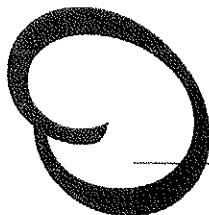




New South Wales

 **Office of the Inspector**
of the Independent Commission
Against Corruption

Annual Report
2013 - 2014



30 October 2014

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 2014.

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

The Hon. David Levine AO RFD QC
Inspector: ICAC

Received by me and authorised
to be made public forthwith on

..... Thursday 30 October 2014
at 11.20 am.....

.....
President

PART 1: THE INSPECTOR'S ROLE AND FUNCTIONS

1.1 PRELIMINARY OBSERVATIONS

I was appointed as the Inspector of the Independent Commission Against Corruption on 10 February 2014. My term is to end on 31 January 2017 (see 1.2). My fixed term as Inspector of the Police Integrity Commission - 5 years - expires on the same day.

1.2 NEW LEGISLATION

Significant amendments to the *Police Integrity Commission Act, 1996* ("PIC Act") and the *Independent Commission Against Corruption Act, 1988* ("ICAC Act") in the 2014 reporting year were enacted in the *Police Integrity Commission and Independent Commission Against Corruption (Inspectors) Act 2013* (No 72 of 2013) ("*Inspectors Act*").

The *Inspectors Act* allowed for the two positions of the Inspector of the PIC and the Inspector of the ICAC to be held by the same person. The Act *did not abolish or merge* the two positions, rather it removed the impediment to one person holding both Offices.

In the Second Reading Speech, the Hon David Clarke noted that the powers and functions of the PIC and the ICAC were substantively similar and that the powers and functions of the two Inspectors were comparable. He noted that the amendments would enhance the effectiveness of the Inspector positions, particularly as it would allow one person to take on both highly specialised roles.

The *Inspectors Act* also amended the *PIC Act* and the *ICAC Act* to enable the Governor to appoint an Assistant Inspector of PIC and ICAC. The Second Reading Speech noted that the appointment of an Assistant Inspector would ensure continuity in oversight of the PIC and the ICAC in the event that the Inspector is unavailable or if there is an increase in the workload of the Inspectorates. The amendments are intended to allow for greater flexibility in the appointment of Inspectors and to help ensure that these important oversight roles are performed effectively. (See also 1.3 'The "Vacuum" Period' below).

In order to avoid any incompatibility if the holding of one Office means that another Office could not be executed impartially, the *Inspectors Act* also amended the *PIC Act* and the *Public Interest Disclosures Act, 1994* ("*PID Act*") to provide that the Ombudsman, instead of the ICAC, has jurisdiction to investigate the conduct of the Inspector of PIC, and to receive and investigate public interest disclosures about the Inspector of PIC.

The main amendment was that s.125 of the *PIC Act* now provides that:

125 (1) Conduct of the PIC Commissioner or any officer of the Commission cannot be made the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974*, except in relation to matters referred to the Ombudsman by the Inspector.

(2) Conduct of the PIC Commissioner or an officer of the Commission cannot be made the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974*.

The relevant sections with respect to the amendments are:

- ss 125 and 126 of the *PIC Act* were amended
- s.5(3) of the *PID Act* was amended
- s.12A(4) and (5) were inserted into the *PID Act*
- s.13 of the *PID Act* 4A and 4B were omitted
- Schedule Part 13 inserted to provide that Section 125(2), extends to conduct of the Inspector or an officer of the Inspector occurring before the commencement of that amendment
- Schedule 2 Part 6 added to *PID Act*.

With respect to the dual Inspector role and the Assistant Inspector role, the *PIC Act* was amended as follows:

- Definition of Assistant Inspector inserted (s.4(1))
- Section 88A (Assistant Inspector) and Section 88B (Dual appointments) were inserted
- Schedule 2 heading to include Assistant Inspector
- Schedule 2(1A) – reference to Inspector includes reference to Assistant Inspector in certain instances.

The *ICAC Act* was amended as follows:

- Definition of Assistant Inspector inserted (s.3(1))
- Sections 57AA (Assistant Inspector) and 57AB (Dual appointments) were inserted
- Schedule 1A heading to include Assistant Inspector
- Schedule 1A(1A) – reference to Inspector includes reference to Assistant Inspector in certain instances.

In addition, the *Members of Parliament Staff Act 2013 (No 41 of 2013)* amended the *ICAC Act* as follows:

- The definition of *public official* in section 3(1) was expanded to include a person employed under the *Members of Parliament Staff Act 2013* (s.3(1)(e1)).

1.3 THE “VACUUM” PERIOD

A factor that has affected the operation of this Inspectorate is that the Office of Inspector was vacant from 1 October 2013 to 9 February 2014, a period of four months.

