

September 2012

The Hon Donald Harwin MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Madam Speaker

In accordance with section 77B of the *Independent Commission Against Corruption Act 1988* (the ICAC Act), I, as the Inspector of the Independent Commission Against Corruption (the Inspector), hereby furnish to each of you for presentation to the Parliament the Annual Report of the Inspector for the year ended 30 June 2012.

This report has been prepared in accordance with the requirements of the ICAC Act.

Pursuant to section 78(1A) of the ICAC Act, I recommend that the report be made public forthwith.

Yours sincerely



Harvey Cooper AM
Inspector

ACKNOWLEDGEMENTS

I would like to place on record my appreciation of the considerable assistance received during the year from:

- Ms Seema Srivastava, Executive Officer and
- Ms Felicity Cannon, Office Manager/Executive Assistant.

It is proper that I mention the prompt, courteous and efficient responses from the Independent Commission Against Corruption to my requests for information and documents.

Appreciation is also expressed for the direction and assistance provided by the Committee on the Independent Commission Against Corruption and its conscientious staff.

My thanks also to the staff of the NSW Department of Premier and Cabinet for providing administrative services and advice on human resources, information technology and corporate governance issues.

A special expression of gratitude to Ms Virginia Tinson, Associate Director, Corporate Governance, Ms Marianne Weaver, Manager, Facilities and Risk Management and Ms Sandra Scacciotti, Senior Project Officer, Facilities and Risk Management of the Department of Premier and Cabinet for their hard work leading to the smooth relocation of the Office from Redfern to Bligh House.

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PART 1: THE INSPECTOR'S ROLE AND FUNCTIONS

1 PRELIMINARY OBSERVATIONS

I was initially appointed as the Inspector of the Independent Commission Against Corruption ("the Inspector" and "the ICAC" or "the Commission") for a term commencing on 1 October 2008 and ending on 30 September 2011. That term has been extended for a further two years ending on 30 September 2013.

Clause 4(2) of Schedule 1A of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") provides that a person may not hold the office of Inspector for terms totalling more than 5 years.

This report covers the period between 1 July 2011 and 30 June 2012, and is referred to as the "current reporting period".

2 ROLE OF THE INSPECTOR

The Inspector's role and functions are prescribed under Part 5A of the ICAC Act. Under section 57A of the ICAC Act the Inspector is appointed by the Governor of NSW. The Committee on the Independent Commission Against Corruption ("the Committee") is empowered to veto the proposed appointment which is required to be referred to the Committee by the Minister.

"The Minister" referred to above, and below under section 57B(2) of the ICAC Act, is the Premier of New South Wales.

The principal functions of the Inspector are set out in section 57B(1) of the ICAC Act. These are to:

- audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
- 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
- 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, and

- assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

The definition of maladministration is set out under section 57B(4) of the ICAC Act as follows:

...action or inaction of a serious nature that is:

- a) contrary to law, or
- b) unreasonable, unjust, oppressive or improperly discriminatory, or
- c) based wholly or partly on improper motives.

Section 57B(2) of the ICAC Act enables the Inspector to exercise the prescribed statutory functions on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Committee or any public authority or public official. Section 57B(3) of the ICAC Act provides that the Inspector is not subject to the Commission in any respect. Under section 77A of the ICAC Act the Inspector may make special reports on any matters affecting the Commission or on any administrative or general policy matter relating to the functions of the Inspector. Under section 77B of the ICAC Act the Inspector is required to report annually to Parliament. Both of these reports are to be made to the Presiding Officer of each House of Parliament.

3 POWERS OF THE INSPECTOR

3.1 Powers under the ICAC Act

Section 57C of the ICAC Act establishes the powers of the Inspector. The Inspector may investigate any aspect of the Commission's operations or any conduct of any officers of the Commission.

Section 57D of the ICAC Act empowers the Inspector to make or hold inquiries for the purposes of the Inspector's functions. Under section 57D(2) any inquiry made or held by the Inspector under this section provides the Inspector with the powers, authorities, protections and immunities of a Royal Commissioner as conferred by Division 1 of Part 2 of the Royal Commission Act 1923 (NSW), with the exception of section 13 of that Act. There have been no inquiries held pursuant to section 57D to date.

3.2 Further Powers

3.2.1 Does the Inspector have the power to investigate the conduct of Special Constables engaged by the ICAC to provide security in its premises?

A complaint was received which raised the question whether the Inspector has jurisdiction to deal with the conduct of Special Constables who are undertaking duties at the ICAC.

Under an agreement between the ICAC and the Commissioner of the NSW Police Force the latter provides to the former Special Constables to “coordinate and deliver security and front desk services” of the type more particularly described therein. In return the ICAC pays a fee to the NSW Police Force.

There was an initial objection that the Inspector does not have power to deal with complaints against police officers including Special Constables.

As is set out above, section 57B of the ICAC Act empowers the Inspector to deal with complaints of stated classes of misconduct “on the part of the Commission or officers of the Commission”.

