

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**REVIEW OF THE REPORT OF THE INSPECTOR OF THE NSW
INDEPENDENT COMMISSION AGAINST CORRUPTION
REGARDING OPERATION HALE**

At Sydney on 11 February 2016

The Committee met at 10.00 a.m.

PRESENT

Mr D.F. Tudehope (Chair)

Legislative Council

The Hon. T.J. Khan
Reverend the Hon. F.J. Nile
The Hon. L.J. Voltz

Legislative Assembly

Mr R. Hoenig
Mr A.J. Marshall (Deputy Chair)
Ms T. Mihailuk
Mr C.S. Patterson
Ms K. Smith
Mr M.O. Taylor

CHAIR: Good morning and thank you for attending the public hearing of the Joint Committee on the Independent Commission Against Corruption to review the report of the Inspector regarding Operation Hale. Today the Committee will hear first from witnesses from the Independent Commission Against Corruption: the Hon. Megan Latham, Commissioner; Mr Roy Waldon, Solicitor to the Commission; Mr Andrew Koureas, Executive Director, Corporate Services Division; Ms Sharon Loder, Executive Director, Investigation Division; and Dr Robert Waldersee, Executive Director, Corruption Prevention Division. I thank you for being here today. After the luncheon adjournment the Committee will hear from witnesses from the Office of the Inspector of the Independent Commission Against Corruption: the Inspector himself, the Hon. David Levine, and Ms Susan Raice, the Principal Legal Advisor. After the Inspector's evidence the Committee will hear from the Director of Public Prosecutions, Mr Lloyd Babb, SC.

At the outset, I thank the witnesses for appearing today and for making themselves available. I remind everyone to turn off their mobile phones as they can interfere with the Hansard recording equipment. I also remind those who are here from various media outlets that it is not permissible to photograph or film any of the material on the table in front of members of the Committee either by way of film footage or still photograph footage. For the benefit of the gallery, I note that the Committee has resolved to authorise the broadcast of sound and video excerpts of its public proceedings unless any witness takes objection to that process. I note that the Commissioner does not object to that. Copies of the guidelines covering these proceedings are available. Please note that any filming is to be as unobtrusive as possible. I prefer that people with cameras do not walk around during the course of the proceedings and should not disrupt the Committee proceedings or focus on the Committee documents. In addition, filming of individuals in the public gallery should be avoided.

Before commencing and calling witnesses I would like to make a few observations in relation to this hearing. Some of those observations flow from the deliberative session which we conducted prior to this hearing. It is trite to say that the proceedings today have garnered a significant amount of public interest and, I am advised, probably more than most committee hearings held in this place. Having said that, I propose to make some observations which may be well known to the public but I propose to traverse some of the historical material leading up to this inquiry today and some of the decisions that we made in the deliberative process prior to the hearing this morning.

On 30 October 2014, by way of media release, the ICAC announced it would hold a public inquiry into allegations concerning alleged corrupt conduct by a senior public official. The media release stated that the NSW Independent Commission Against Corruption was to hold a public inquiry into allegations concerning alleged corrupt conduct by a senior public official. The media release provided the following:

The NSW Independent Commission Against Corruption (ICAC) will hold a public inquiry commencing on Monday 10 November 2014 as part of an investigation it is conducting into allegations that on 31 May 2014 Deputy Senior Crown Prosecutor, Margaret Cunneen SC and Stephen Wyllie, with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, and that Sophia Tilley, with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol level at the scene of the motor vehicle accident.

The public inquiry will start at 10:00 am and will be held in the Commission's hearing room on Level 7, 255 Elizabeth Street, Sydney. It will run from 10 to 12 November 2014.

The media release then went on to say:

As this matter involves a senior public official involved in the administration of justice in New South Wales, the Commission considered it appropriate for a person from outside New South Wales to preside at the inquiry. Accordingly, Mr Alan MacSporran QC has been appointed an Assistant Commissioner to preside at the public inquiry, and Counsel Assisting the Commission will be Mr Michael Fordham SC.

As a result of that media release, Margaret Cunneen instituted proceedings in the Supreme Court of New South Wales with a view to preventing the proceedings being conducted. That matter was heard by the Supreme Court of New South Wales, which found that the ICAC was entitled to proceed with the public inquiry. That decision of Justice Hoeben was appealed to the New South Wales Court of Appeal which, by majority, found the ICAC was acting beyond its jurisdiction in proceeding with the investigation and public inquiry. The matter was ultimately decided by the High Court on 15 April 2015, which, by majority, found that the ICAC was acting outside its jurisdiction in conducting the investigation and pursuing the public inquiry.

