77B of the Act provides that the Inspector is to prepare annual reports 'of the Inspector's operations during the year ended on that 30 June' and furnish them to the Presiding Officers of each House of Parliament by October 30 of that year. As noted above, the Inspector currently provides statistics on categories of complaints received and case studies that illustrate complaints from each category, for example, complaints that are outside jurisdiction, or that allege maladministration on the part of the ICAC.
- 1.7 The Inspector of the Police Integrity Commission (PIC) performs a complaint handling function similar to that performed by the ICAC Inspector. The Committee notes that the Inspector of the Police Integrity Commission, the Hon Peter Moss QC, includes in his annual reports a summary of each complaint received or carried over into the

¹ Mr Harvey Cooper AM, Inspector of the ICAC, *Transcript of evidence*, 27 August 2010, p 19

relevant reporting year. According to the PIC Inspector, the complaint summaries are written in a way that maintains confidentiality and the anonymity of complainants:

Generally, such summaries attempt to avoid identifying Complainants or confidential informants. However, ... some Complainants have expressly elected to be identified as such in this Annual Report in respect of their complaints. There being no obvious countervailing considerations, those requests have been acceded to.²

1.8 The Committee has previously considered the Inspector's reporting on complaints, concluding that complaint statistics set out in a manner similar to that used by statutory bodies such as the ICAC and the NSW Ombudsman are easier to interpret.³

1.9 In considering this matter, the former Chair of the Committee observed that reporting on complaints by providing statistics on how they were received and their outcomes is preferable to giving detailed accounts of complaints, as it provides a simple overview of the Office's complaint handling work:

CHAIR: I noticed in your report you set out a number of cases you have looked at, complaints not warranting investigation, et cetera. You just set out the general nature of the allegation. Would it be better to put those together in table form? For example, would it be better to put in a table of total complaints received, total finalised, ongoing complaints, and then another table which might indicate how the complaints were treated, for example, outside jurisdiction or not warranting an investigation, referred back to the ICAC, and another table with the outcomes—complaints sustained or not sustained—a further table, method of receipt of complaints—by email, facsimile, telephone, et cetera? On turnaround times, for example, would you envisage it would be favourable to put in a table with turnaround times for complaints finalised? What I am getting to is that the ICAC report itself sets out tables so we can look and get fairly quickly a general picture of how the Commission is operating—general statistics. You have a series of examples in there that do not really tell us anything, I think, and I know you have your reasons for that, and my view—and other Committee members might have a different view of this—is that it would be easier to comprehend if they were in table form.

Mr KELLY: I am totally happy to take that on board, Chairman. I am sure we can do something like that with the report ending 2008.⁴

1.10 The complaint reporting format recommended by the Committee was subsequently adopted by the Inspectorate.

Committee comment

1.11 The Committee is pleased with the level of detail, and the quality of, the Inspector's current reporting on complaints. The Committee does not consider it necessary for the Inspector to report on complaints by providing a detailed outline of each complaint received by his office. It is sufficient to provide statistics of the total number of complaints, and to indicate the categories that complaints received during the year fall into, as well as illustrating each category by providing a case study (as is the current practice). The Committee is satisfied that this complaint reporting format provides sufficient detail and analysis of complaints received by the Inspector.

² Inspector of the Police Integrity Commission, *2010 Annual Report*, p 14

³ Committee on the ICAC, *Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption*, report no 4/54, October 2008, p 3

⁴ Committee on the ICAC, *Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption*, report no 4/54, October 2008, pp 3-4

- 1.12 Although the current level of reporting on complaints is adequate in terms of detail, the Committee's view is that changes in relation to complaints received by the Inspector may necessitate reporting in greater detail. Such changes may include an increase in the overall number of complaints received, or an increase in a particular category of complaints.
- 1.13 In examining such a change or trend, the Committee may wish to seek greater detail on complaints from the Inspector than is currently provided. Should the Committee decide that it wishes to receive further details regarding complaints, or an overview of complaints received by the office, it may raise the matter with the Inspector during future annual report examinations. It is also open to the Committee to seek any additional information it may consider necessary on the Inspector's exercise of his Royal Commission powers to conduct formal inquiries under s 57D and his investigative powers under s 57C. The latter include powers to: require ICAC officers to supply information, produce documents, and attend to answer questions or produce documents; refer matters to other agencies for action; and make recommendations for disciplinary action or criminal prosecution.

Reporting on audits

- 1.14 The ICAC Inspector conducts audits as part of his functions under s 57B(a) of the Act, which provides for him to audit the Commission's operations to monitor compliance with the law of the state. During 2008-2009, the Inspector published an audit report on the Commission's applications for and execution of search warrant applications. Prior to the end of his term, the previous Inspector, Mr Graham Kelly, tabled a report on ICAC's compliance with the now repealed Listening Devices Act. According to the 2008-2009 Annual Report, the current Inspector had also commenced and partially completed a second audit during the reporting year.⁵
- 1.15 During the public hearing held as part of the review, the Inspector sought the Committee's guidance on the way in which he should report the findings of audits:
- On the question of reports of audits, I was wondering whether, when I have done an audit and I find nothing untoward, I should give a report in relation to that, or should I include a reference to that within the annual report? It does not matter to me. I am quite happy to do anything, but I would like to abide by the guidance of the Committee.⁶
- 1.16 Currently, the Inspector's practice is to publish separate reports detailing the results of audits he conducts, in addition to publishing an annual report. The ICAC Act does not specify that the Inspector is to report on the findings of his audits of the Commission's operations.
- 1.17 The ICAC Inspector's audit role is based on, and mirrors, that of the Inspector of the PIC. The Committee notes that the current PIC Inspector reports on activities conducted as part of his audit role in his annual report. Audit activities conducted during 2009-2010 were reported on as follows:
- In this Report the term "monitoring" is used to include the auditing of the operations of the Commission for the purpose of reviewing compliance with the law of the State, ...
- Monitoring and related activities have, typically, included weekly meetings with the Commissioner of the Police Integrity Commission, Mr John Pritchard, and the Commission Solicitor, Ms Michelle O'Brien, to discuss relevant issues and strategies,

⁵ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, pp 11, 17

⁶ Mr Harvey Cooper AM, Inspector of the ICAC, *Transcript of evidence*, 27 August 2010, p 19

Commentary

the regular review of representative samples of operational files, and the taking of necessary steps to satisfy myself as to the justification for the exercise of the Commission's various investigative powers. As needs arise separate discussions with senior officers of the Commission may take place.

In fulfilling my function under s.89(1)(a) and (1)(c) of the Act, I have ... a computer providing electronic access to all the material on file at the Commission This includes the records of the Commission's various operations. Periodically and at random, I access such operations in absolute security. ...

My regular meetings with the Commissioner and the Commission Solicitor identify the operations in which there has been activity, such as the issue of new warrants. This enables me to examine retrospectively such new warrants to ensure that all necessary approvals and administrative actions were completed in the process of obtaining and executing a warrant. ...⁷

Committee comment

- 1.18 The ICAC Inspector's current practice is to report on each audit conducted by his Office by tabling an audit report, which outlines the audit's methodology and findings. The Inspector's annual reports provide a broader overview of the Office's work during the relevant year, including audits conducted and complaints received. The Inspector sought the Committee's views on whether he should continue to publish separate audit reports in cases where the audit shows the ICAC to be in compliance with relevant laws. In doing so, the Inspector did not raise any difficulties with continuing to publish separate reports.
- 1.19 The Committee has noted that the PIC Inspector provides details of his audit activities in his annual reports. However, it is relevant to note that the ICAC Inspector performs this audit role in a different way, conducting intensive, targeted audits of the Commission's records in relation to its use of certain powers. For example, as part of a recent audit of the ICAC's compulsory powers, the Inspector requested and assessed five lever arch binders of ICAC files and records produced between April and September 2009, in addition to relevant sections of the Commission's Operations Manual.⁸ The Inspector's audit reports provide a detailed account of the audit, as well as providing an analysis of the audited material in terms of assessing the Commission's compliance with legal requirements. In the Committee's view, it is appropriate that the Inspector's audit work is detailed in a separate report rather than being included in his annual reports. The Committee considers that the level of detail contained in the Inspector's audit reports is more suited to a separate report format, consistent with current practice. This is the case even where the Inspector finds the Commission to be in compliance with relevant laws.
- 1.20 The Committee also considers that it is more useful for the Inspector to continue to publish separate audit and annual reports for reasons of timeliness. Audit reports are published by the Inspector throughout the year, while annual reports are required to be tabled each year in October. The Inspector's audit work is an important part of the Office's role and the Committee is satisfied that the current reporting arrangements ensure that adequate details of completed audits are provided in a transparent, timely and comprehensive format.

⁷ Inspector of the Police Integrity Commission, *2010 Annual Report*, pp 10-1

⁸ Office of the Inspector of the Independent Commission Against Corruption, *Report of an audit into the exercise by the Independent Commission Against Corruption of its powers under sections 21, 22, 23 and 35 of the Independent Commission Against Corruption Act 1988*, March 2010, pp 4-7

Reporting provisions in the ICAC Act

Background

1.21 Under the ICAC Act, the Inspector of the ICAC must furnish an annual report to Parliament each year (s 77B) and he or she may make a special report to Parliament on a discretionary basis concerning 'any matters affecting the ICAC, including, for example, its operational effectiveness or needs', and 'any administrative or general policy matter relating to the functions of the Inspector' (s 77A). The general provisions relating to reports provide that the Inspector may furnish a report to the Presiding Officers, which is subsequently laid before each House, and recommend the report be made public forthwith. A report published in these circumstances attracts all the privileges and immunities of a report laid before the House (s 78). These reporting provisions mirror those applicable to the Inspector of the PIC under Part 8 of the *Police Integrity Commission Act 1996* (PIC Act).

1.22 Questions have been raised concerning:

- the capacity of the Inspector to make reports on his statutory functions, given the construction and terms of the current reporting provisions in the Act; and
- whether the special reporting provisions may be used for the purpose of reporting on the Inspector's functions at sections 57B(1)(b) and (c).⁹

1.23 The issues surrounding the reporting provisions applicable to the Inspectors of the PIC and ICAC have had a protracted history and were initially raised with the Committee on the Office of the Ombudsman and the PIC in August 2006 by a former PIC Inspector, the Hon James Wood. The Committee on the Office of the Ombudsman and the Police Integrity Commission subsequently recommended in November 2006 that:

RECOMMENDATION 16: The Committee recommends that the Police Integrity Commission Act 1996 should be amended to clarify that the Inspector is able to report to Parliament at his discretion in relation to any of his statutory functions.