Under section 57C the Inspector:

- (a) may investigate any aspect of the Commission’s operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission.

These powers extend to former officers of the Commission (section 57G).

Included in the definition of “officer of the Commission” in section 3 of the Act is “a member of staff of the Commission”.

Under section 104A of the ICAC Act:

- (2) The Commission may:
 - (a) with the approval of the Minister for Police after that Minister has consulted the Commissioner of Police, and
 - (b) on such terms and conditions as may be approved by the Minister administering this Act, arrange for one or more police officers to be made available (by way of secondment or otherwise) to perform services for the Commission.

- (4) Members of the staff of the Commission referred to in this section are under the control and direction of the Commissioner in their capacity as such members.

As previously mentioned, the Special Constables perform services for the Commission by means of the arrangements contained in the agreement between the ICAC and the Commissioner of Police. By reason of sub-section 4 of section 104A they are members of the staff of the Commission. By reason of the definition of “officer” they are officers of the Commission.

It follows that they are subject to the powers of investigation of the Inspector set out in sections 57B and 57C of the ICAC Act.

This explanation led to the withdrawal of the initial objection.

3.2.2 The extent of the power to make adverse findings against the Commission and/or its officers.

During the public hearing conducted by the Parliamentary Committee on the Independent Commission Against Corruption on 17 February 2012 I was asked if I have the power to “make adverse findings”. My reply was: “Yes, most definitely, both in the course of dealing with a complaint and in the course of an audit.”

Further consideration has caused me to believe that it is necessary to qualify this answer by defining what is meant by “adverse finding”.

The adverse findings in relation to the conduct of the Commission and/or its officers or former officers that I am empowered to make are:

- In the course of an audit, whether the Commission has complied with the law of the State (section 57B(1)(a)).
- In the course of dealing with a complaint, whether the Commission or its officers have engaged in conduct amounting to misconduct of the type defined in sections 57B(1)(b) and (c).
- In the course of an audit and/or in the course of dealing with a complaint, whether the procedures of the Commission relating to the legality or propriety of its activities are effective and appropriate.
- In the course of an audit and/or in the course of dealing with a complaint, whether a recommendation of disciplinary action or criminal prosecution against an officer of the Commission should be made.

In the case of *Balog v Independent Commission Against Corruption* [1990] HCA 28; (1990) 169 CLR 625 the High Court considered whether the Commission was precluded by the Act, as it then was, from reporting a finding that any offence was or may have been committed by either of the appellants. The Court held that the only finding which the Commission may properly make in a report pursuant to section 74 concerning criminal liability is that referred to in subsection (5), namely, whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.

At paragraph 25, the Court said:

25. We would allow the appeal. It is important that the terms of any declaration should not be too wide. It must be clear that, even if the material elicited by the Commission in the course of its investigation is such as to establish or suggest that the appellants or either of them have been guilty of criminal or corrupt conduct, the Commission may set forth or refer to that material in its report pursuant to s.74, notwithstanding that it cannot state any finding of its own. Of course, depending upon the nature of the material, even to deal with it in that way may inevitably implicate the appellants or one or other of them in criminal or corrupt conduct. The Commission is nonetheless entitled to report upon the results of its investigation; it is merely precluded from expressing any finding, other than under section 74(5), in relation to the appellants. We would declare in each appeal that the Commission is not entitled in any report pursuant to section 74 of the Act to include a statement of any finding by it that the appellant was or may have been guilty of a criminal offence or corrupt conduct other than a statement made pursuant to sub-section (5) of that section.

As a result of this decision, the ICAC Act was amended to change the definition of “corrupt conduct” to make it clear that a finding by the Commission of corrupt conduct does not carry with it the implication that a person is guilty of an offence.

No such amendment applies to the Inspector. Consequently, whilst I am entitled to make findings of fact which are against the interests of the Commission and/or its officers, I am not entitled to include a statement of any finding that the Commission or an officer of the Commission was or may have been guilty of a criminal offence or engaged in corrupt conduct.

3.2.3 The power to make adverse findings against a complainant.

The Inspector’s powers to investigate and report are limited to investigating and reporting on the conduct of the Commission or of its officers or former officers. There is no power to make any finding as to the conduct of the complainant, adverse or otherwise.

However, the conduct of the Commission or its officers is examined in a context which can, and often does, involve disputed issues of fact concerning the conduct of the complainant on the one hand and the officers on the other.

A finding of the factual issues in favour of ICAC officers does not amount to a finding of misconduct on the part of the complainant which is outside the Inspector's powers. It does amount to a finding that the conduct of the officers does not amount to misconduct which is within the Inspector's powers.

4 ANNUAL REPORTING REQUIREMENTS

The Inspector is neither a Department nor a Department Head for the purposes of the *Annual Reports (Departments) Act 1985* (NSW). The requirements placed by that Act on those bodies therefore do not apply to the preparation of an annual report by the Inspector.

