



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

**Report concerning a Complaint by Mr  
Jeffrey McCloy about the conduct of the  
Independent Commission Against  
Corruption in Operation Spicer**

**(Special Report 18/02)**



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

12 April 2018

Our ref: C37 2015 - 18/02

The Hon John Ajaka 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 sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*"), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a *Report concerning a Complaint by Mr Jeffrey McCloy about the Conduct of the Independent Commission Against Corruption in Operation Spicer (Special Report 18/02)*.

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

Yours sincerely,

Bruce R McClintock  
Inspector, Independent Commission against Corruption.

1. I am pleased to present this report pursuant to sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* (the 'ICAC Act') determining a complaint made by Mr Jeffery McCloy concerning the conduct of the Independent Commission Against Corruption ("the ICAC or "the Commission") during Operation Spicer.
2. I have decided to dismiss the complaint. My reasons are stated in the attached letter to Mr McCloy's solicitors which forms part of this report.
3. In addition to informing Parliament of the way I have dealt with Mr McCloy's complaint, I wish also to report to Parliament about one aspect of the functions and powers imposed on me by Part 5A of the *Independent Commission Against Corruption Act 1988*.
4. In 2015 Mr McCloy commenced proceedings in the Supreme Court of New South Wales against then Commissioner Megan Latham SC and the Commission, seeking to have her disqualified for bias and the Commission restrained from making a report on matters involving Mr McCloy. Those proceedings were heard by his Honour Justice Robert McDougall of the Supreme Court. The allegations of bias are fairly stated in the following passage from the judgment:

*9 Mr McCloy's Further Amended Summons filed in Court on the first day of the hearing (for convenience, I will refer to this simply as "the summons") set out, in grounds comprising 220 paragraphs, matters that, he said, would give rise to a reasonable apprehension of bias. In broad summary, the matters relied upon included:*

- (1) *conduct of the Commissioner before the commencement of the public inquiry in Operation Spicer;*
- (2) *adverse treatment, influenced by what was called a "predetermined case theory", of a number of witnesses;*
- (3) *unfair treatment, in reliance on a "Practice Direction" issued by the Commission, of witnesses and Counsel;*
- (4) *matters put to witnesses including (but not limited to) Mr McCloy, and in submissions, without a proper factual or legal basis;*
- (5) *alleged refusal to permit questioning on what were said to be "critical facts in issue", on the basis that unless a positive case were being advanced, the matters could be covered in submissions;*
- (6) *indications of political bias by both Counsel assisting and the Commissioner;*
- (7) *a miscellaneous collection of grounds that included alleged lack of even-handed treatment as between Counsel and otherwise; and the appearance (on the part of Senior Counsel assisting) of a personal interest in the outcome of the inquiry;*
- (8) *another miscellaneous collection of grounds including aspects of want of*

*procedural fairness; asserted failures on the part of Senior Counsel assisting to comply with the Barristers' Rules; unfairness arising through access to documents and scheduling of evidence; questions without notice and beyond the scope of the inquiry; and other matters.*

*10 Grounds concerning matters that occurred in the course of the public inquiry relate to some 28 of the 43 days that the public inquiry occupied. According to the citation of transcript pages in the summons, those complaints relate to 110 pages of a transcript that exceeded 5000 pages in length. As I have noted, no complaint is made in respect of the public inquiry in Operation Credo (the transcript for that inquiry runs to some 2600 pages).*

*11 The public inquiry in Operation Spicer was intensely political. The politicians whose conduct was in question included Liberal parliamentarians, two of whom, as I have said, were at the time Ministers of the Crown. The allegations made against them were extremely serious. The hearings generated a substantial amount of dispute. That is hardly surprising, bearing in mind both the nature of the allegations made and the fact that the investigation into those allegations was, if not fatal, at least extremely damaging to the careers of those against whom they were made. The two Ministers whose conduct was under examination felt obliged to resign their portfolios. The Liberal parliamentarians whose conduct was the subject of inquiry resigned from the Party, and moved to the cross-benches.*

*12 It is apparent from the transcript alone that the hearings were heated, and at times intensely confrontational. It is apparent even from the transcript that the heated and confrontational nature of the hearings resulted in more than the usual amount of sniping, or sledging, between the numerous members of the Bar (many, Senior Counsel) who appeared with leave to represent the interests of their various clients. Those impressions are confirmed – indeed, strengthened – by viewing the video recording of parts of the hearing. All those matters must be assessed, in deciding whether the matters upon which Mr McCloy relies are capable of founding the necessary reasonable apprehension of bias.*