Following the decision of the High Court, the New South Wales Government appointed an expert panel to review the issues which had been raised by the High Court, including the extent of the jurisdiction of the ICAC. That panel reported to the Government on 11 August 2015 and made various recommendations for

legislative change to spell out the jurisdiction of the ICAC. At the time of receiving the independent panel's report the Premier was at pains to say, and this was supported by the Leader of the Opposition:

I have said many times that we have zero tolerance for corruption in NSW, which means a robust ICAC.

The Government thereafter took steps to amend the Independent Commission Against Corruption [ICAC] Act and on 28 September 2015 the ICAC amendment Act was assented to. That amendment Act clarified the jurisdiction of the ICAC and received bipartisan support. Simultaneously with the conduct of an inquiry by an expert panel, the Inspector of ICAC also conducted an investigation into the manner in which ICAC conducted Operation Hale. The report of the Inspector was delivered to the Government on 4 December 2015.

Following the delivery of the report to the Government the report was referred to this Committee for further consideration in respect to the conclusions and recommendations which had been made by the Inspector. It is fair to say that the manner in which ICAC has investigated an allegation involving Margaret Cunneen has polarised the community in its perception of the manner in which ICAC operates. There is no doubt that there are sections of both the community and the media who believe that ICAC had acted properly in relation to the manner in which it had performed and that this Committee and the Government should not be seen as acting in any way which could be construed as diminishing its powers. On the other hand, there are those who believe that ICAC is out of control and needs to be reined in by the Government. There is, of course, a third view, which is that every organisation from time to time needs some form of review to ensure that it retains the confidence of the community.

It is to that end that this Committee is charged to ensure that the Independent Commission Against Corruption [ICAC] remains a robust organisation with the confidence of the community generally. The deliberations of this Committee are designed to make recommendations to the Government which will ensure the Government's stated aim of having a robust ICAC, that those recommendations are delivered and acted upon. There is no doubt that in the event that the ICAC has conducted an investigation, which has had the effect of preventing a prosecution of persons who should properly be prosecuted, those actions should be reviewed to ensure the interests of justice are properly served. It is also true to say that in making recommendations relating to the conduct of its affairs by an organisation that the reputation of the organisation together with the reputation of those persons who appear before it should as far as possible be protected.

The Commissioner has seen a significant attack mounted in the media on the manner in which the ICAC operates. There are those who complain that she has not sought to defend the ICAC robustly enough. On Tuesday afternoon between 3.00 and 3:30 p.m. the Commissioner had delivered to the Committee two volumes of material on which she seeks to rely for the purpose of rebutting various conclusions and recommendations which were adopted by the Inspector in delivering his report of 4 December 2015. The material submitted contains a detailed submission together with supporting documentation. In addition to the supporting documentation the Commissioner has delivered to the Committee ten DVDs of material which she has labelled "The Inspectors material". That material is understood to contain all of the material which has been placed before the Inspector for the purposes of arriving at the conclusions which he did. The Commissioner respectfully suggests that those conclusions are not supportable.

It is safe to say that this Committee has not had an opportunity, in the 36 hours since the delivery of the material, to inspect and appraise itself of the nature of the material before it. The Committee has today agreed that the submission of the Commissioner will be accepted. However, the annexures to her submissions, tabs one to eight, and the DVD material will not be admitted for publication at this time. I should reinforce that this is not a decision not to release the material, it is a decision to delay the release of the material until members of the Committee have had the opportunity to assess it and potentially obtain advice in relation to it. I anticipate there will be those who suggest that the Committee is choosing winners and losers by making that decision. I reiterate that the deliberations of this Committee are not about choosing winners and losers, but are about ensuring that the process is conducted properly and proper recommendations can be made to the Government.

Additionally, the Commissioner has foreshadowed that she proposes to release to the Committee, but has not at this time, the telephone intercept which was provided to the Inspector by the Australian Crime Commission. In her submission she makes a cogent argument as to why she is able to release that material to the Committee. The Commissioner concludes by saying that she obtained advice as to whether it was available to her to release the material. The Commissioner has not provided to the Committee a copy of the advice upon which she relies. In any event, given the very sensitive nature of the manner in which telephone intercepts should be treated the Committee may wish to obtain advice as to whether the Committee is empowered to receive the telephone intercepts and whether they can be publicly released. I raise these issues as I foreshadow

the Commissioner or members of the Committee may wish to make reference to some material which is contained in the documentation which has been provided to the commission and which we have resolved not to make public.