Similarly, the provisions of the *Annual Reports (Statutory Bodies) Act 1984* (NSW) do not apply since the Inspector is not a person, group of persons or body to whom Division 3 of Part 3 of the *Public Finance and Audit Act 1983* (NSW) applies; nor is the Inspector or the Office prescribed as a statutory body by the *Annual Reports (Statutory Bodies) Act 1984* (NSW). As noted earlier in this report, however, section 77B of the ICAC Act requires the Inspector to report annually to Parliament and to submit an annual report of the Inspector's operations during the year within a 4 month period after 30 June of each year.

5 OTHER RELEVANT LEGISLATION

5.1 Government Information (Public Access) Act 2009 No 52 (GIPA Act)

The *Government Information (Public Access) Act 2009* ("the GIPA Act" or "GIPA") came into force on 1 July 2010 replacing the *Freedom of Information Act 1989*.

Information concerning the Inspector and the ICAC's statutory functions are exempt from being released under an access application made under the GIPA Act.

Under Schedule 1 of the GIPA Act, an access application made for access to any information relating to the ICAC's corruption prevention, complaint handling, investigative or reporting functions will not be granted.

Under Schedule 2 of the GIPA Act an access application made for access to any information relating to the auditing, complaint handling, investigative and reporting functions of the Inspector of the ICAC will not be granted.

Applications for access to information can be made in respect of the Inspector's administrative functions, for example human resources policies and practices. Such applications will be assessed on a case by case basis.

In compliance with section 125 of the GIPA Act the following report on GIPA applications is published:

In 2011-2012 there were no access applications made under the GIPA Act to the Inspector.

The website of the Office of the Inspector provides a link to the Office's Publication Guide as required under section 20 of the GIPA Act. It also contains details of how to obtain information from the Office of the Inspector of the ICAC, and the categories of information which may be provided under an access application or an informal access request.

5.2 The Public Interest Disclosures Act 1994 (PID Act)

The *Public Interest Disclosures Act 1994* ("the PID Act") provides for public servants and officials to report serious wrong doing in public sector agencies on a confidential basis. Under the PID Act complaints or allegations made by public servants or public officials are called disclosures. The PID Act provides for such persons making disclosures to be protected against actual or potential reprisals.

The Inspector is an investigating authority under the Act. Pursuant to section 6D(1) of the PID Act the Office of the Inspector of ICAC has a policy for managing established public interest disclosures. This policy and the Inspector's Statement of Commitment to the PID Act are available on the OIICAC website.

The following information is provided as required by section 31 of the PID Act:

(a) the number of public officials who have made a public interest disclosure to the Inspector,

Six

(b) the number of public interest disclosures received by the Inspector, in total and the number of public interest disclosures received by the Inspector relating to each of the following:

- i. corrupt conduct, three
- ii. maladministration, three
- iii. serious and substantial waste of public money or local government money (as appropriate), Nil
- iv. government information contraventions, Nil
- v. local government pecuniary interest contraventions, Nil

(c) the number of public interest disclosures finalised by the Inspector,

Six

(d) whether the Inspector has a public interest disclosures policy in place,

Yes

(e) what actions the head of the Office of the Inspector has taken to ensure that his staff awareness responsibilities under section 6E(1)(b) of the Act have been met.

On the job training and also the Statement of Commitment and relevant policy and procedures for managing disclosures made under the PID Act have been disseminated to OIICAC staff.

5.3 Telecommunications (Interception and Access) Act 1979 (Cth)(TIA Act)

The Inspector is included as an “eligible authority” for the purposes of the *Telecommunications (Interception and Access) Act 1979 (Cth)* (“the TIA Act”).

In accordance with reporting requirements under sections 96(1) and 159(1) of the TIA Act, the Commonwealth Attorney-General’s Department was advised by the Inspector that there was nil usage of the provisions of the TIA Act during the current reporting period.

6 THE IMPACT OF OTHER LEGISLATION UPON THE ROLE AND POWERS OF THE INSPECTOR

6.1 The Surveillance Devices Act 2007 (NSW) (SD Act)

In my earlier Annual Reports I pointed out that provisions of the *Surveillance Devices Act 2007* (“the SD Act”) impacted upon my ability to undertake audits of the ICAC’s exercise of its powers under it and were in conflict with the Inspector’s prescribed functions under section 57B (1)(a) of the ICAC Act.

The Commissioner contended (in my view correctly) that the provisions of the SD Act prima facie, prohibited him from furnishing “protected information” to

the Inspector for the purpose of an audit (as opposed to the purpose of a targeted inquiry). At that time, applying sections 40(6) and 40(7) of the Act, in their then form, he determined that it was in the public interest to provide the information and, therefore, did so. This meant that the Inspector's power to conduct an audit of the use of any surveillance device was dependent upon the willingness of the Commissioner to make a determination that it was in the public interest to provide the information.