RECOMMENDATION 17: It is further recommended that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety and other forms of misconduct on the part of the PIC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.¹⁰

1.24 Since that time the respective Chairs of the Committees on the ICAC, and the Office of the Ombudsman and the PIC have kept each other informed of developments on this issue by way of correspondence.

1.25 In June 2010, the Department of Premier and Cabinet wrote to the Committee seeking its view on proposals to amend the reporting provisions of the PIC Act, which parallel those applicable to the Inspector of the ICAC under the ICAC Act

⁹ The statutory functions exercised by the Inspector at sections 57B(1)(b) and (c) of the ICAC Act include the functions to:

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
- (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 Commission or officers of the Commission.

¹⁰ Committee on the Office of the Ombudsman and Police Integrity Commission, *Report on the Ten Year Review of the Police Oversight System in New South Wales*, report no 16/53, November 2006, pp 145

(reproduced at Appendix Four). The Department preferred to make consistent amendments to the parallel reporting provisions in both Acts. It had under consideration two proposals:

- i. A proposal put forward by the Committee on the Office of the Ombudsman and the PIC that the PIC Act be amended 'to clarify that the PIC Inspector is able to report to any party, including Parliament, at its discretion, in relation to any of its statutory functions'; and
- ii. A possible alternative proposal 'under which the Inspector could, in his discretion, provide a report about a complaint to Parliament with a recommendation that the report be made forthwith'.¹¹

ICAC Commissioner and ICAC Inspector's views

1.26 In order to inform its response to the proposed amendments outlined by the Department of Premier and Cabinet, the Committee sought the views of the ICAC Inspector and Commissioner at the public hearing held on 27 August 2010.

1.27 In answers to the Committee's questions on notice, the Inspector stated that he had not experienced any difficulties with the operation of the reporting provisions of the ICAC Act. In terms of audit reports under s 57B(1)(a), the Inspector's practice is to report his findings as a special report to Parliament, in accordance with s 77A of the Act. Complaint reports dealt with under s 57B(1)(b) are reported to the parties concerned. The Inspector also outlined the circumstances in which he would consider reporting to Parliament on a complaint investigation:

A report to Parliament about a completed investigation would occur where the complaint was referred by the Parliamentary Joint Committee or where the complaint involved an allegation of serious misconduct on the part of a senior officer of the Commission or involved an allegation of systemic misconduct. The term "misconduct" includes all forms of impropriety and maladministration referred to in section 57B of the Act.

Where the complaint is one of misconduct on the part of an individual officer of the Commission not involving systemic misconduct, a report would be given to the officer concerned and to the Commissioner.¹²

1.28 In terms of proposals to amend the reporting provisions, the Inspector expressed the view that, although he has interpreted the special reporting provision found at s 77A as authorising him to report on audits, an amendment to the Act - consistent with the 2006 recommendations of the Committee on the Office of the Ombudsman and PIC - would remove any ambiguity around the reporting provisions:

I have construed this authorisation as enabling me, as the result of an audit, to make findings whether there is any conduct amounting to maladministration under clause (c) and whether the procedures are effective and appropriate under clause (d) and to include those findings within a Special Report to the Parliament in accordance with section 77A of the Act.

A contrary view is arguable. To put the matter beyond doubt, I would suggest an amendment similar to [the Committee on the Office of the Ombudsman and PIC's] recommendation 17 that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or

¹¹ Letter from Paul Miller, A/Deputy Director General (General Counsel), to the Deputy Chair, Mr Paul Pearce MP, dated 16 June 2010, see Appendix Four.

¹² Inspector of the ICAC, Answers to indicative questions, 24 August 2010, question 3, p 1

its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.¹³

- 1.29 In evidence to the Committee, the Inspector expressed the view that it would not be appropriate to utilise the special reporting provisions under s 77A, if he found that the conduct subject to complaint was not serious or systemic. The Inspector argued that the Act should be amended to give him the discretion to make reports in such cases to the Commissioner and the officer concerned. This would be necessary to enable him to resolve the complaint and, in the process, afford individuals procedural fairness by giving them an opportunity to respond to any adverse comments or findings:

... at the moment the only mention of a report is under section 77A to the Parliament. But that creates a problem when you are dealing with an allegation of misconduct on the part of an individual officer; for example, if it were alleged that an officer had punched someone in the course of performing a search—an unlawful assault. Here again, if I were to make a finding on the part of an officer which was of a very serious nature or involved some systemic matter—not just a mere assault of one on one—then in my view the appropriate procedure is you use section 77A.

If, however, the finding of misconduct was nowhere near that serious, then it is unreasonable, in my view, to make a special report which becomes public to everybody. The appropriate course then would be to report my findings to the Commissioner and to the officer concerned, but here again do I have power to give a report or publish a report to a mere officer? That is where a problem arises and it is not just that. If I were to make an adverse finding against that officer, I would be obliged out of procedural fairness to give him a draft of my report and invite his comment. So, it is for that reason that I think the Inspector should be given a general discretion to publish a report to the Commission and the person against whom the complaint has been made.¹⁴

- 1.30 The Inspector also addressed the issue of whether he should have the discretion to report to *anyone* (emphasis added). Mr Cooper stated that he had reconsidered his initial view after the Commissioner of the ICAC had raised difficulties with the broadness of this proposed power:

Initially I felt that we should also have the power to report to anyone. The Commissioner has drawn to my attention his problems with that and I have a lot of sympathy with his particular point of view. I note that the Commissioner submitted that the Inspector should be empowered to publish not only his report but, should he decide to do so, part of his report to the complainant. The Inspector will then be able to sanitise his report when publishing it to the complainant.¹⁵

- 1.31 The Hon David Ipp QC, Commissioner of the ICAC, gave evidence to the Committee in support of the Inspector's views on proposals to amend the Act. In addition, the Commissioner expressed support for the proposal that, where the Inspector makes adverse comment about the ICAC in his report, the ICAC's response should also be included in the report:

... I draw attention to the fact that in the report of 22 April 2010 of the Committee on the Office of the Ombudsman and the Police Integrity Commission the Committee suggested that the PIC Act be amended so that where the PIC disagrees with an adverse comment in the Inspector's complaint report the PIC's response to that comment is included in the report. That Committee considered that the Commission's view should be available to a reader of the Inspector's report. This Commission

¹³ Inspector of the ICAC, Answers to indicative questions, 24 August 2010, question 4, p 2

¹⁴ Mr Harvey Cooper, Inspector of the ICAC, *Transcript of evidence*, 27 August 2010, p 2

¹⁵ Mr Harvey Cooper, Inspector of the ICAC, *Transcript of evidence*, 27 August 2010, p 2

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endorses those views and submits that a like provision should be included in any amendment of the ICAC Act. Otherwise, the Inspector and I are in complete agreement....¹⁶

- 1.32 The Inspector advised the Committee that he would enter into a memorandum of understanding with the ICAC Commissioner to confirm existing practice in relation to the contents of reports to complainants: '... I will agree not to publish to a complainant the Commission's operational methods, source of information, names of witnesses and like information. I agree with that and indeed that has been my practice since I became Inspector.'¹⁷

Committee comment

- 1.33 The Committee notes the advice of the current Inspector that he has not experienced any particular difficulties with the reporting provisions of the ICAC Act. Nevertheless, given that there may be some lack of clarity around the reporting provisions, the Committee supports amendments to the Act to put beyond doubt the ability of the Inspector to report appropriately on the performance of his functions.
- 1.34 The Committee also notes the views of the Inspector and ICAC Commissioner in relation to reporting on the handling and investigation of complaints. In light of the evidence and information received from the Inspector and the Commissioner, the Committee has formed the following views on the need for amendments to the reporting provisions of the ICAC Act in respect of reports by the Inspector of the ICAC.
- 1.35 The Committee considers that the first proposal outlined by the Department of Premier and Cabinet, that the Inspector be given a general discretion to publish to anyone, appears to be too broad as it implies a power to publish to the world at large. It also places the Parliament in the same position as any other report recipient. The Inspector has confirmed that he no longer supports an amendment along these lines.
- 1.36 The second proposal, that the Inspector be given the discretion to furnish a report about a complaint to Parliament with a recommendation that the report be made public forthwith, appears to the Committee to be too narrow, as it does not capture reporting by the Inspector on those more routine complaints or matters that do not warrant reporting to Parliament. The Committee shares the Inspector's view that dealing with some complaint matters may not require a report to Parliament.
- 1.37 It is important to distinguish between reports to Parliament and 'special reports' under the Act, and reports by the Inspector on more routine complaints or matters that he is required to deal with but which are not of sufficient public interest or seriousness to be reported to Parliament, for example, lesser misconduct by an individual ICAC officer.

Reporting on complaint handling and misconduct functions

- 1.38 The Committee considers that publication of reports should occur within the context of the performance of the Inspector's functions. In the case of the functions at sections 57B(1)(b) and (c), this would be for the purpose of dealing with complaints and relevant conduct. Publication of reports would be aimed at handling and resolving a complaint or matter, for instance, through provision of a complaint report to the public official with administrative responsibility for addressing the misconduct,

¹⁶ The Hon David Ipp QC, Commissioner of the ICAC, *Transcript of evidence*, 27 August 2010, p 16

¹⁷ Mr Harvey Cooper, Inspector of the ICAC, *Transcript of evidence*, 27 August 2010, p 3

the officer whose conduct is the subject of concern, and affected parties. This would give some clarity to a situation where the Inspector may wish to publish a report on a more minor matter to the Commissioner of the ICAC and/or the Commission officer against whom a complaint was made. The current provisions of the Act do not expressly provide for such action.

- 1.39 Further, while the complainant or individual the subject of the complaint may be informed by the Inspector of his findings and the outcome of a complaint, it may not be appropriate to provide them with a copy of the full report. This approach would be consistent with the relevant provisions applicable to other bodies performing similar oversight and complaint handling functions, for example, the NSW Ombudsman.
- 1.40 Therefore, the Committee is recommending an amendment to the Act to clarify that reports made by the Inspector under sections 57B(1)(b) and (c) in relation to complaints or matters that are not of a sufficiently serious or systemic nature to warrant being made to Parliament may be provided to complainants, affected parties and other relevant individuals, as considered necessary by the Inspector for the purpose of dealing with and resolving the complaint or matter.