It is, I have to say and do say with the utmost respect, profoundly unsatisfactory that the Office of the Inspector was vacant as it is an Office personal to the holder: If there is no Inspector there is no jurisdiction to be exercised by anyone.

Two members of the former Inspector's staff were retained, one on a part time basis and one on a full time basis from 1 October 2013 to 17 January 2014 in one case and from 1 October 2013 to 2 May 2014 in the other.

During that period, as is explained elsewhere, complaints were received and on their face apparently assessed by persons whose functions did not include taking such a step which is exclusively that of the Inspector. Complainants were interviewed and statements were made to the complainants relating to whether or not the subject of their complaints fell within or without the jurisdiction of the Inspector. This is extremely unfortunate as it gave rise to expectations in the complainants whose complaints were also, as a matter of course, articulated by the former Inspector's staff indicating that they, (the complaints), would receive some form of attention and satisfaction.

It is my respectful view poor governance to permit such an important Office to be vacant for so long a period. The more so when the term of the holder thereof is fixed and its expiry date also known well in advance.

It can be taken that, subject to the usual exigencies, that I hope to serve my term until January 2017, and that it is known and diarized within the relevant ministerial department that an appointment thereupon shall have to be made. If I am obliged to retire beforehand some months' notice will be given. The situation to some extent has been alleviated by the availability of the appointment of an Assistant Inspector in the amending legislation referred to.

Finally I wish to say this: that I do not suggest that what took place between 1 October 2013 and 9 February 2014 in terms of what was done by the two former members of the Inspector's staff, who the DPC saw fit to keep in place, was done otherwise than in good faith.

1.4 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. A Committee of the NSW Parliament comprising representatives of all political parties and independent members called "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 Joint 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. The importance of this provision must never be overlooked.

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.

PART 2: THE POWERS OF THE INSPECTOR

2.1 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.

PART 3: OTHER RELEVANT LEGISLATION

3.1 GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 NO. 52 (GIPA ACT)

The *Government Information (Public Access) Act 2009* (“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 made in respect of the Inspector’s administrative functions (for example, human resources policies and practices) may be granted. Such applications will be assessed on a case by case basis. In compliance with section 125 of the *GIPA Act* the Inspector advises that there were no access applications made under the *GIPA Act* to the Inspector during the current reporting period.

As required under section 20 of the *GIPA Act*, Publication Guidelines, have been published by the Inspector. These Publication Guidelines are available on the Office of the Inspector of ICAC website: www.oicac.nsw.gov.au.

The Publications Guidelines provide information about the Inspector’s functions and the structure of the Office and other matters as required by section 20, namely:

- The ways in which the functions of the Inspector affect members of the public
- Any arrangements which exist to enable members of the public to participate in the formulation of the Inspector and the Office’s policies and the exercise of the Inspector’s functions
- The various kinds of government information held by the Office
- The kind of government information held by the Office that the Inspector makes or will make publicly available
- The kinds of information that are or will be made available free of charge or those for which a charge will be imposed.

Under section 7(3) of the *GIPA Act*, the Inspector advises that he has conducted an annual review of his program to proactively release information which is in the public interest. All information which is publicly available is contained on the Office website.

In compliance with section 7(a) of the *GIPA Regulation* the Inspector advises that the web site content was reviewed to assess what, if any, further information could be pro-actively released. Furthermore, the Inspector reviewed all categories of administrative information which is published in previous Annual Reports and audit reports to assess what, if any, further information could be pro-actively released. Whilst no new information was released, existing information was updated to ensure currency and relevance. It is a process of ongoing review.

3.2 THE PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT)

The Public Interest Disclosures Act 1994 ("the *PID Act*") provides for public servants and other public 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 and public officials are called disclosures. The *PID Act* provides for public servants and public officials making disclosures to be protected against actual or potential reprisals.

The Inspector is an eligible authority to whom a public disclosure can be made under the *PID Act*.

Pursuant to section 6D(1) of the *PID Act* the Inspector has developed policies and procedures for receiving, assessing and dealing with public interest disclosures. These policies and procedures as well as the Inspector's Statement of Commitment to the *PID Act* are available for viewing on the Office's website at www.oiiac.nsw.gov.au.

The following information, relevant to the current reporting period, is provided pursuant to section 31 of the *PID Act* and clause 4 of the *Public Interest Disclosures Regulation 2011*:

- a) The number of public officials who have made a public interest disclosure to me – 0
- b) The number of public interest disclosures received by me relating to each of the following:
 - i. corrupt conduct only– 0
 - ii. maladministration and/or corruption– 0
 - iii. serious and substantial waste of public money or local government money (as appropriate)– 0
 - iv. government information contraventions- 0
 - v. local government pecuniary interest contraventions- 0

3.3. 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) ("*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.