Accordingly, I recommended appropriate statutory amendments to overcome the need for the Commissioner to make such a determination.

Such amendments were made to the ICAC Act by the *Independent Commission Against Corruption Amendment Act 2011 No 36* which inserted at the end of section 57F:

- (2) Section 40 of the *Surveillance Devices Act 2007* does not apply to the use, publication or communication of protected information within the meaning of that Act in relation to the exercise of the Inspector's functions under section 57B.

The amending Act of 2011 inserted clause 31 in Schedule 4 which states:

The amendment made to section 57F by the amending Act extends to the use, publication or communication before the commencement of the amendment of protected information within the meaning of the *Surveillance Devices Act 2007* in relation to the exercise of the Inspector's functions under section 57B.

My audit powers in relation to Surveillance Devices, therefore, are no longer dependent upon the willingness of the Commissioner to make a determination that disclosure of the information is in the public interest.

6.2 Telecommunications (Interception and Access) Act 1979 (Cth)(TIA Act)

In earlier Annual Reports I pointed out that existing provisions of the *Telecommunications (Interception and Access) Act 1979 (Cth)* ("the TIA Act") impacted upon my ability to undertake audits of the ICAC's exercise of its powers under that Act and were in conflict with the Inspector's prescribed functions under section 57B (1)(a) of the ICAC Act.

Any amendment to the TIA Act is for the Commonwealth Government. As pointed out in my 2009-2010 Annual Report I was advised on 25 January 2010 by the Commonwealth Attorney General's Department that my suggested amendments would not be made to the TIA Act.

This means 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 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 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 could proceed undetected for purposes unrelated to the objectives of the ICAC. It is for this reason, among others, that the exercise by the Inspector of powers of audit have been considered by the NSW legislature to be so important.

PART 2: THE OFFICE OF THE INSPECTOR OF THE ICAC

7 ADMINISTRATION

7.1 Premises

During the current reporting period the Office of the Inspector of the ICAC (the OIICAC or the Office) was located at Redfern. The contact details are:

Postal address: GPO Box 5341, Sydney, NSW, 2001
Telephone: (02) 8374 5381
Facsimile number: (02) 8374 5382
E-mail: InspectorICAC@OIICAC.nsw.gov.au

The Office relocated to Level 10, Bligh House, 4-6 Bligh Street, Sydney on 23 July 2012. The contact details have not changed.

7.2 Staff

The instrument appointing the Inspector provides that the position is “part time.” Generally, the Inspector has worked two days per week.

The staffing structure consists of Ms Seema Srivastava, Executive Officer and Ms Felicity Cannon as Office Manager/Executive Assistant to the Office of the Inspector. These two staffing positions are held under the *Public Sector Employment and Management Act (2002)* (“the PSEM Act”).

The Executive Officer and Office Manager work four and five days per week respectively and the Inspector works two days per week. This staffing has been at an appropriate level to keep all work up to date and, where necessary, the Inspector and the Executive Officer have increased their working days.

The Inspector is also authorised under the ICAC Act to employ such other staff as he may require either under the PSEM Act or otherwise.

All employees, permanent and temporary, are required to undergo extensive security vetting prior to commencement of employment.

7.3 Budget & Finance

The Inspector is an independent statutory officer. The Office of the Inspector (OIICAC) is a cost centre within the Department of Premier and Cabinet (DPC).

In 2010-2011 the OIICAC budget was \$453,148.

The administration of the Office's budget is handled by the Department of Premier and Cabinet (DPC) which, each month, issues to the Office of the Inspector a detailed operating statement. In addition, it issues a similar statement for the full financial year ending 30 June 2012.

The statement for the period from 1 July 2011 to 30 June 2012 shows a total expenditure of \$438,642 falling within the set budget. This compares with a total expenditure of \$319,192 in the prior year. The increase in outgoings was mainly due to the fact that Ms Srivastava was on leave without pay for eight months during the prior year as well as increases in staff salaries and the daily allowance for the Inspector.

As has occurred in previous years, the Office continued to receive a range of support services from the DPC on a fee for service basis in areas such as information technology, payroll administration, human resources and payments of accounts.

8 LIAISON AND COMMUNICATION

8.1 Liaison with the ICAC

Liaison with the ICAC is conducted in accordance with the terms of a Memorandum of Understanding ("MOU") agreed between the Inspector and the Commissioner. The MOU has been updated from time to time as required. The most recent MOU was executed on 14 June 2012.

Clause 5.1 of the MOU provides that the Commission will notify the Inspector of matters which come to its attention which involves conduct of an officer of the Commission that comes within the principal functions of the Inspector.

By letter dated 7 March 2012 the Commissioner advised the Inspector of a problem relating to the return of an item seized in the course of the execution of a Search Warrant. The letter continued that the Commission was developing an automated alert within its case management system and that once the automated process had been settled the Commission's procedure for "Obtaining and Executing Search Warrants" will be updated to reflect the changes.