Reports to Parliament

- 1.41 The Inspector's discretion to report to Parliament should apply to the exercise of any of his statutory functions, where such a report is warranted in the public interest. Reports to Parliament should concern serious and systemic issues, legislative issues, and matters affecting the privileges, rights and immunities of the Parliament. The previous ICAC Inspector's report on matters relating to ICAC's investigation of allegations concerning the former member of the Legislative Council, Mr Peter Breen, is an example of a report that warranted being made to Parliament. The Inspector utilised the special reporting provisions on that occasion.¹⁸
- 1.42 The Committee considers that there should be no change to the Inspector's ability to make special reports to Parliament pursuant to s 77A of the ICAC Act. However, there may be some merit in making explicit that the Inspector may utilise the special reporting provisions in relation to the performance of any of his functions. This would include those functions at sections 57B(1)(a) and (d) of the ICAC Act, which currently do not make reference to the capacity to make reports.
- 1.43 The Committee recommends amendments to the ICAC Act in the following terms:
- That express provision be made for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.¹⁹
 - To clarify that the Inspector may report to Parliament on any of his statutory functions, as considered necessary and, in doing so may utilise the special reporting provisions at s 77A of the ICAC Act.
- 1.44 The Committee considers that these proposals will provide flexible and appropriate reporting arrangements for the Inspector to deal with his statutory functions at sections 57B(1)(b) and (c) of the ICAC Act by way of reports and recommendations. They would clarify that the Inspector has the discretion to determine whether or not a

¹⁸ Inspector of the ICAC, Answers to indicative questions, 24 August 2010, question 4

¹⁹ Inspector of the ICAC, Answers to indicative questions, 24 August 2010, question 4

complaint or matter dealt with under the Inspector's functions at ss 57B(1)(b) and (c) warrants a report to Parliament.

- 1.45 On the basis of the evidence received during the current review, the Committee considers that amendments in these terms would receive the support of the Inspector of the ICAC and the Commission. The proposals would also enable the Inspector to make reports to Parliament, including a 'special report', on the performance of any of his statutory functions. The general reporting provisions found at sections 78 and 79 of the Act would apply to any report furnished by the Inspector to the Presiding Officers, thereby providing the Inspector with the discretion to recommend publication of the report forthwith.
- 1.46 The Committee's previous correspondence to the Premier outlining its position on amending the reporting provisions of the ICAC Act in similar terms to the amendments proposed to the PIC Act is reproduced at Appendix Five.

RECOMMENDATION 1: That the Premier, as Minister with responsibility for the administration of the *Independent Commission Against Corruption Act 1988*, consider bringing forward amendments to the Act, to clarify that:

Reports to Parliament

- The Inspector of the Independent Commission Against Corruption may report to Parliament, as he considers necessary, on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.
- The Inspector may report to Parliament on any of his statutory functions, as considered necessary and, in doing so may utilise the special reporting provisions at section 77A of the Act.

Reports to other parties

- Reports made by the Inspector under sections 57B(1)(b) and (c) in relation to complaints or matters that are not of a sufficiently serious or systemic nature to warrant being made to Parliament, can be provided to complainants, affected parties and other relevant individuals, as considered necessary by the Inspector for the purpose of resolving the complaint or matter in question.

ICAC's responses to adverse comment

- 1.47 In evidence to the Committee, the ICAC Commissioner proposed a further amendment to the ICAC Act, consistent with a recommendation by the Committee on the Office of the Ombudsman and PIC. As part of its inquiry into the handling of complaints against the PIC, that Committee recommended that the PIC Act be amended to provide that, in circumstances where the Inspector of the PIC makes a report in which he comments adversely on the PIC's conduct and the PIC is in disagreement with the Inspector, the PIC's response to the adverse comment be reproduced in full in the Inspector's report.²⁰

²⁰ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report of an Inquiry into the handling of complaints against the Police Integrity Commission*, report no 9/54, April 2010, p v

- 1.48 The Committee did not have the opportunity to seek the ICAC Inspector's views on this proposal during the current review. However, the Committee notes that although there may be no difficulty with the proposal in terms of procedural fairness, the recommendation arose in the context of an inquiry into the handling of complaints against the PIC. That inquiry was conducted in the context of disagreements between the PIC and the PIC Inspector on the latter's reporting in relation to complaints against the PIC.
- 1.49 The Committee is not aware of any similar issues having arisen in relation to reports by the Inspector of the ICAC on complaints against the ICAC. Also, the proposal is modelled on legislation applicable to Inspectors of investigative bodies in other Australian jurisdictions, namely the Queensland Crime and Misconduct Commission and the West Australian Crime and Corruption Commission. The Committee notes that the statutory framework underpinning the relationship between the inspectors and investigative commissions in those jurisdictions is quite distinct from that which applies in New South Wales to the Inspectors of the ICAC and the PIC and their respective commissions. The Committee recommends that the Inspector of the ICAC be consulted before such an amendment were to proceed.

Inspector's proposed amendments to legislation

- 1.50 The Inspector states in his 2008-2009 annual report that the *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIA Act) and *Surveillance Devices Act 2007* (NSW) 'prevent my ability to undertake audits of the ICAC's exercise of powers and are in conflict with the Inspector's prescribed functions under section 57B(1)(a) of the ICAC Act.'²¹

Telecommunications (Interception and Access) Act 1979 (Cth)

- 1.51 In outlining the need for an amendment to the TIA Act, the Inspector notes that under the ICAC Act, his principal functions include assessing the effectiveness and appropriateness of the ICAC's procedures relating to the legality and propriety of its activities (s 57B(1)(d)). In order to perform this function the Inspector is required to audit the ICAC's operations to monitor compliance with the laws of the state (s 57B(1)(a)). Under section 57C, the Inspector may investigate any aspect of the ICAC's operations or any conduct of ICAC officers. The Inspector is also entitled to full access to ICAC's records and may require ICAC officers to supply information or produce documents about any matter relating to the Commission's operations or any conduct of ICAC officers.
- 1.52 The Inspector states that, pursuant to his powers under s 57C, he sought to conduct an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the TIA Act. The then Commissioner responded by noting the stringent restrictions on access to material prepared for or obtained under the warrant provisions of the TIA Act and stating that, in his view, providing material to the Inspector for the purpose of general audits could be outside the scope of the exception in the TIA Act that allows access by the Inspector. Advice obtained by the ICAC from the Commonwealth Attorney-General's Department indicated that the TIA Act would allow the Commission to provide the Inspector with applications for telecommunications interception warrants for a targeted inspection

²¹ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, p 5

into an allegation of misconduct or corruption, but not for the purpose of undertaking a general audit to determine if misconduct had occurred.²²

- 1.53 According to the Inspector, the TIA Act therefore effectively prevents him from performing his audit function. He also observes that the ICAC's use of telecommunications interception warrants is unlikely to be the subject of a complaint to his office:

The difficulty that now confronts the Inspector is that it is prohibited by the current wording of paragraph (eb) of section 68 of the TIA Act from conducting such an audit.

The Inspector's role was created to provide a means of monitoring the extensive and intrusive powers of the ICAC so as to ensure that its use of those powers are appropriate for achieving its objectives.

The obtaining of a warrant and subsequent interception pursuant to the TIA Act are normally unknown to the person(s) who is the object of the warrant and interception. It is therefore only in rare circumstances that a complaint would be received from such a person(s).²³

- 1.54 According to the Inspector, the NSW Ombudsman's limited role in relation to telecommunications interception - that of 'ensuring compliance with legal requirements and the keeping of records' - does not assess whether the Commission is exercising its powers appropriately. The Inspector states that 'it is for this reason, among others, that the exercise by the Inspector of its powers of audit have been considered by the NSW legislature to be so important.'²⁴

Surveillance Devices Act 2007 (NSW)

- 1.55 The Inspector's proposed amendment to the Surveillance Devices Act seeks to ensure that he is able to access 'protected information', as defined under the Act, to conduct audits of the Commission's applications for surveillance devices warrants.

- 1.56 In his 2008-2009 Annual Report, the Inspector outlines the need for the amendment, stating that the current provisions of the Act prohibit the communication by ICAC of relevant material to his office:

Section 40 prohibits the communication or publication of protected information. The section does set out certain circumstances in which protected information may be communicated. The relevant exceptions to the prohibition are set out in subsections (5), (6), and (7), which state:

(5) Without limiting subsection (4), protected information may be communicated or published by a law enforcement officer to any person with the consent of the chief officer of the law enforcement agency of which the officer is a member.

(6) A chief officer may consent to the communication of protected information under subsection (5) only if satisfied that it is necessary or desirable in the public interest for the protected information to be communicated to the person concerned and that the public interest in communicating the information outweighs any intrusion on the privacy of the person to whom it relates or of any other person who may be affected by its communication.

²² Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, pp 5-6

²³ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, pp 5-6

²⁴ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, p 6

(7) In deciding whether to give consent the chief officer must take into consideration the manner in which the protected information will be dealt with after it is communicated to the person concerned.

The ICAC Commissioner comes within the definition of "chief officer".

1.57 The Inspector points out that, although the Commission has facilitated an audit of its use of listening devices by making a determination that it is in the public interest to provide the Inspector with 'protected information', the necessity of such a determination is 'contrary to the spirit, if not the letter, of section 57C of the ICAC Act':

Under these subsections the Commissioner is given the power to determine whether protected information will be communicated to the Inspector. This, in effect, revokes the powers of the Inspector under section 57C of the ICAC Act.²⁵

1.58 The Inspector recommends an amendment to the Surveillance Devices Act to resolve this inconsistency with the ICAC Act:

To avoid any problems that could arise out of the inconsistency between the terms of these two acts it is suggested that a new subsection be inserted following upon subsection 7 to the following effect:

“nothing in subsections (5) (6) and (7) shall be deemed to restrict the powers of the Inspector of the Independent Commission Against Corruption as contained in the Independent Commission Against Corruption Act 1988.”

The effect of such an amendment would be to allow the Inspector of the ICAC to conduct an audit of the ICAC's exercise of its powers under the SD Act to determine whether such powers have been exercised appropriately.²⁶

Recent developments

1.59 The Inspector initially raised his inability to conduct audits of the Commission's applications for telecommunications interception and surveillance devices warrants with the Committee in May 2009, writing to advise that he had written to the then Premier requesting support for amendments to the TIA Act and the Surveillance Devices Act. The Inspector also sought the Committee's support for his proposed amendments.

1.60 In evidence to the Committee at a hearing in August 2009, the then ICAC Commissioner, the Hon Jerrold Cripps QC, expressed support for amendments that would enable the Inspector to perform his audit function:

CHAIR: In his audit function Inspector Harvey Cooper referred to his ability to audit telecommunications records and he suggested an amendment. ... Have there been any developments in that area?

