



New South Wales



Office of the Inspector
of the Independent Commission
Against Corruption

Annual Report
2014 - 2015

Table of Contents

PART 1: THE INSPECTOR'S ROLE AND FUNCTIONS

1.1	FOREWORD & PRELIMINARY OBSERVATIONS	1
1.2	.....	2
1.3	NEW LEGISLATION AND OTHER LEGAL DEVELOPMENTS	2
1.4	THE INDEPENDENT PANEL.....	3
1.5	THE S.77A REPORT.....	5
1.6	ROLE OF THE INSPECTOR.....	6
1.7	INSPECTOR'S POWERS UNDER THE ICAC ACT.....	7

PART 2: OTHER RELEVANT LEGISLATION

2.1	GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 NO 52 (GIPA ACT).....	8
2.2	THE PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT)	9
2.3	TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) ACT 1979 (CTH) (TIA ACT)	11

PART 3: THE OFFICE OF THE INSPECTOR OF ICAC

	ADMINISTRATION.....	11
3.1	PREMISES	11
3.2	STAFF.....	11
3.3	BUDGET AND FINANCE.....	11

PART 4: LIAISON AND COMMUNICATION

4.1	LIAISON WITH THE ICAC	12
4.2	MEETINGS/CONFERENCES UNDERTAKEN BY THE INSPECTOR.....	13
4.3	.....	13
4.4	WEBSITE.....	14

PART 5: THE INSPECTOR'S STATUTORY FUNCTIONS

5.1	AUDITING THE OPERATIONS OF THE ICAC [SECTION 57B(1)(A)]	14
5.2	AUDITS CONDUCTED IN THE PERIOD 1 JULY 2014 TO 30 JUNE 2015.....	14
5.3	COMPLAINTS [Sections 57(1)(b) and 57(1)(d)	15
5.4	PERIOD 1 JULY 2014 to 30 JUNE 2015.....	16
5.5	.....	17
5.6	.....	17
5.7	.....	18
5.8	.....	18
5.9	.....	19

Table of Contents

**PART 6: OUTCOME OF INQUIRY INTO COMPREHENSIVE REVISION
OF THE TIA ACT..... 20**

PART 7: TWO EXTRAORDINARY EVENTS

7.1 OPERATION "HALE".....21

7.2 A MATTER OF LEPIDOPTERY.....21

PART 8: CONCLUSION.....26

PART 1: THE INSPECTOR'S ROLE AND FUNCTIONS

1.1 FOREWORD & PRELIMINARY OBSERVATIONS

As Inspector I am accountable to the Parliament. It is, in my opinion, concomitant with the powers and functions allocated to me that I take steps to ensure that the institution of the ICAC itself enjoys respect and high standing in the community. The people of New South Wales can have little confidence in the capacity of the ICAC to carry out its mandate if its reputation is inconsistent with the authority that the ICAC should enjoy by the proper performance of its functions. I say this in the context that the relevant reporting year and periods both before and certainly since have given rise to a great deal of publicity some of which reflects two perceptible attitudes - for and against ICAC, which might have the effect of diminishing the standing of the institution. If the ICAC is to perform its serious work seriously, it must be taken seriously. It must not be perceived as an institution culturally projecting an almost breathtaking arrogance in relation to its own powers, in relation to the people with whom it is dealing, in relation to other institutions of governance of the State not least the Parliament to which the ICAC itself is accountable and to the judicial system.

The reporting year, sadly, cannot be said to have been one that reflects well on the relationship between the Inspector and the ICAC. It has been characterised by what I regard as *hauteur* on the part of the ICAC as an institution towards myself, the Parliament, the media and certainly towards persons who have connection with the ICAC purporting to act in accordance with the terms of its Statute.

The themes above referred to were also referred to in the Section 77A report furnished to the Parliament in June, as part of the Independent Panel (the Hon AM Gleeson AC QC and B McClintock SC) established by the Premier.

- 1.2 At the time of preparing this Report I have the benefit of having received the Annual Report of the Independent Commission Against Corruption for the year 2014-2015. I am grateful that this document was produced by the Commission and acknowledge the assistance it will have provided to me in the preparation of my Annual Report, especially in those areas particularly relevant to the role of Inspector.

Whilst the *Independent Commission Against Corruption Act 1988* requires the furnishing of the Report to the Parliament in accordance with s.77B, I shall take the approach throughout this Report of extending the period beyond the 30th of June if by so doing, in any given area, some finality, watershed or other significant conclusive point has been reached in relation to some matter.