By letter dated 15 March 2012 the Inspector, amongst other comments, requested a copy of the Procedure when it is updated.

Under cover of a letter dated 15 June 2012 the Commissioner set out details of the automated alert incorporated in the computerised case management system and enclosed a copy of the updated Procedure.

8.2 Meetings/conferences undertaken by the Inspector

During the current reporting period the Inspector attended or met with the following:

- On 23 August 2011, to meet the members of the newly constituted Parliamentary Committee on the Independent Commission Against Corruption.
- On 14 September 2011, the Presiding officers, The Hon Donald Harwin MLC, President, Legislative Council and The Hon Shelley Hancock MP, Speaker, Legislative Assembly to present Parliament with the Inspectors 2010-2011 Annual Report.
- On 14 September 2011, His Hon David Patten, Commissioner, Special Commission of Inquiry into the New South Wales Crime Commission to provide information concerning the role of the Office of Inspector and its relevance to the Inquiry then being conducted.
- From 15-17 November 2011, attended the Australian Public Sector Anti-Corruption Conference 2011 (APSACC) held in Fremantle, Western Australia.
- On 17 February 2012, the Parliamentary Committee on the ICAC to review the Inspector's 2010-2011 Annual Report.
- On 6 March 2012, the Hon David Levine, AO RFD QC, newly appointed Inspector of the Police Integrity Commission to discuss operational and policy issues.
- On 8 March and 14 June 2012, the Commissioner of the ICAC, the Hon David Ipp AO QC, to discuss ongoing operational and policy issues.
- On 29 March 2012, the Presiding officers, The Hon Donald Harwin MLC, President, Legislative Council and The Hon Shelley Hancock MP, Speaker, Legislative Assembly, to present Parliament with the Inspectors audit entitled "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."
- On 24 May 2012 the Office of the Inspector received and gave a presentation to 16 students and faculty members of the Malaysia Anti Corruption Academy which is supported by the Malaysia Anti-Corruption Commission.

- On 20 June 2012, the Presiding officers, The Hon Donald Harwin MLC, President, Legislative Council and The Hon Shelley Hancock MP, Speaker, Legislative Assembly, to present Parliament with the Inspector's audit report entitled "Report of an audit of applications for and execution of surveillance device warrants and retrieval warrants by the Independent Commission Against Corruption."

8.3 Website

The website (www.oicac.nsw.gov.au) contains information about the Inspector's role and functions and complaint handling and reporting methods as well as:

- Provision for lodging a complaint on line.
- All published reports.
- Information in respect of the Inspector's obligations under the *Government Information (Public Access) Act 2009* and the *Public Interest Disclosures Act 1994* details of which are set out earlier in this report.
- Links to the websites of the following agencies and bodies whose functions support the NSW Government's objectives of providing integrity and accountability in government administration:
 - Independent Commission Against Corruption;
 - Committee on the Independent Commission Against Corruption;
 - NSW Ombudsman;
 - Police Integrity Commission;
 - Inspector of the Police Integrity Commission;
 - LawAccess;
 - Office of the Information Commissioner;
 - Department of Premier and Cabinet.

As appears in the following table, there were 29,680 hits on the Inspector's website, being an average of 2,473 per month. The high number of hits recorded in May and June could be due to staff working on the update of the website to change the format and to meet the requirements of the GIPA and PID Acts.

Website hits – full year statistics	Total Hits
July 2011	907
August 2011	752
September 2011	903
October 2011	941
November 2011	826
December 2011	690
January 2012	700
February 2012	823
March 2012	944
April 2012	383
May 2012	14,603
June 2012	7,208
Total hits	29,680
Average hits	2,473

PART 3: THE INSPECTOR'S STATUTORY FUNCTIONS

9 AUDITING THE OPERATIONS OF THE ICAC [Section 57B (1)(a)]

In order to carry out its statutory obligation to investigate allegations of serious and systemic corrupt conduct, the ICAC is vested with compulsory powers to seek and obtain information under sections 21, 22, 23 and 35 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). It is further empowered to apply for and execute surveillance device warrants pursuant to the *Surveillance Devices Act 2007* ("the SD Act"). Such warrants include listening device, data surveillance, optical surveillance and tracking surveillance.

The use of these powers can impinge upon the civil rights of those persons affected. A person can be the object of scrutiny by a surveillance device without his or her knowledge. This means that he or she lacks the opportunity to complain of any unjustified use of such a device.

With this in mind, during the reporting period, audits were conducted of the exercise of the powers of the ICAC between 1 September 2010 and 31 March 2011:

- under s. 21 of the Act to require production of a statement of information;
- under s. 22 of the Act to require a person to attend and produce a document or other thing;
- under s. 23 of the Act to enter and inspect premises occupied or used by a public authority or public official in that capacity;
- under s. 35 of the Act to summon a person to appear before the Commission to give evidence at a Compulsory Examination. This does not include a Public Inquiry;

This involved consideration of 38 section 21 notices, 336 section 22 notices; and 53 section 35 summonses. There were no section 23 notices.