5. Mr McCloy's complaint to this Inspectorate dated 1 July 2015 raises substantially identical matters as can be seen from the following paragraphs of that complaint:
  1. *This is a complaint about the conduct of, respectively, Commissioner Latham and of Senior Counsel Assisting in the course of ICAC's Operation Spicer. That conduct occurred:*
    - a) *in the course of that part of the inquiry involving examination of witnesses, including Mr McCloy; and*
    - b) *in events involving the Commissioner and Senior Counsel Assisting, external to that inquiry.*
  2. *Information about some of this conduct has become available only recently. Whilst many of these matters if considered individually would be of concern, they may not*



warrant consideration in the form of a formal complaint to the ICAC Commissioner or any remedial process. But, when all of the relevant conduct (including that involving evidence of other witnesses and of other circumstances not previously known to us) is considered as a whole, there emerges powerful implications that both the Commissioner and Senior Counsel Assisting appear to:

- a) have been engaged in collateral purposes; and
  - b) have a personal interest in the outcome of Operation Spicer.
3. Further continuation of the inquiry is highly incompatible with procedural fairness to Mr McCloy. Law reports are replete with many kinds of disqualifying conduct, both as regards judicial and extra judicial institutions, mostly involving mistake or inadvertence, or latent factors. However, the conduct of the Commissioner and of Senior Counsel Assisting that is considered below can only be described as extraordinary to the point of being almost unbelievable. The specific complaints are that such conduct appears to:
- a) have been engaged in for collateral purpose to achieve pre-determined, or hoped-for outcomes, and not only for any final report, but to smear, and to damage reputations
  - b) have been reprehensible, both the Commissioner and senior Counsel Assisting relishing it. In that respect, the Commissioner has failed to exercise appropriate control over Senior Counsel Assisting's conduct in examining witnesses where context demonstrates extreme bias. Significantly, they have boasted of such conduct regarding Operation Spicer and ICAC proceedings generally. The Commissioner long ago departed from the appearance of impartial decision-making in Operation Spicer.
6. His Honour Justice McDougall heard Mr McCloy's claim on 12 and 13 November 2015 and gave judgment on 10 December 2015. In that judgment his Honour comprehensively dealt with and rejected all of Mr McCloy's claims of bias against Commissioner Latham and impropriety against Counsel Assisting. These are, as I have indicated, substantially the same matters that are the subject of the complaint to me. As a result, his Honour dismissed Mr McCloy's proceedings with costs.
7. The test his Honour was applying in determining whether Commissioner Latham should be restrained from further hearing and dealing with the Operation Spicer investigation was the well-known test applied in administrative law, that is, whether a fair-minded lay observer might reasonably apprehend that the Commissioner would not bring an open mind to the question of what finding should be made in relation to Mr McCloy. See [2015] NSWSC 1879 [36]-[53]. It is worth quoting [53]:

*53 To jump ahead for a moment: a rational consideration of the transcript of the whole of Mr McCloy's evidence, which puts the matters complained of into their proper context, shows that he was treated with scrupulous fairness by the Commissioner, and given every opportunity by her to state his position. The observer*

would be aware of those matters, and would take them into account in considering whether, as a result of all the matters on which Mr McCloy relies in his summons, the reasonable apprehension of bias exists.

8. My functions and powers are stated in sections 57B, 57C and 57F of the ICAC Act which are in the following terms:

***S57B Principal Functions of Inspector***

*(1) The principal functions of the Inspector are:*

*(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*

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

*(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*

*(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

*(2) The functions of the Inspector may be exercised 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.*

*(3) The Inspector is not subject to the Commission in any respect.*

*(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves 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.*

*(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:*

*(a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and*

*(b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.*

### **57C Powers of Inspector**

*The Inspector:*

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and*
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and*
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and*
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to 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, and*
- (f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and*
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.*

### **57F Incidental powers**

- (1) The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.*
- (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.*

- 9. The most significant of these provisions is s57B(1) which states my principal functions as Inspector. It is the main source of power I am exercising in making this Report. The criteria for the exercise of the power granted by the provisions differ from those to his Honour Justice McDougall was applying in determining whether there was apprehended bias on the part of the Commissioner. Nevertheless, it is almost inconceivable that if the Commissioner had, in fact, engaged in conduct of the kind referred to in section 57B that it would not give rise to a reasonable apprehension of bias or other basis upon which administrative law relief would be granted restraining her from continuing with the hearing.
- 10. Thus, as a matter of practical reality, McDougall J's rejection of Mr McCloy's complaint against Commissioner Latham connotes rejection of his complaint to me. Further, McDougall J rejected (as [53] quoted above makes clear) all of Mr McCloy's allegations of bias and misconduct. His Honour was, in my opinion, correct in

reaching these conclusions.