Mr WALDON: Are you talking about TI or about surveillance devices?

Mr CRIPPS: About TI.

CHAIR: Does it relate to both those issues or to just one?

Mr WALDON: There are issues relating to both. ...

...

CHAIR: Is there a case for amendments to both Acts?

²⁵ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, p 7

²⁶ Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2008-2009*, p 7

Mr CRIPPS: There should be in order to make it clear. ... The important function of the Inspector is to ensure that people in the organisation do not abuse the power they have to tap phones and to put surveillance devices on people so that members of the public have confidence we are not doing it. People in the commission are warned that if they do it they might be caught. So far as I am concerned, any possible inhibition in this legislation to the Inspector would get my support if it were removed.²⁷

1.61 Following the tabling of the Inspector's 2008-2009 annual report, the Committee wrote to the NSW Attorney-General regarding the difficulties the Inspector had experienced with the TIA Act. The Committee requested the Attorney-General to make representations to the Commonwealth Attorney-General to make the necessary amendments to the TIA Act, to enable the Inspector to access the required telecommunications intercept material for audit purposes. The Committee also sought advice in relation to the Inspector's request for amendments to the Surveillance Devices Act.

1.62 In answers to questions on notice as part of the Committee's review, the Inspector advised that, following his initial request, he had also written to the Commonwealth Attorney-General's Department and the current Premier seeking support for a proposed amendment to the TIA Act. In January 2010, the Inspector received a response from the Commonwealth Attorney-General's Department indicating that the proposed amendment would not be made, as it would be inconsistent with the terms of the Act, which limit responsibility for inspection of intercept records to the NSW Ombudsman:

While the Department understands the importance of your role as Inspector and the impact that role has in maintaining the integrity of the telecommunications interception regime, the TIA Act does not allow any agency to use their powers under the TIA Act for auditing purposes. In fact, the TIA Act limits the powers of all agencies to the investigation of specific offences and restricts the inspection role specifically to the Ombudsman.

Amending the TIA Act to enable the Inspector of the ICAC to use the audit functions bestowed by the ICAC Act to conduct a general sampling of the telecommunications interception records obtained by the ICAC under the TIA Act, would affect this legislative division of responsibility. It would also raise consistency issues that would need to be considered across all affected jurisdictions.

Given these concerns, I do not anticipate that your suggested amendments will be recorded into the TIA Act at any stage in the immediate future.²⁸

1.63 The Inspector also outlined the Department of Premier and Cabinet's advice regarding the proposed amendments:

By letter dated 24 March 2010, the Director-General of the Department of Premier and Cabinet advised me that since the issue was first raised in May 2009 officers of the Department of Premier and Cabinet have undertaken consultation with relevant agencies and officers on the proposed amendments and that the Department is currently preparing a proposal for consideration by the Government.²⁹

1.64 During a public hearing conducted by the Committee on 11 August 2009, the ICAC indicated that, in terms of the Surveillance Devices Act, the then Commissioner had certified in the public interest that certain surveillance records be made available to

²⁷ The Hon Jerrold Cripps QC, then Commissioner of the ICAC, *Transcript of evidence*, 11 August 2009, pp 17-8

²⁸ Inspector of the ICAC, Answers to questions on notice, 29 July 2010, question 4, p 3

²⁹ Inspector of the ICAC, Answers to questions on notice, 29 July 2010, question 4, p 3

the Inspector to enable him to carry out his functions under the ICAC Act. The Commissioner also expressed support for an amendment to the Surveillance Devices Act:

Mr WALDON: ... In the most recent issue, the Inspector indicated that he wanted to audit our surveillance devices records under the new Surveillance Devices Act. We took the view that, in order for him to do that, the commission had to certify that it was in the public interest to provide him with that material which, of course, the commissioner did. Because of the way in which the Surveillance Devices Act is structured, there are only limited bases on which you can provide surveillance device material to anyone. I think there were a couple of bases on which that information could be provided to the Inspector. However, for the purposes of the audit we took the view that in order to ensure it complied with the requirements of the Act our commissioner had to certify that it was in the public interest for it to be provided. That was done.

CHAIR: That is the way in which it is proceeding at the moment?

Mr WALDON: Yes.

CHAIR: Is there a case for amendments to both Acts?

Mr CRIPPS: There should be in order to make it clear. ...³⁰

- 1.65 In answers to questions on notice the Inspector indicated that no amendment has been made to the Surveillance Devices Act. He stated that, although he has been able to conduct an audit of the Commission's use of surveillance devices, such audits can only occur if the Commissioner grants approval for access to the required records:

The situation under the SD Act is slightly different. The Commissioner of the ICAC has enabled an audit of the Commission's use of surveillance devices pursuant to warrants issued under the SD Act by making a determination that it is in the public interest to provide "protected information" pursuant to subsections (6) and (7) of section 40 of the Act. This means that for me to conduct such an audit I am dependent upon the goodwill of the Commissioner. In my view, this is contrary to the spirit, if not the letter, of section 57C of the ICAC Act.³¹

Committee comment

- 1.66 The ICAC is able to use significant coercive powers in investigating allegations of corrupt conduct, including telecommunications interception and surveillance devices as well as controlled operations and assumed identities. During 2008-2009, the Commission obtained 34 telephone intercept warrants and 14 surveillance device warrants.³²
- 1.67 The ICAC Act provides for the scrutiny of the Commission's use of these powers in the role of the ICAC Inspector. However, the Inspector has identified an inconsistency between the ICAC Act and the provisions of the TIA Act and the Surveillance Devices Act, in that the provisions of these Acts prevent him from performing key aspects of his functions under the ICAC Act.
- 1.68 In terms of the current system for inspecting agencies' use of telecommunications interception powers, the NSW Ombudsman's function of inspecting records relating to interception warrants is outlined in the Office's most recent annual report:

³⁰ The Hon Jerrold Cripps QC, then Commissioner of the ICAC, *Transcript of evidence*, 11 August 2009, p 17

³¹ Inspector of the ICAC, Answers to questions on notice, 29 July 2010, question 4, p 4

³² ICAC, *Annual Report 2008-2009*, p 46

A judicial officer or member of the Administrative Appeals Tribunal grants a warrant for a telephone interception, so, unlike controlled operations, we do not scrutinise compliance with the actual approval process.

We make sure that the agency carrying out the telecommunication interception complies with all the necessary record-keeping requirements. These records must document the issue of warrants and how the information gathered was used. Some records have to be given to the Attorney-General and all intercepted material must be destroyed once specified conditions no longer apply. All telephone intercept records have to be kept under secure conditions by the agency.

We have to inspect each agency's records at least twice a year, and also have a discretionary power to inspect their records for compliance at any time. We report the results of our inspections to the Attorney-General. The *Telecommunications (Interception and Access) (NSW) Act 1987* prevents us from providing any further information about what we do under that Act in this annual report – or in any other public report we prepare.³³

- 1.69 As the Inspector has observed, the Ombudsman's role is limited to checking compliance with record keeping, not looking at whether the original decision to undertake a telephone intercept was valid or if the process involved impropriety. As the Ombudsman reports to the Attorney-General on the results of these recordkeeping checks, there is no public accountability or oversight of ICAC's compliance with the TIA Act's requirements.
- 1.70 The Committee considers that it is vital that the Inspector is able to perform his functions of conducting audits of ICAC's compliance with telecommunications interception, surveillance devices and controlled operations legislation, consistent with the intent of the ICAC Act. In the Committee's view, it is necessary that these wide powers are adequately oversights.
- 1.71 The Committee considers that the current oversight of telecommunications interception records by the Ombudsman is not comparable to the oversight functions of the ICAC Inspector, as provided for in the ICAC Act. The Ombudsman's functions in this regard involve a much narrower system of checks than an audit conducted by the Inspector, limited as they are to ensuring that record keeping obligations are being met.
- 1.72 The Committee supports the Inspector's audit function as an important accountability mechanism in view of the coercive and covert powers exercised by the ICAC. The Committee has also previously expressed its support for an expansion of the audit program. The Committee agrees that the audit role is curtailed by the current statutory limits placed on the Inspector. As it stands, the Inspector is only able to access telephone intercept material to investigate a specific complaint of misconduct. The Committee shares the Inspector's view that telephone intercepts are unlikely to be the subject of a complaint to the Inspector due to the covert nature of the activity. The Inspector's proposal to amend the TIA Act would serve to ensure that he is able to perform the audit role effectively in terms of oversights the Commission's use of its telephone intercept powers.
- 1.73 The Committee also notes that the former ICAC Commissioner indicated his support for removing any legislative impediment preventing the Inspector from performing this role, emphasising the importance of oversight of the Commission's coercive powers. The Hon Jerrold Cripps QC observed that adequate oversight builds public

³³ NSW Ombudsman, *Annual Report 2009-2010*, p 85

confidence in the appropriateness of the Commission's use of its power to tap phones and employ surveillance devices.

- 1.74 The Committee is of the view that further action is required in relation to the Inspector's proposed amendment to the TIA Act. The Committee is recommending that the NSW Attorney General write to Commonwealth Attorney General to request an amendment consistent with that requested by the Inspector of the ICAC.
- 1.75 In terms of surveillance devices, the Committee agrees that the Inspector should not be dependent on the Commission giving permission for him to access the necessary records to conduct an audit of the ICAC's use of surveillance devices. The Committee's view is that this solution to the current difficulties experienced by the Inspector is a temporary measure and the Committee is supportive of a legislative amendment to clarify that the Inspector should be authorised to access all surveillance material held by the ICAC for the purpose of performing his functions. It appears to the Committee that this may have been an oversight at the time of drafting the Surveillance Devices Act. In this regard, the Committee notes that the *Listening Devices Act 1984*, which was repealed by the Surveillance Devices Act in 2008, did not prevent the Inspector from accessing surveillance material.
- 1.76 The Committee notes that this matter was raised by the Inspector some time ago. In the Committee's view, a resolution to the issue is therefore a matter of some priority. The Committee is therefore recommending an amendment to the Surveillance Devices Act, in line with the Inspector's request.

RECOMMENDATION 2: That the Attorney General write to the Commonwealth Attorney General to request an amendment to the *Telecommunications (Interception and Access) Act 1979* (Cth) that would enable the Inspector of the Independent Commission Against Corruption to access telecommunications interception material for audit purposes, consistent with his functions under the *Independent Commission Against Corruption Act 1988*.