The report relating to this Audit was published in March 2012.

In addition, I have audited and assessed the effectiveness and appropriateness of the procedures of the Commission in relation to the application for and execution of Surveillance Device Warrants and Retrieval Warrants pursuant to Part 3 of the *Surveillance Devices Act 2007* (the SD Act) during the year 2011.

The Commission advised that six applications for Surveillance Device Warrants were sought and granted during the nominated period, that no applications for a Surveillance Device Warrant were refused and that no applications were made for a Retrieval Warrant.

The report relating to this audit was published in April 2012.

Each of the two audits examined a sample of cases in which the ICAC has used these powers in order to:

1. determine whether the ICAC has obeyed the terms of the legislation.
2. examine the systems instituted and maintained by the ICAC to ensure that such use is limited to those circumstances where it is lawful and is appropriate for the conduct of its statutory functions.
3. determine whether such use has in fact been appropriate to the conduct of its statutory functions.

Pursuant to section 57B (2) of the ICAC Act, during the course of each audit I assessed whether there were grounds for reporting the existence of evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission.

Pursuant to section 57B (1)(b), during the course of each audit I also assessed whether there were grounds for reporting the existence of evidence of maladministration including unreasonable invasions of privacy and action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives under section 57B (1)(c).

In addition I assessed the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities (section 57B (1)(d)).

Examination of the exercise of each of the powers revealed the following:

- Each exercise examined was applied for and used as one of the tools authorised by the Act to enable the Commission to carry out its statutory functions;
- Each took place only in circumstances where a belief was reasonably formed in the light of information available from other sources that it was soundly based;
- In all cases it was appropriate in the light of the information then available.

- In the majority of the cases the exercise of the powers was effective in obtaining information which contributed to the investigations of the Commission;
- There was no evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission;
- There was no evidence of maladministration, including unreasonable invasions of privacy, or of any action or inaction of a serious nature that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives.

10 COMPLAINTS [Sections 57B (1)(b) AND 57B (1)(c)]

10.1 Overview

The Inspector of the ICAC can deal with complaints of abuse of power, Impropriety, maladministration and other forms of misconduct only on the part of the ICAC or its officers or former officers.

Maladministration is defined as action or inaction of a serious nature that is contrary to law or unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives.

There is no power to deal with complaints against other bodies. Furthermore, there is no power to compel the ICAC to investigate or not to investigate a particular complaint nor is there power to tell the ICAC how an investigation should be conducted. Consequently, when considering a complaint the focus must be on whether the conduct of ICAC amounts to misconduct of the type described above. In the course of looking at this focus, the conduct of those against whom complaints to the ICAC were initially made is considered, but only in the context of whether there was evidence of corruption on which the ICAC could have taken more action than it did and, if it could, whether its failure to do so amounts to such misconduct.

Each complaint received is assessed and a decision is made as to whether it is within jurisdiction, whether there is any substance to the complaint and, whether it warrants investigation; and, if so, whether there is a real possibility that the complaint may be substantiated.

Where a complaint is within jurisdiction the following steps are taken:

- 1) The ICAC file is obtained.
- 2) The documents provided by the complainant and the ICAC file are examined;
- 3) The complainant and any other person nominated by him/her may be interviewed;
- 4) With the consent of the interviewee the interview is recorded;
- 5) A copy of the recording is retained in the file of the Office of the Inspector and a further copy is given to the interviewee;
- 6) The recording is transcribed. A copy if the transcription is retained in the Inspector's file and a further copy is given to the interviewee who is afforded the opportunity to correct it;
- 7) All of the information is then considered and the complainant is advised in writing of the decision of the Inspector.

The majority of complaints involved matters in which the ICAC declined to investigate or to make a finding of corruption. In effect the complainant sought an appeal against the decision of the ICAC. When assessing such complaints I obtain the ICAC's files concerning the complaint in order to ascertain whether there is any evidence of the ICAC engaging in the type of misconduct prohibited by the ICAC Act.

Fourteen complaints were investigated and interviews were conducted in relation to six.

10.2 Categories

The complaints under consideration during the current reporting period fell into three categories:

- complaints which were out of jurisdiction;
- complaints warranting investigation; and
- complaints not warranting investigation.

One complaint was withdrawn. One complaint lapsed on the death of the complainant.