PART 4: THE OFFICE OF THE INSPECTOR OF ICAC

4. ADMINISTRATION

4.1 PREMISES

The Office is located on Level 10, Bligh House, 4-6 Bligh Street, Sydney.

The contact details are:

Postal address: GPO Box 5341, Sydney, NSW, 2001

Telephone: (02) 9228 5260

Facsimile: (02) 8243 9484

E-mail: icac_executive@oiicac.nw.gov.au

4.2 STAFF

The staffing structure of the Office consists of two part-time employees – an Executive Support Officer and a Senior Legal Project Officer. They are the same persons who are employed in the PIC Inspectorate.

4.3 BUDGET AND FINANCE

The Office of the Inspector is a cost centre within the NSW Department of Premier and Cabinet (DPC).

The statement for the period from 1 July 2013 to 30 June 2014 shows a total expenditure of \$316,480. This compares with a total expenditure of \$425,373 in the prior year. The budget for 2013-2014 is \$301,000.

Over the period of October 2013 to February 2014 where the Inspector of the ICAC position was vacant, expenses of \$94,258 were incurred against a budget of \$151,153.

PART 5: LIAISON AND COMMUNICATION

5.1 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 purpose of the MOU is to ensure that communications between the Inspector’s office and the ICAC are conducted at an appropriate level.

The MOU is periodically updated to ensure relevance. The most recent MOU was executed on 14 June 2012. This MOU is in the process of minor revision.

5.2 MEETINGS/CONFERENCES UNDERTAKEN BY THE INSPECTOR

Date	With Whom	Where	Purpose
2014 January 23	JC Parliament General Meeting	NSW Parliament House	
March 25&26	Conference, Anti- Corruption	Off site	
March 28	ICAC Committee	NSW Parliament House	
April 8	PMCA Committee	OICAC	Discussion – New Qld Committee set up to monitor & review Qld Crime & Misconduct Commission
June 4	ICAC IT	ICAC	Remote access training
June 23	ICAC Staff	ICAC	Meet and greet

5.3 WEBSITE

The Inspector's website is managed by the Office. The website address is www.oicac.nsw.gov.au. The website of the Office of the Inspector of the ICAC has been radically updated and contains all relevant statutory and other information for members of the public.

PART 6: THE INSPECTOR'S STATUTORY FUNCTIONS

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

The ICAC is invested 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"). In addition there is the power to apply for and execute search warrants under Division 4 of part 4 of the ICAC Act and Division 4 part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. 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.

6.2 AUDITS CONDUCTED IN PERIOD 1 JULY 2013 TO 30 JUNE 2014

In the period 1 July 2013 to 30 September 2013, no audits were conducted by the Hon Harvey Cooper AM.

In the period 10 February 2014 to 30 June 2014, I did not conduct any formal audits.

- 6.3 In the light of the duration of the “vacuum” period, and of the fact that the Inspectorate was not fully staffed until ICAC vetting was completed at the end of March 2014, I saw little point in either intrusive piecemeal or major oversight audits. The ICAC had been and was at that time (and has been since) principally involved in: Operation Spector (Corrupt solicitation of funds by public officials); Operation Credo (Australian Water Holdings Pty Ltd); Operation Spicer (Election funding payments) and Operation Verdi (University of New England).

Remote computer access enabled the Inspectorate to follow the progress of hearings. Any further information was provided by the ICAC.

- 6.4 On 12 December, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report:

- Comprehensive revision of the Telecommunications (Interception and Access) Act 1979 (“TIA Act”), with regard to:
 - a. The recommendations of the Australian Law Reform Commission for Your Information: Australian Privacy Law and Practice Report, dated May 2008, particularly recommendation 71.2; and
 - b. Recommendations relating to the Act from the Parliamentary Joint Committee on Intelligence and Security Inquiry into the potential reforms of Australia’s National Security Legislation Report, dated May 2013.

The Inspector of ICAC was invited to make a submission to the inquiry. I made a submission as Inspector of the ICAC but I noted in my submission that the particular provisions relating to the Inspector of the ICAC in the TIA Act were in very similar terms to the provisions relating to the Inspector of the PIC. I submitted that any amendment to the provisions relating to the Inspector of the ICAC should also be made with respect to the Inspector of the PIC as the same limitations on the Inspector of the ICAC using his or her audit functions applied to the Inspector of the PIC.

In particular I noted in my submission that:

"The current position is therefore that the Inspector (of the ICAC) is unable to fully perform his or her statutory functions. In particular, in performance of the Inspector's audit function, he or she may wish to assess the legality and propriety of the ICAC's reliance on telephone intercepts in furtherance of its investigations and in order to do so, may need to access the intercepted information obtained under warrant. A warrant and interception under that TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but rather, for improper purposes. It is for this reason that the Inspector has been given the powers of audit. However, the current form of the TIA Act is said to prevent the Inspector from accessing such lawfully obtained information and this is precluded from fulfilling this important function.