RECOMMENDATION 3: That the Attorney General, as Minister with responsibility for the administration of the *Surveillance Devices Act 2007*, consider bringing forward amendments to the Act to clarify that the prohibitions on the communication or publication of protected information should not be deemed to restrict the powers of the Inspector of the Independent Commission Against Corruption, as contained in the *Independent Commission Against Corruption Act 1988*.

Appendix One – Questions on notice

Office of the Inspector

of the Independent Commission Against Corruption



New South Wales

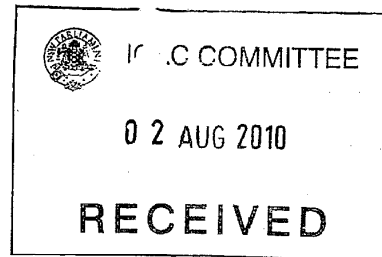
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29 July 2010

The Hon Richard Amery MP
Chair
Parliamentary Joint Committee on the ICAC
Parliament of NSW
Macquarie Street
Sydney NSW 2000



Dear Mr Amery,

I refer to your letter received 23 July 2010 enclosing questions on notice. I am setting out your questions followed by the relevant answer.

QUESTION

Preliminary observations

1. The Annual Report refers to the Committee's 2008 recommendation for the Inspector to seek an increase in funding to enable him to undertake a broad range of audits of the ICAC. The report states that the Inspector's funding for 2008-2009, of \$600,000, represented a 6.25% reduction from the previous year's budget, and that the budget would not be increased for 2009-2010 (p 2). The report also noted that expenditure was \$454,665 (p 8).

Is the reduction of the Inspectorate's budget significant and, in particular, is the Office's budget sufficient to enable you to perform your audit and complaint handling functions under the ICAC Act?

2. What is the projected budget for the Inspector's Office in the 2010-2011 financial year?
3. The Annual Report states that the Inspector proposes to review options for low cost alternative accommodation for the Office in 2009-2010 (p 2), while noting that implementing a solution would depend on available funds.
 - a. Has the Inspector located other suitable office accommodation?
 - b. In what way would budget constraints prevent relocation of the Office, given that the Inspector's expenditure appears well below budget?

ANSWER

Since August 2009 the office has been staffed by the Office Manager and myself. Together we have managed to deal with all complaints and enquiries received as well as to produce three audit reports. I have attended the office generally two days per week although on occasion that has increased to three days. At the time of writing the actual expenditure for 2009/2010 is not available but I anticipate it will be about \$300,000. Accordingly, the answer to part 1 of your

question is in the affirmative. However, if an extensive investigation is required in the future in order to deal with a complaint then additional staff would be engaged on a casual basis.

Notwithstanding that the expenditure for 2009/2010 was approximately \$300,000, an indicative budget of \$600,000 will be sought for 2010/2011 to allow for extra costs due to requirement for a lengthy complex investigation(s).

I did make enquiries in August and September 2009 to locate other accommodation. Although the current location of the office has in the past been of concern to potential employees, the two people who work in this Office find the location convenient from the viewpoint of transport to and from their respective homes. Furthermore, although many complainants have attended this office to be interviewed in relation to their complaints none has expressed concern with its location. Indeed, some have commented positively on its proximity to Redfern railway station and comparative ease of car parking. Budget constraints have not been a consideration.

The main difficulty with the current location is that the Security and Recovery Coordination Directorate has the right to occupy the premises virtually at a moment's notice. The understanding is that this right will be exercised only in the event of a major emergency.

QUESTION

Impact of recent legislation upon the Inspector's role and power

4. The Annual Report discusses the way in which the Inspector's ability to conduct audits of the ICAC's use of certain powers is impeded by provisions of the *Telecommunications (Interception and Access) Act 1979 (Cth)* (TIA Act) and the *Surveillance Devices Act 2007 (NSW)* (SD Act) and suggests amendments to both Acts to overcome this issue.

The Inspector initially brought this matter to the Committee's attention during 2009, and the Committee expressed its support for a legislative resolution to the issue and asked that the Inspector advise it of any developments.

- a. Has there been any response from the NSW Attorney-General in regard to the Inspector's suggested amendments?
- b. To what extent has the Inspector been impeded in the performance of his functions by the failure to address these issues, for example, is the ICAC Commissioner still authorising disclosure of documentation and material to the Inspector to circumvent his lack of access under the legislation?

ANSWER

The best way of answering this question is to set out the events of the past year in chronological order.

Unfortunately, notwithstanding support from your Committee and from the ICAC Commissioner, no amendments have been made.

By letter dated 12 May 2009 to the then Premier I sought support for the suggested amendments to each of the two Acts. On the same day I wrote to the Chair of your Committee enclosing a copy of the letter to the Premier seeking its support.

On 4 August 2009 I sent an e-mail to the Legal Officer, Telecommunications and Surveillance Law Branch, National Security Law and Policy Division of the Commonwealth Attorney Generals Department requesting the amendments to the TIA Act.

By letter dated 11 September 2009 your Committee wrote to me advising its support for the legislative amendments.

On the 14 January 2010 I wrote to the NSW Attorney General in his capacity as the Minister responsible for the SD Act to seek his support for an amendment to that Act. I enclosed a copy of your Committee's letter of 11 September 2009.

On 14 January 2010 I wrote to the then Premier in her capacity as the minister responsible for the *Independent Commission Against Corruption Act* (ICAC Act) seeking her support for amendments to the SD Act and enclosed a copy of your Committee's letter of 11 September 2009. I pointed out that I had no response to my letter of 12 May 2009 to the then Premier.

By letter dated 25 January 2010 from the Australian Government's Attorney General's Department I was advised:

"While the Department understands the importance of your role as Inspector and the impact that role has in maintaining the integrity of the telecommunications interception regime, the TIA Act does not allow any agency to use their powers under the TIA Act for auditing purposes. In fact, the TIA Act limits the powers of all agencies to the investigation of specific offences and restricts the inspection role specifically to the Ombudsman.

Amending the TIA Act to enable the Inspector of the ICAC to use the audit functions bestowed by the ICAC Act to conduct a general sampling of the telecommunications interception records obtained by the ICAC under the TIA Act, would affect this legislative division of responsibility. It would also raise consistency issues that would need to be considered across all affected jurisdictions.

Given these concerns, I do not anticipate that your suggested amendments will be recorded into the TIA Act at any stage in the immediate future."

On 9 March 2010 I wrote further letters to the Premier and the Attorney General seeking replies to my earlier letters.

By letter dated 24 March 2010, the Director-General of the Department of Premier and Cabinet advised me that since the issue was first raised in May 2009 officers of the Department of Premier and Cabinet have undertaken consultation with relevant agencies and officers on the proposed amendments and that the Department is currently preparing a proposal for consideration by the Government.

The current situation is that I am precluded from conducting an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the Commonwealth TIA Act.

I regard the Inspector's role as having been created to provide a means of monitoring the extensive and intrusive powers of the ICAC so as to ensure that its use of those powers are appropriate for achieving its statutory objectives.

The obtaining of a warrant and subsequent interception pursuant to the TIA Act are normally unknown to the person(s) who is the object of the warrant and interception. It is therefore only in rare circumstances that a complaint would be received from such a person(s).

Although the TIA Act places obligations upon the NSW Ombudsman, those obligations are limited to ensuring compliance with legal requirements and the keeping of records. The NSW Ombudsman does not test if the ICAC's powers are being exercised appropriately. Thus, a warrant and interception under the TIA Act unrelated to the objectives of the ICAC could proceed undetected. It is for this reason, among others, that the exercise by the Office of the Inspector of its powers of audit have been considered by the NSW legislature to be so important.

The situation under the SD Act is slightly different. The Commissioner of the ICAC has enabled an audit of the Commission's use of surveillance devices pursuant to warrants issued under the SD Act by making a determination that it is in the public interest to provide "protected information" pursuant to subsections (6) and (7) of section 40 of the Act. This means that for me to conduct such an audit I am dependent upon the goodwill of the Commissioner. In my view, this is contrary to the spirit, if not the letter, of section 57C of the ICAC Act.

QUESTION

The Office

5. According to the Annual Report, usage statistics for the Office's website were not available from the Department of Premier and Cabinet (the host of the website) due to a problem with an outsourced service provider (p 10). Has this problem been rectified? If so, please provide the Committee with up to date statistics on website usage for the Office.

ANSWER

Although the Department was asked to take steps to make such usage statistics available, the full changeover of service providers did not occur until March 2010. No statistics were collected by the Department prior to that month. Website statistics for the forthcoming 2010-2011 reporting period are expected to be full and complete.

The usage since March 2010 is:

March 425 hits; April 523 hits; May 599 hits; June 70 hits.

I am unable to provide an explanation for the dramatic drop in June.

QUESTION

Complaints

6. There was a significant drop in complaints received by the Inspector during 2008-2009, with 35 complaints being received, down from 62 for the previous reporting period.
 - a. In the Inspector's view, what factors led to this reduction?
 - b. What effect, if any, has the reduction in complaints had on the Office's workload and staffing?
7. In his concluding comments, the Inspector states that he looks forward to making further improvements in the office's efficiency in handling complaints (p 17). Please outline the improvements that have been made in relation to the handling of complaints, and the further improvements the Inspector intends to make in this area.

ANSWER

According to the relevant Annual Reports the number of complaints received during 2005/2006 was 35, during 2006/2007 was 37, during 2007/2008 was 62 and during 2008/2009 was 35.

Apart from the year 2007/2008 the number of complaints received has always been in the vicinity of 35. During 2009/2010 the number was 38. It would seem that 2007/2008 was an abnormal year. I have no explanation for this abnormality.

Intuitively speaking, the fewer the complaints the lower the work load. However, the extent of the lowering of the work load depends, not so much upon the number, but rather upon the nature of the complaints received and the work required to assess and investigate them. At this stage it appears that the workload can be handled by existing staff. However, as stated earlier, an extensive investigation may require additional staff.

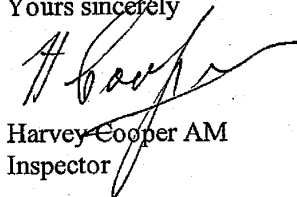
Amongst the improvements to efficiency are: --

- a) A reduction in the number of staff to handle a similar volume of work to that in 2005/2006, 2006/2007 and 2008/2009.
- b) A reduction in the time taken to deal with complaints.
- c) Personally interviewing complainants. Where the interviewee consents, the interview is sound recorded and she/he is provided with an electronic and written copy of the record of the interview.
- d) Revision of our website to provide greater clarity of the function of the Office of the Inspector and to make provision for on-line lodging of complaints.
- e) Development of an internal electronic reporting system which involves progressive recording of steps in each assessment/investigation thereby allowing quicker and easier access to results.