The Annual Report of this Inspectorate 2013-2014 concluded with the sentence "*I am confident that in the year 2014-2015 a more settled relationship would have been established between the Inspectorate and the Commission*". It is, alas, fair to say that the optimism reflected in that sentence in the end was misplaced.

1.3 NEW LEGISLATION AND OTHER LEGAL DEVELOPMENTS

The Annual Report 2013-2014 dealt with the substantial amendments to the *ICAC Act* and to the *Police Integrity Commission Act, 1996* that brought it about that the one person could occupy both offices.

In the reporting year, the Parliament enacted the *Independent Commission Against Corruption Amendment (Validation) Act 2015* ("*the Validation Act*") which commenced on the 6th of May. The ICAC Annual Report deals in detail with this at pp 48-49.

The amendment was in response to the decision of the High Court of Australia in *ICAC v Cunneen & Ors* [2015] HCA 14. Whilst some reference will be made to Operation "Hale" involving Ms Margaret Cunneen SC and others briefly below, this

Inspectorate's audit and investigation of Operation "Hale" will be the subject of a special report to be delivered to the Parliament under s.77A of the ICAC Act.

1.4 THE INDEPENDENT PANEL

A further consequence of the High Court decision in *Cunneen* was the establishment by the Premier of an Independent Panel constituted by the Hon. Murray Gleeson AC QC and Mr Bruce McClintock SC.

The Panel's terms of Reference in the Letters Patent were:

"In light of the decision of the High Court of Australia in ICAC v Cunneen [2015] HCA 14, the Panel is commissioned to consider, and report to Our Governor, on:

1. *The appropriate scope for the ICAC's jurisdiction,*
2. *Any legislative measures required to provide the ICAC with the appropriate powers to prevent, investigate and expose serious corrupt conduct and/or systemic corrupt conduct involving, or affecting, public authorities and/or public officials, and*
3. *Whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers, taking into account:*
 - i. *The jurisdiction, responsibilities and roles of other public authorities and/or public officials in the prevention, detection, investigation, determination, exposure and prosecution of corrupt conduct, and*
 - ii. *Any report of the Inspector of the ICAC completed and available during the course of this inquiry which includes consideration of:*
 - (a) *The conduct of past and current investigations of the ICAC,*
 - (b) *Whether the ICAC's powers, and its exercise of its powers, are consistent with principles of justice and fairness,*
 - (c) *The extent to which ICAC investigations give rise to prosecution and conviction, and*
 - (d) *Whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC's powers."*

Prior to the delivery of the Report by the Independent Panel and in accordance with its Terms of Reference I furnished to the Parliament under Section 77A of the ICAC Act, 1988 my Report which can be found at: oiiacac.nsw.gov.au/news_and_events.

The Independent Panel presented its report on the 30th of July 2015. It can be found on the Department of Premier and Cabinet's website at dpc.nsw.gov.au. It made the following recommendations:

"Recommendation

The Panel recommends the following amendments to the Act:

Recommendation 1: Section 8

The Panel recommends that the Act be amended to include within the definition of corrupt conduct in section 8 conduct of any person (whether or not a public official) that impairs or could impair public confidence in public administration and which could involve any of the following matters:

- (a) Collusive tendering;*
- (b) Fraud in or in relation to applications for licences, permits or clearances under statutes designed to protect health and safety or designed to facilitate the management and commercial exploitation of resources;*
- (c) Dishonestly obtaining or assisting or benefitting from the payment or application of public funds or the disposition of public assets for private advantage;*
- (d) Defrauding the revenue;*
- (e) Fraudulently obtaining or retaining employment as a public official.*

This could be done by inserting a new subsection in section 8 (perhaps subsection (2A)) and would necessitate a consequential amendment to section 7(2).

If section 8 is amended in the manner recommended, subsection (3) will give the amendment application to conduct that occurred previously, so long as the words "or, in the case of conduct falling within [the proposed new subsection] the commencement of that subsection" are added after 'this subsection'. The Panel recommends that addition.

The Panel also recommends that the words 'or expanding' be added to section 8(6) after the word 'limiting'.

Recommendation 2: Section 13

The Panel recommends that section 13(1) be amended to add to each of paragraphs (e) to (i) a reference to promoting the integrity and good repute of future administration.

Recommendation 3: Section 13

If parliament is of the view that breaches of the Parliamentary Electorates and Elections Act 1912, the Election Funding, Expenditure and Disclosures Act 1981 or the Lobbying of Government Officials Act 2011 should be made the subject of the ICAC's jurisdiction, the Panel recommends that this be done by inserting a subsection in section 13(1) to the following effect:

- (ba) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that there has been a breach of the Parliamentary Electorates and Elections Act 1912,*

the Election Funding, Expenditure and Disclosures Act 1981 or the Lobbying of government Officials Act 2011.