I propose that the TIA Act be amended to enable the Inspector to receive lawfully obtained information in order to conduct an audit of the ICAC's application for and use of information from warrants and intercepts made under the provisions of the TIA Act. To this end, section 68 (eb) of the TIA Act should be amended to provide as follows:

(eb) if the information relates, or appears to relate, to a matter that May give rise to an investigation or audit by the Inspector of the Independent Commission Against Corruption – to the Inspector of the Independent Commission Against Corruption.

The provisions under the Police Integrity Commission Act 1996 ("PIC Act") with respect to the statutory functions of the Inspector of the Police Integrity Commission ("PIC") are in similar terms to those of the Inspector of the ICAC. The Inspector of the PIC is also prevented from having access to lawfully obtained information in order to conduct an audit pursuant to section 89(1)(a) of the PIC Act. I submit that a similar amendment should also be made to section 68(fa) of the TIA Act namely that:

(fa) if the information relates, or appears to relate, to a matter that May give rise to an investigation or audit by the Inspector of the Police Integrity Commission – to the Inspector of the Police Integrity Commission.

The proposals appear to me to fall within the spirit of Recommendation 71-2(b) of the 2008 Australian Law Reform Commission Recommendations and Recommendation 18 of 2013 Recommendations".

The reporting date for the Committee to publish its report was extended by the Senate until 29 October 2014. I cannot, therefore, report on the outcome of that inquiry until the next reporting period.

PART 7: COMPLAINTS [Sections 57(1)(b) and 57(1)(d)]

7.1 OVERVIEW

The Inspector is authorised to 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 for the Inspector to deal with complaints against other bodies. Furthermore, there is no power for the Inspector 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.

A substantial proportion of complaints involve matters in which the ICAC declined to investigate or make a finding of corruption. In effect the complainant seeks to appeal against the decision of the ICAC. When assessing such complaints the Inspector's objective is to determine whether there was any evidence of the ICAC engaging in the type of misconduct prohibited by the *ICAC Act*. Consequently, when considering such complaints 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 out of jurisdiction, whether there is any substance to the complaint and, whether it warrants investigation.

7.2 PERIOD 1 JULY 2013 TO 30 JUNE 2014

There have been 27 new complaints received in the reporting period. I propose to break down the complaints into three separate periods; the period 1 July 2013 to 30 September 2013, when the Hon Harvey Cooper AM was Inspector; the period 1 October 2013 to 9 February 2014, when the Office of the Inspector was vacant and the period 10 February 2014, when I was appointed Inspector, to 30 June 2014.

1. Period 1 July 2013 – 30 September 2013

There were seven new complaints received in this period and they were all closed in the period. Of the seven closed:

- 6 were not sustained
- 1 was outside jurisdiction of the Inspector

2. Period 1 October 2013 – 9 February 2014

There were 16 complaints received in this period. As the Office was vacant, the complaints could not be assessed.

Of these 16 complaints, eight were closed in the reporting period. Of those closed:

- 1 was out of the jurisdiction
- 1 was withdrawn
- 6 were not sustained

Eight complaints received in this period have been carried over to the 2014/2015 reporting period.

3. Period 10 February 2014 – 30 June 2014

There were four complaints received in this period, three have been closed.
Of those closed:

- 1 was not sustained
- 1 was outside the jurisdiction
- 1 was referred back to the ICAC for investigation.

One complaint received in this period has been carried over to the 2014/2015 reporting period.

Of the 27 new complaints received in the entire reporting period, 9 have been carried over to the 2014/2015 reporting period.

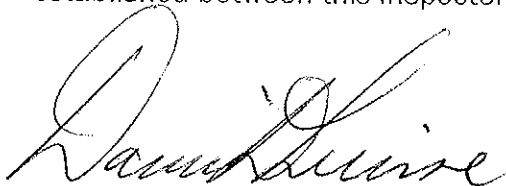
- 7.3 Matters carried over from the 2012-2013 reporting period: There was one matter carried over from the previous reporting period. It was closed in August 2013. The complaint was not sustained.
- 7.4 One of the complaints was an internal ICAC complaint against another current ICAC officer, alleging misconduct. The ICAC conducted its own investigation and I was informed of the outcome. I concurred with the action taken by the ICAC.

PART 8: CONCLUSION

In my respectful view the year for reporting has been an aberration by reason of the vacuum to which I have referred.

An immense amount of time and resources have been expended in trying to resolve the matters that in my view were of arguable validity during the period in which there was no Inspector in Office.

I am confident that in the year 2014-15 a more settled relationship will have been established between this Inspectorate and the Commission.



The Hon David Levine AO RFD QC
Inspector
October 2014