Submission No 1

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

Organisation:

Name: Mr Graham Kelly

Position:

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Hon Damien Tudehope

Chair

Committee on the Independent Commission Against Corruption

Parliament House

Macquarie St

Sydney NSW 2000

Dear Sir

Having been the first Inspector of the Independent Committee Against Corruption 2005 to 2008, I feel constrained to write to the Committee in relation to the ***Report to the Premier: The Inspector's Review of the ICAC 12 May 2016*** ('the Report')**.**

I profoundly disagree with some of the central recommendations in the Report

The 4 core recommendations of the current Inspector with which I disagree are, in plain concept and language, that:

1. The position of the Inspector should be full time ('Recommendation 1');
2. The ICAC's power to hold public hearings should be abrogated, that is to say, 'the proceedings of the ICAC should be in private' ('Recommendation 2');
3. There should be a power to 'expunge' findings of corrupt conduct ('Recommendation 3');
4. There should be a requirement that a person be informed of the nature of the allegation or complaint before they are compelled to give evidence to the ICAC ('Recommendation 4').

Recommendation 1

I disagree with this recommendation for both historical and on-going reasons.

When the then Premier first approached me to accept appointment as the inaugural Inspector, he envisaged that the role would require about 1 day every couple of weeks. I found that to establish

the office from scratch required about 2 days of fair dinkum work per week. Much of this time was consumed on the purely administrative tasks needed to set the Office up, to recruit staff and to develop proper procedures. But nothing like full time. What, though, is needed is a top quality Executive Officer who can support the Inspector.

Secondly, I informed the then Premier that in my view the role required someone with management experience as well as legal experience. I similarly informed his successor of my (by then even more firmly held) view that this was not a position for a retired judge; above all, it is an appointment for one who has strong management qualifications as well as legal experience. This advice has obviously been ignored in making subsequent appointments.

Why do I hold these 2 views?

- That the position should only be part-time; and
- That this is a position that should be held by someone with management, as well as legal, experience.

First, it is simply not a full-time job unless its reach is much more than originally envisaged and, in my actual experience, required. The Office is required to do 2 things only:

- To receive and if appropriate investigate complaints against the ICAC; and
- To report on the ICAC's processes.

In my experience, many of the complaints received by the Inspector are trivial, many merely asserting, without evidence, bias or corruption within the ICAC itself; they need to be taken no further. Others are by people concerned to impede the ICAC's very proper investigations of apparently corrupt conduct; these are not deserving of much truck if the objective of the legislation to inhibit corrupt public sector conduct is to be given proper effect.

As for co-operative exchange of information between the office of the Inspector and the ICAC about current activities, I have to say that the then Commissioner, the late Jerrold Cripps, and I had no real difficulty in this. Our interchanges of what we were both up to were facilitated by regular meetings between the 2 of us alone. I just don't see the burdensome need for the formal notification protocols that the current Inspector implores. They would inevitably make for more work for the Office of the Inspector but for the ICAC as well (diverting its resources from its real task of corruption prevention and exposure)

True it is that the Inspector's powers are limited in that they don't extend to making enforceable orders against the ICAC. Rather, they are the powers to review and report, including to the JPC, the Government and publicly. To give the Inspector power to make enforceable orders against the ICAC (which seems an inevitable outcome of what he asks), would involve a major transformation of the State's anti-corruption system. The Inspector would, in my view, inevitably become an appeal tribunal, with all the paraphernalia that that would entail. And the ICAC would become a mere tribunal of first instance, lacking the authority and respect it now has in corruption prevention and exposure. Adverse findings by it would nearly always end up being 'appealed' to the Inspector. This is not at all the way the system was envisaged to work; nor, would I suggest, could it effectively and efficiently work to weed out corrupt public sector behaviour in New South Wales.

Overwhelmingly since its inception by the Greiner Government, the ICAC has worked well, not only to expose corrupt conduct in the public sector, but to cause the public sector to adopt and enforce corruption prevention measures. It would, I believe, be cavalier to mess with its fundamentals too much.

As to the function of reviewing and reporting on the ICAC's processes, more than anything else this requires appropriate work plans (including tailored to the useful application of resources). It pre-eminently calls for the exercise of management knowledge, skill and experience to assess the effectiveness of ICAC processes. That is why I have consistently argued that the Inspector's role requires management experience and skills and does not call for the appointment of retired judges.

Certainly, in my experience, some of the ICAC's processes should have been more effective and in some cases fairer. But overall it seemed to me to operate about as the community is entitled to expect it to do.

I would not like to see this management review function of the Inspector become subservient to what would amount to an inappropriate appeal function.

(I shall comment below on 3 significant changes that I believed - and still do believe - should, however, be made.)

Recommendation 2

One of the ICAC's most powerful tools is the public inquiry. This recommendation (namely, that proceedings of the ICAC should be in private) should be completely and quickly rejected.

First of all, public hearings are inherently ***transparent.*** Transparency matters mightily in deterring and exposing corruption. It is not at all surprising that the premier international body concerned with the elimination of corruption is called ***Transparency International.*** It is almost trite to say that the mere possibility of public exposure has an enormously strong deterrent effect on corrupt conduct. What is more, it causes the public sector to adopt and enforce procedures to guard against corruption.

Secondly, the public inquiry gives the ICAC the opportunity to have witnesses examined under oath before an open 'court'. This puts far greater pressure on witnesses to tell the truth, for they know that others who know the facts may come forward to contradict them. The public hearing has been the source of many of the convictions for telling lies to the ICAC.

Thirdly, the public hearing gives a person who is suspected of corrupt conduct the opportunity to clear their name without speculation, supposition or innuendo. If I were under investigation by the ICAC, I would certainly want the opportunity to clear my name publicly. In other words, this is precisely the opposite argument to the one advanced by the Inspector that public hearings can lead to the 'trashing' of reputations.