This would require a consequential amendment to section 12A.

Recommendation 4: Section 74B

The Panel recommends that the Act be amended so that the Commission's power to make findings of corrupt conduct may be exercised only in the case of serious corrupt conduct. This could be achieved by the insertion of a new section 74B(1A) to that effect. (A number of other corresponding amendments would need to be made to section 74B to conform to the proposed new subsection.)"

Parliament thereupon enacted the *Independent Commission Against Corruption Amendment Act 2015* which related principally to Recommendation 3 and election funding. That legislation came into operation on 28 September 2015.

In relation to litigation, the Committee is referred to the summary on pp 49 and 50 of the Annual Report of the ICAC 2014-15. It can be updated as follows (in respect of matters with which I am concerned):

Item 5 in the Annual Report of the ICAC at p.51 (McCloy), the High Court handed down its decision on the 7th of October 2015. (*McCloy v NSW* [2015] HCA 34). In relation to matter No. 8 on p.51 concerning *Nucoal Resources Ltd*, Rothman J handed down his decision in the Supreme Court of New South Wales on the 24th of September 2015 (*NuCoal Resources Limited v ICAC* [2015] NSWSC 1400). As to matter No 10 (*Travis Duncan & Ors*) the Court of Appeal handed down its decision on the 9th of September 2015 (*Duncan v ICAC* [2015] HCA 32. The ICAC was successful in each.

1.5 The S.77A REPORT

The Report furnished by me to the Parliament under Section 77A was furnished consequent upon the requirement of the Independent Panel. The Report speaks for itself and purports to be no more than an anodyne recitation of various matters that were then the business of the Inspectorate with some commentary applicable at the time. Little has changed since (see pp.7-12) of the Section 77A Report).

1.6 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.

1.7 INSPECTOR'S 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 2: OTHER RELEVANT LEGISLATION

2.1 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.

2.2 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.oiiacac.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 – 1

- 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– 1
 - 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

2.3 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 3: THE OFFICE OF THE INSPECTOR OF ICAC

ADMINISTRATION

3.1 PREMISES

In May 2015, this Inspectorate once again relocated, largely due to the fact that its then premises exceeded in its dimensions the needs of the Office.

The contact details are:

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

Telephone: (02) 9228 5260

E-mail: oiicac_executive@oiicac.nsw.gov.au

3.2 STAFF

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

3.3 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 2014 to 30 June 2015 shows a total expenditure of \$397,378. This compares with a total expenditure of \$316,480 in the prior year. The budget for 2015-2016 is \$412,205.

Inspector's remuneration: An annual retainer of \$10,000. (This is in addition to the annual retainer of \$10,000 received as Inspector of the Police Integrity Commission). A daily rate of \$1,800. (This is paid to cover the work done for both Offices- Inspector of ICAC and Inspector of PIC).

PART 4: LIAISON AND COMMUNICATION

4.1 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 was executed on the 29th of May 2015 with minor revisions to that which preceded it.

There have been no meetings between the Inspector and the Commissioner or any other ICAC executive or senior officer during the reporting period.

4.2 MEETINGS/CONFERENCES UNDERTAKEN BY THE INSPECTOR

Date	With Whom	Where	Purpose
2015 April 27	Blair Comley, Paul Miller and Will Atkins of DPC	DPC, 52 Martin place	High Court decision in Cunneen
April 29	Premier Mike Baird, Tom Payton, Policy Advisor	Premier's office	High Court decision in Cunneen
May 7	Robin Brett QC, Inspector of Independent Broad-Based Anti-Corruption Commission (Vic); The Hon Michael Murray AM QC, Parliamentary Inspector of Corruption and Crime Commission (WA), Paul Favell, Parliamentary Crime and Corruption Commissioner QLD)	Office of IBAC, Melbourne.	Inaugural Inspectors' meeting
June 26	The Hon Murray Gleeson AC, Bruce McClintock SC	The Hon Murray Gleeson's office	The Independent Panel Review of the Jurisdiction of the ICAC.

4.3 The meeting on the 7th of May referred to above was organised on the initiative of the Hon Michael Murray AM QC from Western Australia. The one day event permitted each Inspector to outline in brief his role and functions and for the group to discuss matters of policy and practice either idiosyncratic or in common. One matter of special significance was the *Commonwealth Telecommunications (Interception and Access) Act 1979* and the impediments that exist to the performance by the respective Inspectors by the current structure of that legislation in terms of access to intercepted material. That subject will be discussed in due course in the Section 77A Report I propose to furnish to Parliament in relation to Operation "Hale". I volunteered to host in Sydney in 2016 the next meeting of Inspectors. The initiative of the Hon Michael Murray AM QC is to be recognised and complimented.