During the year I have concentrated my audits on those activities which involved ICAC's most intrusive powers such as those under sections 21, 22, 23 and 25 of the ICAC Act published in March 2010; data, optical and tracking surveillance under the Surveillance Devices Act published in November 2009; and listening devices under the Surveillance Devices Act published in September 2009.

Please let me know if any further information is required.

Yours sincerely



Harvey Cooper AM
Inspector

Appendix Two – Indicative questions on notice: reporting provisions

ICAC Inspector – Answers to indicative questions (received 24 August 2010)

1. What are the Inspector's current practices in respect of the publication of reports relating to the functions at ss.57B(1)(b) and (c) of the ICAC Act?

Answer: When performing an audit under section 57B (1)(a) I have looked to see whether there is any conduct amounting to maladministration under clause (c) and whether the procedures are effective and appropriate under clause (d). The findings of the audit are then included within a Special Report to the Parliament in accordance with section 77A of the Act.

When dealing with complaints under section 57B (1)(b) my practice has been to make a report only to the parties concerned.

2. Has the Inspector of the ICAC encountered any specific difficulties with the operation of the reporting provisions applicable to that office under the ICAC Act?

Answer: So far no specific difficulty with the operation of the reporting provisions have been encountered.

3. In relation to what types of matters and in what circumstances do you envisage that the Inspector would consider making a report to Parliament about a complaint investigation and what level of reporting is required on a complaint investigation that does not warrant a report to Parliament?

Answer: A report to Parliament about a completed investigation would occur where the complaint was referred by the Parliamentary Joint Committee or where the complaint involved an allegation of serious misconduct on the part of a senior officer of the Commission or involved an allegation of systemic misconduct. The term "misconduct" includes all forms of impropriety and maladministration referred to in section 57B of the Act.

Where the complaint is one of misconduct on the part of an individual officer of the Commission not involving systemic misconduct, a report would be given to the officer concerned and to the Commissioner.

4. Two options have been suggested by the Department of Premier and Cabinet as possible amendments to overcome difficulties with the reporting provisions of the *Independent Commission Against Corruption Act 1988* and the Committee would seek your comment on the relative merits of the suggested amendments:

- i. that the Inspector be given a general discretion to publish to anyone; and
- ii. that the Inspector, in his discretion, provide a report about a complaint to Parliament with a recommendation that the report be made public forthwith.

Answer: The question of reporting involves two separate considerations. First, on what subject matters is the Inspector authorised to report?

The word "reports" occurs only in paragraphs (b) and (c) of section 57B (1). If there is power to report on the subject matters referred to in paragraphs (a) and (d) of section 57B (1), it is

to be found in section 77A which authorises the Inspector to make a special report to the Presiding Officer of each House of Parliament on:

“(a) any matters affecting the Commission, including, for example, its operational effectiveness or needs”

I have construed this authorisation as enabling me, as the result of an audit, to make findings whether there is any conduct amounting to maladministration under clause (c) and whether the procedures are effective and appropriate under clause (d) and to include those findings within a Special Report to the Parliament in accordance with section 77A of the Act.

A contrary view is arguable. To put the matter beyond doubt, I would suggest an amendment similar to recommendation 17 that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.

The second consideration is to whom should the report being made?

The Act provides for only one recipient of reports, namely a special report to the Presiding Officer under section 77A. If I were to make a finding of misconduct on the part of an officer of the ICAC which was not serious or systemic it would be unreasonable to make a special report to the Presiding Officer. The appropriate course would be to address the report containing the finding to the officer concerned and to the Commissioner. If the victim of the misconduct were a member of the public should he/she receive a copy of the report? It could be argued that the Act does not authorise me to publish the report to the Commissioner let alone to the member of the public with the possible consequence that my report loses the protection of absolute privilege under schedule 1 of the Defamation Act 2005.

To overcome this difficulty I suggest that the Inspector be given a general discretion to publish a report to the Commissioner and/or the officer against whom the complaint has been made. In addition, the Inspector should continue to have power, in his discretion, to provide a report about a complaint to Parliament with a recommendation that the report be made public forthwith.

Appendix Three – Questions without notice

This appendix contains a transcript of evidence taken at a public hearing held by the Committee on 27 August 2010. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's website.

CHAIR: The Committee welcomes the Inspector of the Independent Commission Against Corruption, who is present to give evidence relating to the Inspector's annual report 2008-09. In conveying the thanks of the Committee for the Inspector attending, I mention it was a pleasure to meet you not long ago. I intend to keep the promise that the Committee will visit your Redfern facilities in the not-too-distant future. The Committee has received a submission from the Office of the Inspector in response to a number of questions on notice relating to the annual report. Inspector, do you wish to have that submission form part of the evidence given today?

Mr COOPER: Yes, please.

HARVEY LESLIE COOPER, Inspector, Office of the Inspector of the Independent Commission Against Corruption, Suite 702, Tower 1, Lawson Square, Redfern, 2016, sworn and examined:

CHAIR: Would you like to make an opening statement before the commencement of questions?

Mr COOPER: Not so much an opening statement, but an appreciation of some guidance. In my annual report I refer to complaints I have received, indicated various categories, and gave one or two examples of each. That was a departure from the practice of the prior Inspector, who included a summary of all of the complaints received. I would appreciate some guidance as to whether my abbreviated form is satisfactory.

On the question of reports of audits, I was wondering whether, when I have done an audit and I find nothing untoward, I should give a report in relation to that, or should I include a reference to that within the annual report? It does not matter to me. I am quite happy to do anything, but I would like to abide by the guidance of the Committee.

CHAIR: In relation to that, I will have those points discussed at an indicative meeting next week. I will make an observation based on the Commissioner's and the executive's former submission to the Committee. Issues in relation to the amount of time and effort put into a lot of cases and the complaints lodged is very important. The Commission is making a submission for increased resources, increased funding, et cetera. We will discuss them in more detail at a meeting of the Committee and I will respond to you in writing on that particular point.

Mr COOPER: Thank you very much. Otherwise, I have nothing further to add.

CHAIR: I will commence questions by indicating that the Office of the Inspector's website now provides for online lodgement of complaints. Has the new format of receiving complaints resulted in a change in the number of complaints received? The Committee would be interested to see the online complaints included in the annual report statistics on

the method of receipt of those complaints. Has that new format changed the volume and the type of complaint you have received?

Mr COOPER: From what I can see, no. It has made no difference whatsoever. I think I am correct: I do not think we have had one online complaint; otherwise, the complaints come by email or letter or phone call or fax.

CHAIR: You have sought an amendment to the Commonwealth Telecommunications (Interceptions and Access) Act to enable you to audit the appropriateness of the ICAC's applications for, and use of, warrants granted under the Act. You state that as a result of this particular situation, you will continue to be prevented from performing your role of auditing and monitoring the Commission's use of its power to obtain telecommunications interception warrants. Do you have any further comments in relation to this particular matter? The issue with State authorities and dealing with the Federal Telecommunications (Interception and Access) Act has been an issue with a number of agencies.

Mr COOPER: Yes. In my letter to the Committee of 29 July, I referred to the fact that last January the Australian Government Attorney-General's Department wrote to us and said that they are not going to make the amendments I sought because they regard access to the information, purely for the purpose of an audit as distinct from a targeted investigation, as something that they do not want. I have quoted the relevant passage in my letter.

Reverend the Hon. FRED NILE: In regard to your power to publish reports, what progress has been made? You note that you have two options: that you be given a general discretion to publish to anyone, or that the Inspector, in his discretion, provide a report about a complaint to Parliament with a recommendation that the report be made public forthwith. It has been considered by the Premier and Cabinet. Have you had any reports of progress on steps that have been taken?

Mr COOPER: I received a request for our views on those matters and I sent an email to the Committee quite recently, on 24 August. I will deal with the specific questions I have been asked. The first one was: What is my practice in respect of the publication of reports relating to my functions under section 57B? I have stated that when performing an audit under section 57A, I have looked to see you whether there is any conduct amounting to maladministration under clause (c) and whether the procedures are effective and appropriate in accordance with paragraph (d) of section 57A (1). The findings of the audit include within it a special report to the Parliament in accordance with section 77A.

When I am dealing with a complaint that is a specific complaint against an ICAC officer, my practice has been to make a report to the parties concerned. Obviously one party concerned is the Commissioner. Then the other party, who is the person against whom the allegations are made, is entitled to know what I feel. In this regard the Commissioner has raised the point that I must be careful not to give any information to a layperson which could prejudice investigations or procedures of the Commission. I agree entirely with that and indeed I think the Commissioner, in his statement to you a little while ago, covered that very point. We are, at the moment, working on probably an amendment to the memorandum of understanding so that in my report to him—that is my report to the individual layperson—I would not say anything that would affect the workings of the Commission.

Now, with regard to reporting provisions, so far in my little over 12 months or 18 months I have not encountered any particular problems. There are, however, always the

potential for problems. Here again I think it is important to divide this question of reporting into two separate categories. First of all, there is the question of the subject matter of the report: on what matters am I authorised to report? When you look at the Act it appears that the reports occur only in paragraphs (b) and (c) of section 57B (1) where I can deal with certain matters by report. When you go to look at how I can report, the only other point where the word "report" is used is in relation to a special report under section 77A.

I construed those to mean that in the course of an audit I can make findings as to whether there is any conduct amounting to maladministration, whether the procedures are effective and appropriate—that is the Commission's procedures are—and to include those within the special report. But a contrary view is arguable that I do not have that power and to put the matter beyond doubt, I would suggest an amendment similar to recommendation 17 that the Act be amended to make express provision for the Inspector to report to Parliament as he considers necessary on any abuse of power, impropriety, maladministration and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not those matters arise from the making of a complaint to the Inspector.

Now the second consideration is to whom the report should be made and at the moment the only mention of a report is under section 77A to the Parliament. But that creates a problem when you are dealing with an allegation of misconduct on the part of an individual officer; for example, if it were alleged that an officer had punched someone in the course of performing a search—an unlawful assault. Here again, if I were to make a finding on the part of an officer which was of a very serious nature or involved some systemic matter—not just a mere assault of one on one—then in my view the appropriate procedure is you use section 77A.