10.3 Statistical Data

Table 1

Matters received and/or finalised within the current reporting period

	2011-12	2010-11	2009-10
Total complaints under consideration within the current reporting period	32	42	40
Complaints carried over from previous reporting periods	1	3	2
Total complaints finalised within the current reporting period	32	41	37
New matters received in current reporting period	31	38	38
Complaints open at end of reporting period	0	1	3

Table 2**Treatment of Complaints finalised**

	2011-12	2010-11	2009-10
Complaints assessed as outside jurisdiction	9	14	14
Complaints assessed as not warranting investigation	7	4	9
Complaints referred back to ICAC	0	2	1
Complaints investigated	14	20	12
Complaints withdrawn/lapsed	2	2	1

Table 3**Outcomes for complaints finalised within the current reporting period**

	2011-12	2010-11	2009-10
Complaints sustained	0	0	0
Complaints not sustained	32	41	36
Number of complaints resulting in systemic changes	0	0	0

Table 4**Method of receipt for complaints received within the current reporting period**

	2011-12	2010-11	2009-10
Complaints received by mail	3	11	7
Complaints received by e-mail	12	17	17
Complaints received by facsimile	3	1	1
Complaints received by telephone	12	9	13
Complaints referred by a third party	1	0	3

Table 5**Turnaround times for complaints finalised**

	2011-12	2010-11	2009-10
Complaints finalised within 6 months	31	41	36
Average time taken to finalise complaints (days)	n/a*	n/a*	n/a*

*Rather than calculating the average time in which complaints are finalised, the actual time spent is set out below. This approach is taken as averages can create a misleading picture of what has occurred.

Additional Information

Table 5 (i)

Turnaround times to finalise all complaints received in the current reporting period

	2011-12	2010-11	2009-10
Complaints finalised in 0-7 days	14	16	14
Complaints finalised in 8-31 days	9	15	15
Complaints finalised in 32-60 days	5	5	2
Complaints finalised in 61-90 days	1	2	3
Complaints finalised in 91-180 days*	1	0	1
Complaints finalised in over 180 days**	1	0	0

* Delay was due to the time lapsed until we learned of the death of the complainant.

**Complaint was received on 7 September 2011. At the request of the Complainant action was deferred pending ICAC's consideration of an application for review. On 1 February 2012 the complainants advised the review had ended and the Inspector was asked to consider the complaint. The matter was considered and concluded on 15 March 2012.

Table 5 (ii)

Turnaround times to finalise complaints in the current reporting period

Including those carried over from previous period.

	2011-12	2010-11	2009-10
Complaints finalised in 0-7 days	14	16	14
Complaints finalised in 8-31 days	10	16	16
Complaints finalised in 32-60 days	5	6	2
Complaints finalised in 61-90 days	1	3	3
Complaints finalised in 91-180 days	1	0	2
Complaints finalised in over 180 days	1	0	0

Table 6

This additional table provides information with respect to a number of general enquiries which the Office received during the current reporting period. These enquiries were not complaints but sought information such as its role and functions. The Office also received a number of complaints which were clearly intended for other complaint handling agencies, for example the ICAC, but these complaints were incorrectly addressed and received at the Office. These complaints were forwarded to the appropriate agencies.

Enquiries and other correspondence

	2011-12	2010-11	2009-10
Enquiries	5	9	7
Redirected complaints	1*	1	5

*Relevant information was received relating to a case referred to in the Inspector's 2010-2011 Annual Report from a person who had recognised that reference. The information was forwarded to the Commissioner of the ICAC.

10.4 Case Studies

The following are samples of complaints considered during the reporting period.

Out of Jurisdiction

1. Complaint alleged that a Member of Parliament had failed to raise matters in Parliament. The complainant was advised that the Inspector dealt only with complaints against the ICAC and was asked if the complainant had complaints in respect of the actions or non-actions of the ICAC. No reply was received and the file was closed.
2. Complaint about the manner in which a Local Government body and the NSW Ombudsman dealt with his complaints about his neighbour. The Inspector advised the complainant the matter was outside his jurisdiction.
3. Complaint related to decisions of the Federal Family Court and legal practitioners. No complaint made against the ICAC. The Inspector advised the complainant that he had no jurisdiction to deal with the complaint.
4. Complainant is a resident of Belize and made complaints of corruption on the part of his attorney in Belize and the Belize Bar Association. He was advised that the powers of the Inspector do not extend to dealing with this class of complaint.