11. In dealing with Mr McCloy's complaint, I considered the matters set out in the 1 July 2015 complaint independently of McDougall J's findings and came to the same conclusion as his Honour. That is why I found Mr McCloy had not established any of the matters stated in section 57B and dismissed his complaint.
12. I regard sections 57B, 57C and 57F of the ICAC Act quoted above, as granting the Inspector a general discretion as to how to deal with any complaint made to him. In my view, that includes a discretion to decline to consider or reconsider the correctness of findings of the Supreme Court or Court of Appeal in litigation involving a complaint to the Inspector and the same or substantially the same issues. It might well be thought that it is a waste of public resources and of the resources of this Inspectorate to deal with matters already judicially determined as well as a waste of the time of the Presiding Officers of each House of Parliament and their staff to reconsider matters which have been the subject of judicial consideration and determination.
13. Thus, in future, I regard myself as having a discretionary entitlement to dismiss complaints summarily where the substance of the complaint has been the subject of judicial consideration and determination.
14. The purpose of this report is to bring this to the attention of Parliament as well as to report the basis upon which I have determined Mr McCloy's complaint.
15. Pursuant to s 78(1A) of the ICAC Act I recommend that this Report be made public forwith.

*B. R. McClintock*

Bruce R McClintock

**Inspector**

**Independent Commission Against Corruption**

12 April 2018





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

27 February 2018

Our ref: C37 2015 12

Mr Harland Koops  
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Via email: [hkoops@hklaw.com.au](mailto:hkoops@hklaw.com.au)

Dear Sir

**RE: OPERATION SPICER - Mr Jeffrey McCloy**

I refer to your letter dated 27 October 2017 to which I sought a response from the Independent Commission against Corruption ("ICAC"). ICAC replied to me on 23 January 2018. I enclose a copy of Chief Commissioner Hall's letter of that date. I have considered your client's complaints and all the materials which you supplied to my predecessor, the Honourable David Levine, and to me, as well as ICAC's enclosed response. None of the matters you raise amounts, in my opinion, to "abuse of power, impropriety [or] other forms of misconduct" or "maladministration" as those terms are used in section 57B of the ICAC Act. In the interest of brevity, I will refer to these statutory concepts as "abuse of power" in the remainder of this letter.

Accordingly, I propose to dismiss your client's complaint and will report to Parliament pursuant to sections 57B(5) and 77A of the ICAC Act that I have done so. I attach my draft report to Parliament.

I make the following specific points:

1. Counsel assisting is not an "officer of the commission" as that term is defined in section 3 of the ICAC Act. My jurisdiction is limited by section 57B to dealing with complaints of abuse of power on the part of the Commission or officers thereof. It follows that I have no power to deal, at least directly, with your client's complaints concerning Mr Watson. I should add the following comments:
  - a. I accept that a failure by the Commissioner or the Commission to control or supervise counsel assisting so that the counsel in question engaged in some form of impropriety could itself come within section 57B if that failure was itself sufficiently wrongful to amount to abuse of power. In other words, I accept that the

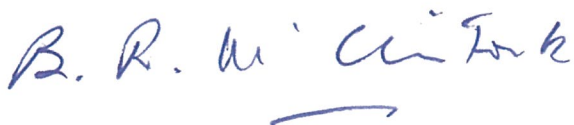
Commission has a duty to supervise counsel assisting so as to prevent impropriety. No failure of that sort on the part of the Commission appears in your client's complaints, however. Specifically, I can see no evidence of any wrongful failure to supervise or control Mr Watson.

- b. Further, nothing in the criticisms your client makes of Mr Watson's conduct could, in my opinion, amount to abuse of power even if he were an officer of the Commission. I disagree with your criticisms of Mr Watson's conduct.
  - c. Your complaints of 15 December 2015 and 1 March 2016 concern submissions made by counsel assisting. I accept the propositions put by the ICAC in its response to me in respect of those complaints as set out in the enclosed letter.
2. Your client's complaint of 1 July 2015 raises allegations of bias against former Commissioner Latham. Those same allegations were substantially the basis of your client's claim against Commissioner Latham in the 2015 proceedings determined by his Honour McDougall J *McCloy v Latham* [2015] NSWSC 1879. I note your assertion that I am bound to consider your client's allegations of bias independently of His Honour's decision. I do not agree that this assertion accurately states the functions and powers given to me by sections 57B, 57C and 57F of the ICAC Act. When matters substantially identical to those the subject of a complaint to me have been the subject of court proceedings, and when those issues have been fully ventilated and determined in those proceedings, I consider I have a discretion not to undertake consideration of the complaint and to dismiss it summarily. In such circumstances, it might be considered an irresponsible waste of public resources to do otherwise. I explain the basis for this conclusion in more detail in my report to Parliament.

In this case, however, I have decided not to exercise that discretion and have considered the matters you raise as allegations of bias against Commissioner Latham. I have also considered the findings of fact and conclusions of law set out his Honour McDougall J's judgment. Having done so, I have concluded that his Honour was right. His reasons for rejecting your client's claim seem to me to be compelling. Thus, for the reasons given by his Honour in the judgment referred to, I reject the allegations of bias made in your client's 1 July 2015 complaint.

Further, none of those allegations, even if established could, in my opinion, amount to abuse of power within the meaning of section 57B of the ICAC Act. For these reasons Mr. McCloy's complaint will be dismissed.

Yours sincerely,



Bruce McClintock  
Inspector: ICAC