In the event that reference is to be made to that material it may be necessary to conduct that part of the inquiry in camera. I would asking the indulgence of those present today to expedite that process so that any part of the proceedings which needs to be conducted in camera can take place expeditiously. Additionally, there may need to be deliberations by the Committee in respect of matters raised with the Commissioner or the Inspector as to whether they are appropriate to be raised at this time. In the event that those deliberations need to take place again those deliberations will need to take place in private. At the conclusion of this inquiry generally the Committee would issue a report. However, the Inspector has been asked to prepare a further report in relation to the practices and procedures of the ICAC.

It is my view that it would be appropriate to defer the Committee's report on this matter until the Committee further considers the report of the Inspector, which we anticipate will be delivered at the end of March. The matters considered today will then be rolled into a single report of the Committee dealing with the issues which have been raised by the Inspector. I conclude by saying that I expect the Committee, those appearing before the Committee and those present here today to show courtesy to Committee members and respect the parliamentary privilege which attaches to the manner in which these proceedings are conducted. I urge upon those members of the media not to publish material which is the subject of the direction that material not be publicly released at this time. That concludes my comments.

MEGAN LATHAM, Commissioner, Independent Commission Against Corruption,

ROY ALFRED WALDON, Solicitor to the Commission and Executive Director Legal Division, and

ANDREW KOUREAS, Executive Director, Corporate Services Division, sworn and

SHARON LODER, Executive Director, Investigation Division, and

ROBERT WALDERSEE, Executive Director, Corruption Prevention Division, affirmed and examined:

CHAIR: Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Ms LATHAM: No, we do not.

CHAIR: Commissioner, as is normal practice you have submitted a detailed submission to the Committee, do you wish to make an opening statement? I do not want to restrict you in time.

Ms LATHAM: It is a short opening statement. First of all, thank you to the Committee for the opportunity to respond to the report of the Inspector, which was published on 4 December 2015. In anticipation of this hearing, as you have just noted, we have provided the Committee with extensive written submissions and supporting material. The commission relies on that material and takes this opportunity to seek to table the submissions, the material at tabs one through to eight of those submissions and the audio and transcript of the telephone intercept [TI] product disseminated to the commission by the Australian Crime Commission on 30 June 2014.

Could I just say in that regard that the material that the commission seeks to tender, as I have said, comprises the 32 pages of the written submissions, the eight documents which appear at tabs 1 to 8, which are referred to in the course of those submissions, and the telephone intercept [TI] product. We do not seek to tender the Inspector material. We have provided that material to the Committee in order to demonstrate that all of that material was available to the Inspector; however, the bulk of the material that was provided to the Inspector, which reinforces the matters that we have raised in our written submissions, are in fact contained in that bundle of documents tab 1 to 8 behind the written submissions. It was provided as a matter of completeness but we do not seek to table the Inspector material.

Could I also indicate that I have the folder which contains the recording of the telephone intercept and the transcript of the telephone intercept. I can hand that to the Committee now. Could I also indicate that we have 11 copies of the advice that we received from counsel in relation to the availability of the TI product for the purposes of these proceedings. The Committee will have seen from the written submissions that the telephone intercept and access Act provides that TI product can be used in exempt proceedings. These proceedings qualify as exempt proceedings under the TI Act and that is the basis upon which we seek to make this material available to the Committee.

The commission submits that a consideration of this material leads to the conclusion that the report is so fundamentally flawed, so lacking in a proper factual foundation and infected by denial of procedural fairness that it should be withdrawn as was proposed by the former Inspector, Mr Harvey Cooper, or that the Committee place no reliance upon it. The commission also submits that the tabled documents should be made public for the reasons outlined in our submission; namely, that they respond directly to the report which is already public, they include information that should have been taken into account, they undermine the basis for the adverse findings in the report, they address speculative false claims to which the commission has not previously been able to lawfully respond, and the failure to publish the material will continue to unfairly damage and undermine public confidence in the commission. Indeed, that is something to which the Chairman has already referred.

The purpose of providing this material is limited to the subject of the Committee hearing; that is, the findings contained in the report which necessarily invites an examination of the existence of a basis for those findings. The material is provided so that the Committee may assess the validity of those findings with the benefit of all of the material that was made available to the inspector albeit not referred to in the report. The material is not provided for the purpose of inviting the Committee to reconsider the merits of any decision made by the commission in relation to Operation Hale and as the Committee is aware section 64 (2) of the

Independent Commission Against Corruption Act prohibits that approach. The executive of the commission are available to answer any questions arising out of the report and the material that we have provided in response to it.

Documents tabled.

Mr RON HOENIG: Now that the Commissioner is tabling the TI material and the legal advice that supports her submission, those who want to examine the legal advice before accepting the Commissioner's view of the law I suggest should do so now because without considering the TI material it is almost impossible for the Committee to consider the Commissioner's evidence in context.