Maladministration

1. Complaint related to the refusal of the ICAC to further investigate his complaints arising out of the approval by a Council of the use of residential premises as a respite facility for people with a disability. Complainant further alleged that the Council then failed to take action over unapproved building works at the premises and further failed to take action over conduct impeding his quiet enjoyment of the use of his land. The complainant was interviewed and a large number of documents were examined. The conduct of the ICAC, the subject of the complaints, did not amount to misconduct or maladministration as defined in the ICAC Act.
2. Complaint in relation to ICAC's handling of his complaint against a government agency and his dismissal from it. He claimed that officers of the said agency had lied to the ICAC and that ICAC believed those lies and chose to cover up the alleged corruption. The Inspector reviewed the files and a number of letters from the complainant and found no misconduct or maladministration on the part of the ICAC.
3. Complaint was in relation to the ICAC not investigating his complaint regarding a number of allegations surrounding his conviction and subsequent imprisonment. The Inspector reviewed a large amount of documentation provided by the complainant and the ICAC file and concluded that there was no misconduct or maladministration on the part of the ICAC.
4. Complaint concerned the failure of ICAC to take action on the complaint of him and others that a local government body, its Mayor and General Manager had systematically deceived councillors over a period from about 1993 to 2000. The complainants produced a large number of documents in 18 folders. The Inspector interviewed the complainants, carefully considered the documents produced by them and ICAC and concluded that there was no misconduct or maladministration on the part of the ICAC.
5. Three complainants alleged misconduct on the part of the ICAC because it had decided not to take further action on their complaint of corruption on the part of officers of a regional council concerning a number of matters giving rise to strong suspicion of corruption. ICAC files were obtained revealing that it had conducted extensive investigations into the complaints including sending investigators to the relevant region to interview persons and examine documents. These showed that defaults of Council Officers were due to erroneous decisions and lack of administrative procedures to minimise the risk of error but these did not amount to corruption. The failure of the ICAC to take further action did not amount to misconduct or maladministration.

6. Complaint concerning the failure of ICAC to fully investigate his complaints that a Council had covered up allegations of misconduct and fraud and, further, had made allegations of misconduct against him in reprisal for his bringing the allegations to light. The Inspector interviewed the complainant and obtained all files from ICAC. ICAC had concluded that the failures of Council to take action were due to incompetence rather than corruption. The NSW Ombudsman had held that the allegations of misconduct were not reprisals and, in any event, they were withdrawn. The failure of the ICAC to take further action did not amount to misconduct or maladministration.
7. Complainant alleged that ICAC wrongly refused to take action on his complaint of repeated acts of corruption on the part of officers of a Council. Further complaint that his local Member of Parliament had disclosed his complaints to the General Manager of the Council which he alleged was in breach of the *Public Interest Disclosures Act*. In support he produced a large number of documents. He was also interviewed. Because he was not a “public official” the PID Act did not apply to him and the action of the Member of Parliament did not amount to corruption. Study of the documents revealed many disputes between the complainant and the Council, but no evidence of corruption. The failure of the ICAC to take further action did not amount to misconduct or maladministration.
8. Complainant had complained to ICAC regarding an alleged corrupt conspiracy by a council and a public authority to cover up their defaults so as to avoid the necessity of having to install an improved drainage system in the vicinity of his and adjoining properties to prevent major flooding and resulting damage. The complainant was interviewed and documentary evidence was studied. There was no evidence of corrupt conduct. The failure of the ICAC to take further action did not amount to misconduct or maladministration.

Allegations of Misconduct by Officers of the ICAC

1. Complainant alleged that whilst in the Commission’s Hearing Room during the course of an enquiry unrelated to him, he was wrongfully evicted. He further alleged that he was unlawfully assaulted by the Commission’s security staff at the Commission’s premises. After interviewing a number of witnesses and studying video and audio recordings of events it was concluded that there was no misconduct on the part of the Commissioner or the Commission’s security staff.
2. Complainant alleged that an ICAC Officer used ICAC equipment for personal purposes. The Inspector considered the ICAC file showing the action taken by it on the complaint and concluded that it had made all

appropriate inquiries and that its decision to take no further action on the complaint was justified and lawful. This complaint did prompt the ICAC to reassess its procedures concerning the private use of its assets and its procedures on this topic have now been changed.

3. Complainant alleged that an ICAC assessments officer had sent him a “dirty filthy email”. Examination of that email revealed that after setting out reasons for having the complainant’s email address blocked from the ICAC system it provided the means whereby complaints of corrupt conduct within the NSW public sector could be raised. There was no misconduct on the part of the ICAC officer.
4. Complainant raised complaints relating to the manner in which the ICAC conducted an operation which led to findings of corruption against him and subsequent prosecution and sentence to imprisonment. Allegations included failing to give him sufficient time to collect evidence and failure to supply him with documents and other materials. All documents were examined which revealed no misconduct on the part of the ICAC.

11 CONCLUDING COMMENTS

Firstly, I express my appreciation to the respective Chairmen and members of the Parliamentary Committee on the ICAC for their courtesies to me.

Secondly, I express my appreciation to the Commissioner, the Hon David Ipp AO QC and to his officers for their cooperation. My requests for information or documents have been promptly met. My suggestions have been accepted.

Thirdly, I am disappointed that my request for amendments to the *Telecommunications (Interception and Access) Act 1979 (Cth)* has been refused.

Fourthly, I am pleased that my request for amendments to the *Surveillance Devices Act 2007 (NSW)* to enable me to conduct audits without reliance on the good will of the Commissioner has now been implemented.

Finally, it is pleasing to note that nothing has been established in audits and investigations of complaints which give rise to any comment adverse to the Commission.

A handwritten signature in blue ink, appearing to read 'H Cooper', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke at the end.

Harvey Cooper AM
Inspector

September 2012