If, however, the finding of misconduct was nowhere near that serious, then it is unreasonable, in my view, to make a special report which becomes public to everybody. The appropriate course then would be to report my findings to the Commissioner and to the officer concerned, but here again do I have power to give a report or publish a report to a mere officer? That is where a problem arises and it is not just that. If I were to make an adverse finding against that officer, I would be obliged out of procedural fairness to give him a draft of my report and invite his comment. So, it is for that reason that I think the Inspector should be given a general discretion to publish a report to the Commission and the person against whom the complaint has been made.

Initially I felt that we should also have the power to report to anyone. The Commissioner has drawn to my attention his problems with that and I have a lot of sympathy with his particular point of view. I note that the Commissioner submitted that the Inspector should be empowered to publish not only his report but, should he decide to do so, part of his report to the complainant. The Inspector will then be able to sanitise his report when publishing it to the complainant.

The Commissioner also advised me that he agrees with me that the Act be amended in the way proposed and that he and I will enter into a memorandum of understanding under which I will agree not to publish to a complainant the Commission's operational methods, source of information, names of witnesses and like information. I agree with that and indeed that has been my practice since I became Inspector. I have always been very careful to observe that. Sorry to go on for so long.

Mr PAUL PEARCE: In relation to the publishing of the report to the Commissioner or for basic procedural fairness to the person against whom the complaint has been made, that would be as well as publishing the report to Parliament, I would assume?

Mr COOPER: Well no. I try to distinguish two classes of situation. If I were dealing with a case of serious misconduct which involved an endemic problem; for example, if it came to my notice that Commission officers going out to search, habitually slap people across the face, that would be the type of report that I feel should be made public. It is a very serious endemic, systemic matter, but if it were just one isolated action of an officer, then at the moment I would not regard that as worthy of general publication but, rather, to be dealt with between the Commissioner and his employee.

Mr PAUL PEARCE: As I understand the role of the Inspector, the Inspector's role relative to the ICAC is acting on behalf of the Parliament and the oversight committee. How does that sit if you then move over to the other side, where you are dealing with the Commissioner rather than necessarily the committee or Parliament?

Mr COOPER: I think both are important.

Mr PAUL PEARCE: I can understand the practical nature of what you are suggesting in relation to one-off incidents. What I am concerned about is that if there is an amendment moved to the Act which moves that around, does that not then change the nature of your relationship to the Commissioner and change the nature of your relationship to the Committee and to the Parliament?

Mr COOPER: I do not know that it changes the relationship. The relationship is constant. What is done within that relationship varies in accordance with the circumstances of the individual case. That is the way I see it.

Reverend the Hon. FRED NILE: To clarify that, if there was an amendment, it should be worded in such a way that the Inspector has a discretion in the reporting process whether he reports to the Parliament and/or to the individual. It should somehow be worded to give you the discretion to make that decision based on the seriousness of the matter.

Mr COOPER: Yes, that is right.

CHAIR: Yours must be one of the few organisations that have had a substantial reduction in their expenses. You have gone from about \$454,000-odd to \$300,000. Has that saving in those two financial years come about because of the reduction in staff?

Mr COOPER: Yes, it came about because of the reduction in staff. In fairness, I think I was bragging perhaps a little too much in that letter. In previous years the Office of the Inspector was kept flat out basically with the Breen investigation, which was a massive investigation. Once that was out of the way and once the executive officer took leave, Ms Cannon and I found that we could run things ourselves. But if we get another massive investigation clearly we will have to get in extra help. It is as simple as that.

Reverend the Hon. FRED NILE: You have the power to do that. You have the power to co-opt additional staff within your budget.

Mr COOPER: I have the power to do it but it is a question of getting the money to do it. I can do it but I would have to make submissions to the office and the Department of Premier and Cabinet and say, "Please, can I have the money?"

CHAIR: Are you now satisfied with the facilities at Redfern and the accommodation you have there?

Mr COOPER: It is working well at the moment. I do not see any need to change it in the immediate future. If something else crops up, sure, I would be happy to look at it.

CHAIR: We have a number of questions on notice and we ask for your response to those. We will respond to your question on clarification of the content of your annual report when we meet next week. We will be in touch with your office to organise a visit to your premises and hopefully have a morning there similar to what we did with the Independent Commission Against Corruption. Thank you for appearing before the Committee.

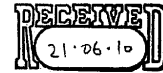
(The witness withdrew)

(The Committee adjourned at 12.47 p.m.)

Appendix Four – Correspondence from the Department of Premier and Cabinet regarding reporting provisions



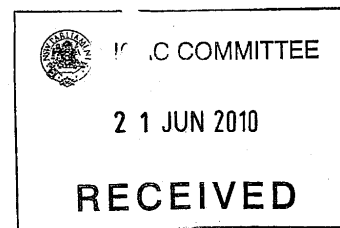
**Premier
& Cabinet**



16 JUN 2010

DPC10 – LB

Mr Paul Pearce MP
Deputy Chair
Committee on the Independent
Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW 2000



Dear Mr Pearce

I refer to the Committee's letters to the Inspector and the Commissioner of the Independent Commission Against Corruption (ICAC) dated 4 May 2009, copies of which were provided to the former Premier. In those letters, the Committee indicated that it was considering whether any legislative amendments were warranted in relation to the publication of reports by the Inspector of the ICAC.

As you will be aware, the Committee on the Office of the Ombudsman and the PIC (in its March 2010 and March 2009 Reports on its Meetings with the Inspector of the Police Integrity Commission) has already recommended that the *Police Integrity Commission Act 1996* (PIC Act) be amended to clarify that the PIC Inspector is able to report to any party, including Parliament, at its discretion, in relation to any of its statutory functions. I understand that that Committee has also recently written to the Minister for Police to reiterate its concerns.

In developing a response, I expect the Department will consider both the proposal put forward by the Committee on the Office of the Ombudsman and the PIC that the Inspector be given a general discretion to publish to anyone, as well as a possible alternative approach under which the Inspector could, in his discretion, provide a report about a complaint to Parliament with a recommendation that the report be made public forthwith.

Given that the legislative provisions regarding reports by the Inspectors of the ICAC and the PIC are identical, however, it would appear preferable to develop a response that is also appropriate for the Inspector of the ICAC.

I would be grateful, therefore, if you could provide me with an update on the status of the Committee's consideration of this issue. I look forward to receiving your reply.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Miller'.

Paul Miller
A/Deputy Director General (General Counsel)

Appendix Five – Correspondence from the Committee to the Department of Premier and Cabinet



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

8 September 2010

The Hon Kristina Keneally MP
Premier and Minister for Redfern Waterloo
Level 40 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

ICC214

Dear Premier

I refer to my previous letter of 24 June 2010, concerning your request for advice from the Committee on possible amendments to the reporting provisions of the *Police Integrity Commission Act 1996* and the *Independent Commission Against Corruption Act 1988*, as they relate to the Inspectors of the PIC and the ICAC.

The Committee recently had an opportunity to raise this issue with the Inspector of the ICAC, the Hon. Harvey Cooper AM, and the Commissioner, the Hon. David Ipp AO QC, at a public hearing conducted on 27 August 2010. The transcript of evidence and answers to relevant questions on notice are attached for your information.

At the outset, the Committee notes the advice of the current Inspector that he has not experienced any particular difficulties with the reporting provisions of the ICAC Act. Nevertheless, given that there may be some lack of clarity around the reporting provisions, the Committee supports the introduction of amendments to put beyond doubt the ability of the Inspector to report appropriately on the performance of his functions.

In light of the evidence and information received from the Inspector and the Commissioner, I wish to advise that the Committee has formed the following views on the need for amendments to the reporting provisions of the ICAC Act in respect of reports by the Inspector of the ICAC.

It is the Committee's opinion that the two possible options for amendments, as proposed by the Department of Premier and Cabinet in its letter dated 16 June 2010, will not necessarily give adequate clarification to the provisions. The first proposal that the Inspector be given a general discretion to publish to anyone appears to the Committee to be too broad as it implies a power to publish to the world at large. It should be noted that the Inspector also has indicated that he no longer supports an amendment along these lines. The second proposal that the Inspector be given the discretion to provide a report about a complaint to Parliament, with a recommendation that the report be made public forthwith, also appears too narrow as it does not capture reporting by the Inspector on those more routine complaints or matters that do not warrant reporting to Parliament.

Instead, the Committee on the ICAC would prefer that amendments be made to the *Independent Commission Against Corruption Act 1988* in the following terms:

- That express provision be made for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety, *maladministration* and other forms of misconduct on the part of the ICAC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector; and
- That the Inspector should be able to recommend such a report to Parliament be made public forthwith, consistent with the existing general reporting provisions in the Act.¹
- To clarify that reports made by the Inspector under sections 57B(1)(b) and (c) in relation to complaints or matters that *are not* of a serious, systemic nature and, therefore, do not warrant being reported to Parliament, can be provided to interested or affected parties, as deemed necessary by the Inspector for the purpose of resolving the complaint or matter in question.

The Committee understands that amendments in these terms would receive the support of the Inspector of the ICAC and the Commission.

The Committee further notes that such amendments would cover both ss.57B(1)(b) and (c) of the ICAC Act, which make specific provision for the Inspector of the ICAC to deal with his statutory functions by way of reports and recommendations (significantly, the Inspector of the PIC does not have a similar function to deal with *maladministration*). The proposals are in similar terms to the amendments to the Police Integrity Commission Act as originally suggested by the Committee on the Office of the Ombudsman and the Police Integrity Commission in its 2006 report on the ten year review of the police complaints system. Recommendations 16 and 17 of that report seem formulated to ensure the public interest is best served and the capacity of each Inspector to report is put beyond doubt.

The construction of the amendments proposed by the Committee on the ICAC also is preferred as it provides the Inspector with discretion to determine whether or not a complaint or matter dealt with in relation to these particular functions warrants a report to Parliament. One example of such a report is the previous ICAC Inspector's report on matters relating to ICAC's investigation of allegations concerning the former member of the Legislative Council, Mr Peter Breen (this was made as a special report to Parliament pursuant to s.77A of the ICAC Act). Where the Inspector does consider such a report to be necessary, the general provisions relating to reports made under the Act, found at sections 78 and 79, which cover tabling to the Presiding Officers and publication forthwith also should apply.