CHAIR: Does anyone else have a view on that?

The Hon. TREVOR KHAN: I support that. I seek a brief adjournment for the purposes of examining that material.

The Hon. LYNDA VOLTZ: Could the Commissioner perhaps table them so that we can consider them?

CHAIR: She has.

The Hon. LYNDA VOLTZ: So they are tabled and ready to go.

Mr RON HOENIG: There are 11 copies of the advice.

The Hon. LYNDA VOLTZ: Have you got the legal advice?

CHAIR: No.

The Hon. LYNDA VOLTZ: Please table the legal advice.

CHAIR: Yes. In accordance with Mr Hoenig's proposal we will now adjourn. Will 15 minutes be sufficient?

Ms LATHAM: It is not that lengthy. Could I just indicate that you will see from the transcript there are two conversations. The disc containing the audio has a vast amount of metadata on it, which is a bit confusing because you only need to go to two specific files on that CD in order to hear them.

The Hon. TREVOR KHAN: Is there a transcript?

Ms LATHAM: Yes.

The Hon. TREVOR KHAN: How many pages.

Ms LATHAM: There are only half a dozen pages. It is not very long.

Mr RON HOENIG: Do you need to listen to it?

Ms LATHAM: I think you need to listen to the recording. Could I just say there is a note on the face of the CD which identifies the file name where you will hear the recording of the intercepts.

CHAIR: We do not have a facility here to listen. We will have to go elsewhere. Is everyone happy with that course?

The Hon. LYNDA VOLTZ: Yes. Where can we go to do it?

CHAIR: The secretariat has suggested that we adjourn to the library. I propose that will have a 15 minute adjournment so we can have an opportunity to listen to that material. Before doing so I wish to reinforce this position. We have deliberated on this material this morning and there is a non-publication in respect of that material for the time being. I reiterate that that is not a decision not to publish but for the time

being the Committee has decided that there will be no publication of either the TI material or tabs 1 to 8 until such time—we may have to deal with that as we go forward as to how we deal with your submission.

Ms LATHAM: Just a point of clarification, you did not include the actual written submission in that.

CHAIR: No, the written submission is for publication immediately.

Ms LATHAM: That has been tabled. Thank you.

CHAIR: That has been tabled and is available for publication.

(Short adjournment)

CHAIR: Ladies and gentlemen, I thank you for your indulgence and your patience in the delay, which has occurred because there has been some discussion downstairs in relation to the material which we have received and listened to this morning. We have all resolved that we should now adjourn these proceedings to further consider the material the subject of the Commissioner's submission. That material formed the basis on which she suggests that the Inspector's report ought be rejected. We also received advice in relation to how we deal with the telephone intercepts.

So, with the support of the committee, we will be adjourning these proceedings, and we hope to reconvene, subject to the secretariat's advice, next Friday. Commissioner, I should probably ask you this first: Would you be available next Friday, 19 February, if we were to convene?

Ms LATHAM: Yes; I will make myself available. Mr Chair, could I just say a few further things, in the light of the adjournment.

CHAIR: Once we have adjourned I probably do not want the issues ventilated any further.

Ms LATHAM: I am not going to—no, I am not ventilating the issues—there are just a couple of responses to some of the things that you said that I think should be put on the public record.

The Hon. TREVOR KHAN: No.

CHAIR: The view of the Committee, Commissioner, is this: I am certainly happy to hear from you again next Friday if you need to correct anything I have said or just—

Ms LATHAM: No, I am not attempting to correct anything. It is just that in relation to the release of the submission itself—the 32 pages—the only thing I wanted to point out is that tab 5—

The Hon. TREVOR KHAN: No. We resolved that the Chair would come in and make a statement and that we would adjourn at that point. I think that is the appropriate position to proceed on, because that was the resolution of the Committee.

CHAIR: I think that is fair. We have put the Inspector on notice that he will not be required this afternoon. We will not be meeting with the Inspector this afternoon and we will not be meeting with the Director of Public Prosecutions this afternoon. There is a serious issue in relation to how the telephone intercept material should be treated and, as a committee, we need to take steps to obtain further advice in relation to that. We have consulted widely with the Clerk of the House and I am comfortable that it would be prudent, in the circumstances, to adjourn today for further consideration of that material.

Bear in mind that this material was delivered to us 36 hours ago. I have to say that that is part of the problem in relation to the position we are now in.

Reverend the Hon. FRED NILE: It is extensive material.

CHAIR: Yes. With no further ado, we will adjourn.

(The witnesses withdrew)

The Committee adjourned at 12.43 p.m.