4.4 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 is regularly updated and contains all relevant statutory and other information for members of the public.

PART 5: THE INSPECTOR'S STATUTORY FUNCTIONS

5.1 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.

5.2 AUDITS CONDUCTED IN PERIOD 1 JULY 2014 TO 30 JUNE 2015

I did not conduct any formal audits. I did, however, commence an audit into the investigation in "Operation Hale", which subsequently became an investigation. I will report on the outcome of this audit in the next reporting period, but by a separate Report under Section 77A.

5.3 COMPLAINTS [Sections 57(1)(b) and 57(1)(d)]

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.

5.4 PERIOD 1 JULY 2014 TO 30 JUNE 2015

There have been 60 new complaints received in the reporting period. This compares with 27 in the last reporting period. 34 of the complaints were received after 15 April 2015 (the date of the High Court decision in *Cunneen*). 13 of the complaints relate to Operation Spicer; 8 to Operation Jasper; 5 to Operation Credo; 2 to Operation Acacia and 5 to Operation Hale.

Of the 60 new complaints received in the reporting period, 22 were closed and 38 have been carried over to the 2014/2015 reporting period.

Of the 22 closed:

- 11 were complaints about ICAC deciding in each instance not to investigate the complaint. I was satisfied that in all 11 cases that the ICAC officers involved in the assessment of the allegations considered all the material provided by the particular complainant and that after proper consideration of its powers and taking into account the law with respect to what amounts to corrupt conduct, it formed the view that there were insufficient details to support the allegations of corrupt conduct. I was also satisfied that ICAC made its determination within a reasonable period of time. I noted that whilst the complainants may feel aggrieved by the
- ICAC's decision not to investigate or that the complainant does not agree with it, is not sufficient for me to make an adverse recommendation or report about the ICAC or its officers.
- 4 did not invoke my jurisdiction.
- 4 invoked my jurisdiction but did not result in my making any reports or recommendations.
- 3 invoked my jurisdiction but after making relevant inquiries with ICAC, I took no further action.

5.5 In relation to Operations Jasper and Acacia many of the complaining parties have gone to the press and have gone to law. The latter course of action has operated as a brake, as it were, on my assessment of the communications in relation to those ICAC operations. I add that such are the nature and dimensions and thoroughness of the communications made to me in connection with what I in shorthand will refer to the “coal industry” or “mining matters”, it would require the expenditure of time and increase in resources almost to the point where the Inspector of ICAC would have to mirror the resources and time spent by that body in coming to its findings in those matters. This would reflect in my opinion an unsatisfactory lack of proportionality.

In relations to Operations Spicer and Credo, in addition to communications reflecting the themes to which I have referred above, are communications connected with the fact that the ICAC has produced no reports and no findings in relation to the subject matter of its investigations. From the information contained on the ICAC’s own website it is apparent that such are the complexities of the matters of Spicer and Credo that there have been variations in the “scope and purpose” in each during 2014 and ICAC has come to the view that there being common elements to both Operations Credo and Spicer, the evidence taken in each operation will be taken as evidence in both. As at the time of the delivery of this annual report I do not know if and when there will be reports in the publication of any findings by the ICAC in relation to Operations Spicer and Credo.

5.6 In addition to the above complaints, in late June of this year, this Inspectorate received a phone call from Geoffrey Watson SC, who expressed concern and distress about certain media reporting about him whilst appearing as Counsel Assisting for ICAC. It was explained to Mr Watson that I did not have the jurisdiction to investigate journalists and that he would need to pursue other avenues in relation to what he said was false and hurtful reporting about himself and others. The press report was concerned with what was alleged to have been an incident in Mr Watson’s chambers involving a witness and some wine. Mr Watson appropriately accepted that this Inspectorate provided no information to anyone in relation to that press coverage.

5.7 Matters carried over from the 2013-2014 reporting period: There were 8 matters carried over from the previous reporting period. Those matters were finalised and closed in the reporting period. Of the 8 closed, 6 were not upheld. The remaining 2 were referred back to ICAC. One was a complaint that ICAC had not notified the complainant of the outcome of his public interest disclosure. ICAC acknowledged that it was an oversight and wrote to the complainant, thus resolving the matter. The other matter was a complaint by a third party about an ICAC officer and concerns that that officer had shown partiality in his dealings in a matter. ICAC investigated and found no misconduct on the part of the ICAC officer involved. I was satisfied with the outcome of ICAC's investigation.