The Committee considers that there is an important distinction to be drawn between 'special reports' under the Act and reports by the Inspector on more routine complaints or matters that he is required by statute to deal with but which are not of sufficient public interest or seriousness to be reported to Parliament, for example, lesser misconduct by an individual officer of the ICAC. The publication of reports on such matters should occur within the context of 'dealing with' a complaint and should be aimed at the resolution of the matter, for instance, through the provision of a complaint report to the public official with administrative responsibility for addressing the misconduct, and interested or affected parties. This would give some clarity to the

¹ Inspector's answer to indicative questions, no.4, received 24 August 2010.

situation where the Inspector may wish to publish a report on a more minor matter to the Commissioner of the ICAC and or the Commission officer against whom the complaint was made. The Act, as presently constructed, does not make express provision for such action.

Any amendments also should leave the Inspector some flexibility in the way in which he reports to complainants and interested parties. Such individuals may be informed by the Inspector of his findings and the outcome of a complaint without being provided with a full copy of a report on a matter. This approach would be analogous to the reporting provisions applicable to other oversight and complaint handling bodies, for example, the NSW Ombudsman.

The Committee also considers that no change should occur in respect of the Inspector's ability to make special reports to Parliament pursuant to s. 77A of the ICAC Act. However, there may be some merit in making explicit that the Inspector may utilise the special reporting provision in this section in relation to the performance of his functions under sections 57B(1)(a) and (d) of the ICAC Act, if he considers such action to be necessary for the purpose of his audits, or assessing the effectiveness and appropriateness of ICAC procedures relating to the legality or propriety of its activities.

Finally, the Committee notes that the Commissioner of the ICAC proposed a further amendment to the ICAC Act along the lines of a recommendation made in April 2010 by the Committee on the Office of the Ombudsman and the PIC in relation to its inquiry into the handling of complaints against the PIC. It was proposed in the report on the inquiry that the PIC Act be amended to include a requirement that, in circumstances where the Inspector of the PIC makes a report in which he comments adversely on the conduct of the PIC and the PIC is in disagreement with the Inspector, the PIC's response to the adverse comment be reproduced in full in the Inspector's report.²

At the conclusion of his evidence to the Committee on 27 August 2010, the Commissioner of the ICAC suggested a similar amendment to the ICAC Act. However, the Committee has yet to obtain the advice of the ICAC Inspector in this regard and will express its view on the suggestion when it reports on its examination of the Inspector's annual report for 2008-2009. In the interim, the Committee has formed the view that while there would appear to be no difficulty with the recommendation in terms of procedural fairness principles, it should be noted that this proposal arose from an inquiry into the handling of complaints against the PIC. That inquiry was conducted in the context of disagreements between the PIC and the PIC Inspector on the latter's reporting in relation to complaints against the PIC.

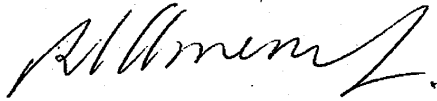
The Committee is not aware of any similar issues having arisen in relation to reports by the Inspector of the ICAC on complaints against ICAC. Also, the proposal is modelled on legislation applicable to Inspectors of analogous bodies in other Australian jurisdictions, namely the Queensland Crime and Misconduct Commission and the Crime and Corruption Commission in Western Australia. It is relevant to note that the statutory framework underpinning the relationship between the inspectors and investigative commissions in those jurisdictions is quite distinct from that which

² Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report of an Inquiry into the handling of complaints against the Police Integrity Commission*, Report No. 9/54 – April 2010, p.v.

applies in New South Wales to the Inspectors of the ICAC and the PIC, and their respective commissions. The Committee would recommend that the Inspector of the ICAC be consulted if such an amendment were to proceed.

In conclusion, I would like to thank you again on behalf of the Committee on the ICAC for the opportunity to comment on these matters. Please contact the Committee Manager, Ms Helen Minnican, on 9230 2062 if you have any questions in relation to the Committee's response.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Amery', written in a cursive style.

The Hon Richard Amery MP
Chair

cc. Paul Miller, A/Deputy Director General (General Counsel), Premier and Cabinet

Appendix Six – Minutes

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 36)

Friday, 27 August at 10.40 am
Room 814-815, Parliament House

1. Attendance

Members present

Mr Amery, (Chair) Mr Pearce (Deputy Chair), Mr Donnelly, Mr Dominello, Mr Khan, Mr Khoshaba, Revd Nile, Mr O'Dea, Mr West.

Apologies, Ms Beamer, Mr Stokes

In attendance Helen Minnican, Carly Sheen, Dora Oravec and Mohini Mehta.

2. Public hearing: Review of the 2008-2009 Annual Report of the Independent Commission Against Corruption; Review of the 2008-2009 Annual Report of the Inspector of the Independent Commission Against Corruption

The press and the public were admitted. The Chair opened the public hearing and, after welcoming the witnesses, gave a short opening address.

The Hon David Andrew Ipp AO QC, Commissioner of the ICAC, and Mr Robert William Waldersee, Executive Director of Corruption Prevention, Education and Research affirmed and examined.

Ms Theresa June Hamilton, Deputy Commissioner of the ICAC, Mr Michael Douglas Symons, Executive Director of the Investigation Division, and Mr Roy Alfred Waldon, Executive Director of Legal Division, and Mr Andrew Kyriacou Koureas, Executive Director of Corporate Services, all sworn and examined.

The Commission's answers to question on notice in relation to the ICAC Annual Report for 2008-2009 were included as part of the witnesses' evidence.
The Commissioner made an opening statement.

The Chair commenced questioning the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance. The witnesses withdrew.

The Committee took a short adjournment at 12.16pm and resumed the public hearing at 12.29pm.

Mr Harvey Leslie Cooper, Inspector, Office of the Independent Commission Against Corruption, sworn and examined.

Also in attendance, Ms Felicity Cannon, Office Manager/Executive Assistant to the Inspector of the Independent Commission Against Corruption.

The Inspector's answers to question on notice in relation to the Office of the Inspector of the ICAC's Annual Report for 2008-2009 were included as part of his evidence.

The Inspector made a brief opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The public hearing concluded at 12.47pm.

3. Deliberative meeting (12.51pm)

a. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Pearce, that the minutes of the deliberative meeting of 3 June 2010 be confirmed.

b. Membership changes

The Chair announced that:

- Victor Michael Dominello had been appointed to serve on the Committee in place of Gregory Eugene Smith, discharged (Legislative Assembly, Votes and Proceedings, 9 June 2010).
- Graham James West had been appointed to serve on the Committee in place of Gerard Francis Martin, discharged (Legislative Assembly, Votes and Proceedings, 24 June 2010).

The Chair welcomed the new members of the Committee.

c. Publication orders

Resolved on the motion of Mr Khoshaba, seconded Mr Pearce, that the corrected transcript of evidence given today be authorised for publication and uploaded on the Committee's website.

Resolved on the motion of Mr Donnelly, seconded Mr Pearce, that the answers to questions on notice from the ICAC, received 13 August 2010, be authorised for publication and uploaded on the Committee's website.

Resolved on the motion of Mr Pearce, seconded Mr Khoshaba, that the answers to questions on notice from the Inspector of the ICAC, received 2 August 2010, and the answers to indicative questions, received 24 August, be authorised for publication and uploaded on the Committee's website.

4. General business

There being no items of general business, the deliberations concluded at 12.58pm and the Committee adjourned until Thursday, 2 September 2010 at 10.00am.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 38)

Wednesday, 8 September at 10.08 am

Speaker's Dining Room, Parliament House

1. Attendance

Members present

Mr Amery, (Chair) Mr Pearce (Deputy Chair), Mr Donnelly, Mr Dominello, Mr Khan, Mr Khoshaba, Mr O'Dea, Mr Stokes, Mr West.

Apologies: Ms Beamer, Revd Nile

In attendance Helen Minnican, Dora Oravec, Emma Wood, Vanessa Pop, Amy Bauder.

Deliberations

2. Minutes

Resolved, on the motion of Mr Donnelly, seconded Mr Khoshaba, that the minutes of the deliberative meeting of 2 September 2010, previously circulated, be confirmed.

3. ***

4. Business arising from the minutes

The Committee considered two items of business arising from proceedings on 27 August 2010, briefing note previously circulated, consideration deferred from 2 September:

- a. *Proposed amendments to the reporting provisions of the ICAC Act, concerning the Inspector of the ICAC and the proposed response to the Premier (relates to earlier correspondence from Paul Miller, Department of Premier and Cabinet, dated 16 June 2010)*

Resolved on the motion of Mr Amery that the Chair write to the Premier in the terms suggested in the briefing note distributed on 2 September, copy of draft letter attached and circulated prior to the meeting (copy attached).

- b. *Amendment to the MoU between the ICAC and the Inspector - Recent agreement between the Inspector and the Commissioner of the ICAC in relation to disclosure of matters concerning the workings of the ICAC in the Inspector's correspondence with complainants and interested parties.*

Resolved on the motion of Mr Amery that the Committee note the agreement and monitor its application.

5. ***

6. Correspondence Group Membership – deferred from the previous meeting.

The Committee agreed that Mr Dominello be a member of the correspondence group, in addition to the present membership, that is, the Chair, Ms Beamer and Mr Stokes.

7. General Business

There being no items of general business, the deliberations concluded at 11.01am and the Committee adjourned sine die.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 39)

Thursday, 11 November 2010 at 9.48am

Waratah Room, Parliament House

1. Attendance

Mr Amery, (Chair) Mr Pearce (Deputy Chair), Mr Donnelly, Mr Dominello, Mr Khoshaba, Revd Nile, Mr O'Dea, Mr Stokes

Apologies: Ms Beamer, Mr Khan, Mr West

Committee staff: Carly Sheen, Dora Oravec, Amy Bauder

2. Minutes

Resolved, on the motion of Mr Stokes, seconded Mr Dominello, that the minutes of the meeting of 8 September 2010 be confirmed.

3. ***

4. Consideration of Chair's draft report: Review of the 2008-2009 Annual Report of the Inspector of the ICAC

The Chair spoke to the draft report, previously circulated.

Resolved on the motion of Mr O'Dea, seconded Revd Nile, that Recommendation 1 be agreed to.

Resolved on the motion of Revd Nile, seconded Mr Pearce, that Recommendation 2 be agreed to.

Resolved on the motion of Mr Khoshaba, seconded Revd Nile, that Recommendation 3 be agreed to.

Resolved on the motion of Mr Pearce, seconded Mr O'Dea, that:

- i. The draft report be the Report of the Committee and that it be signed by the Chair and presented to the House.
- ii. The Chair, the Committee Manager and the Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors.

5. ***

Deliberations concluded at 10.06am and the Committee adjourned until Thursday, 25 November 2010 at 10.00am.