Recommendation 3

I find it difficult to think of a single compelling reason to do this (that is, to provide an 'exoneration protocol', which would allow individuals to apply to the Supreme Court to have decisions of the ICAC expunged).

First, it would emasculate the ICAC, because so much time and resources would have to be wasted on this process.

Secondly, it is simply not the case that an aggrieved person does not have remedies available.

Pre-eminently, there are the Courts if the ICAC exceeds its powers or to enforce procedural fairness (do no more than to think of the Greiner and Cunneen cases). Overall, although there is no direct right of appeal to the Courts, they have proved to be assiduous in ensuring that the ICAC observes its proper jurisdiction and applicable rules of procedural fairness.

And it is open to the Inspector, either at the complaint of an aggrieved party, the JPC itself or the Government, or on their own initiative, to investigate the legality, propriety and fairness of the ICAC's processes and findings and to report publicly on the results.

In any event, the notion that a finding by the ICAC that a person had engaged in corrupt conduct but is subsequently acquitted of an offence could have the finding of corrupt conduct 'expunged' involves profound misunderstandings:

- first, the components of 'corrupt conduct' are not exactly correspondent with any particular crime.;
- secondly, the standard of satisfaction applicable to conclusions of corrupt conduct by the ICAC, namely, comfortable satisfaction, is entirely different to that applicable to criminal charges, namely, satisfaction beyond reasonable doubt.

Thus, it is perfectly possible, and not at all juridically inconsistent, that the ICAC can find that a person has engaged in corrupt conduct but that the person not subsequently either be charged with, or convicted of, a crime. A good example is some of the outcomes of the Wollongong Council inquiry some years ago.

Much of the current fuss has come from the Cunneen investigation. It was a mistake. (I have said publicly before that, had I been the Inspector at the time, and had Ms Cunneen complained to me about the ICAC's investigation of her alleged conduct, I would have unhesitatingly upheld her complaint, for the investigation was simply not within the ICAC's jurisdiction, as the High Court subsequently found.)

Recommendation 4

In my view, this recommendation (namely, that people should be informed about the nature of the allegations or complaint being investigated before a compulsory examination or inquiry begins) involves a profound misunderstanding of the processes that the ICAC properly follows.

There needs to be a complete distinction drawn between the ICAC's *investigative* stages and its *determinative* stages (commonly, in or as a result of its formal public hearings).

There is absolutely no need to give anything like a procedural fairness right to be informed of an allegation during a mere *investigative* process. The ICAC should remain as free as other law enforcement agencies to interrogate potential witnesses and suspects without the need to formulate a precise allegation nor to put it to the person.

I am also afraid that if such a requirement were adopted for the ICAC there would be demands for it to apply to all New South Wales law enforcement agencies (what a bonanza for scoundrels and their lawyers!)

When it comes to a formal hearing at which allegations are ventilated, my understanding is that the ICAC, usually through Counsel assisting it, normally gives a person suspected of corrupt conduct ample opportunity to respond to the allegation, even if only under fairly simple ***Brown v. Dunn*** principles.

Other Observations

First, I feel compelled to say that I believe that, taken together, the recommendations would see the ICAC as we have known it, and as it was established to be, ***gutted***.

It would become another backroom, and largely powerless, organisation hardly worth the money spent on it. And I am not at all impacted by comparisons with other Australian jurisdictions (all of which in my view have lagged well behind New South Wales). I remain convinced of the validity of the New South Wales approach as it was when initiated by Premier Greiner.

That is not to say, I do not think there should be changes made to the ICAC. I am on public record as having proposed 3 changes, all to increase its core effectiveness.

The first is to remove from the definition of 'corrupt conduct' that element that picks up mere breaches of employment obligations. The idea behind this suggestion is to focus the jurisdiction much more clearly and directly on what is commonly regarded as corrupt conduct and not on a fairly legalistic extension of it. The ICAC should, as it is now directed by the Act to do so, concentrate on serious and systemic corruption, not mere technical breaches of employment conditions.

The second is that the ICAC should establish within its management structure a more effective triage system than that which existed when I was the Inspector. The ICAC receives many complaints each year, very many with no or little merit and based on no more than mere suspicion, supposition or scant actionable evidence. These need to be put aside with little fuss or effort, so that its resources

should be spent on the more important allegations, where there seems some clear evidence to support them.

Probably, the most recurrent complaint to me was that the ICAC had failed or refused to investigate some complaint or other. Most of these complaints to me were without real foundation in that the ICAC had good reason not to take the complaint to it any further. A soundly designed triage system would embody clear criteria and so help to explain why the ICAC did not propose to pursue the complaint.

The third change that I believe should be adopted is to *expand* the ICAC's role, to authorise it to undertake prosecutions itself where it has found the likelihood of corrupt conduct involving the commission of a criminal offence. The experience of the current regime of referring possible charges to the DPP has been deplorable over time. There are many reasons for this BUT the people of New South Wales are entitled to expect that findings of corrupt conduct involving the commission of criminal offences are prosecuted promptly.

One reason commonly given for this 'gap' (that the ICAC cannot itself prosecute criminal offences coming to its attention) is that a person cannot (for good reasons) claim the privilege against self-incrimination before the ICAC , as they can before a court. Frankly, I do not accept this as valid reasoning. For a start, it would be perfectly possible for the ICAC to undertake prosecutions with this restriction remaining in place. Secondly, there is in any event good reasoning to support the abandonment of this privilege in such cases.

I trust that your Committee may find the above views of some assistance in its consideration of the recommendations of the current Inspector.

Graham Kelly