5.8 During the reporting period I received articulate and genuinely held grievances in communications in relation to Operation Cavill concerning matters to do with Ryde Council in relation to which, at the time of this report, there is an outstanding prosecution, but not against the complainant. No finding of corruption was made against the complainant and the matter appeared to have "boiled down" to a failure to pay an invoice which in some way could have offended against the *Election Funding, Expenditure and Disclosure Act 1981 (EFED Act)*. The complainant forthwith paid his share of the contribution towards advertising which was the subject of consideration in an amount of \$697.40. Whilst I accept this complainant's subjective perceptions of flaws in the conduct of ICAC of the kind that were being the subject of countless complaints in the nature of those referred to on several occasions above, I was unable to do more than offer sympathy. In addition to there being no finding of corruption, no proceedings are to be taken against the complainant under the *EFED Act* on the advice of the Electoral Commission.

Another matter of a similar kind involved Operation Tilga in which again complaints of the usual kind were received; there was a finding of corruption, however the ICAC accepted the advice of the DPP that there was insufficient evidence to proceed to prosecution.

In Operation Acacia adverse findings of corrupt behaviour were made in relation to Mr A Poole. The Report in Operation Acacia was delivered in August 2013. Recommendations were made that the advice of the DPP be sought in relation to a State matter (and in relation to a Commonwealth matter). The website of the ICAC indicates that on the 17th of July 2015 *“The DPP advised that there was insufficient evidence to proceed with charges against Mr Poole. The DPP’s advice has been accepted by the Commission.”* In the meantime Mr Poole had instituted proceedings against Chubb Insurance Company of Australia Limited seeking to be indemnified under an insurance policy in relation to costs incurred by him in the course of the inquiry conducted by the ICAC. On the 19th of December 2014 in *Poole v Chubb Insurance Company of Australia Limited* [2014] NSW SC 1832, Stevenson J found in favour of Mr Poole. On the evidence on the issues before him, he came to conclusions contrary in nature to those to which the ICAC had come in Operation Acacia. This outcome represents the dysfunctionality and contradictions that exist in the environment of corruption and investigation in this State.

I mention these matters as they point to a fact that it is not well known publicly but does in fact represent the position of the ICAC namely:

“The Commission’s activities are focused on exposing corruption and doing something by way of addressing policies and procedures that prevent its furtherance in the public sector. We do not consider the number of successful prosecutions that arise from enquiries as any relevant indicator of our success. However, we accept that there is a public interest in it”,

the Commissioner in her evidence for the Parliamentary Committee on the Independent Commission Against Corruption, Friday 7 August 2015, p22.

- 5.9 In addition there were 2 matters referred from ICAC involving an internal ICAC complaint in relation to a serving ICAC officer, alleging misconduct. The ICAC conducted its own investigation in both matters and I was informed of the

outcome. I concurred with the action taken by the ICAC. The ICAC's position was articulated at some length in a submission made to the Independent Panel: see para 12.2.6 at pp 75-77 of the Report of the Independent Panel of the 30th of July 2015. I am of the opinion that any debate concerning the *Courts and Other Justice Portfolio Legislation Amendment Bill 2015* and the amendments proposed to the *Criminal Procedure Act 1986* should have some regard to the statement on the part of the ICAC.

PART 6: OUTCOME OF INQUIRY INTO COMPREHENSIVE REVISION OF THE TIA ACT

In my Annual Report for the year ended 30 June 2014, I made reference to submissions I made as both Inspector of PIC and Inspector of ICAC in the "*Inquiry Into Comprehensive Revision of the Telecommunications (Interception and Access) Act 1979*", of which the terms of reference were:

- 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 Report was published in May 2015. I note Recommendation 18 which states:

The Committee recommends that the Telecommunications (Interception and Access) Act 1979 (TIA Act) be comprehensively revised with the objective of designing an interception regime which is underpinned by the following:

- *clear protection for the privacy of communications;*

- *provisions which are technology neutral;*
- *maintenance of investigative capabilities, supported by provisions for appropriate use of intercepted information for lawful purposes; clearly articulated and enforceable industry obligations; and*
- *robust oversight and accountability which supports administrative efficiency.*

The Committee further recommends that the revision of the TIA Act be undertaken in consultation with interested stakeholders, including privacy advocates and practitioners, oversight bodies, telecommunications providers, law enforcement and security agencies.”

To date, I have not been consulted about any proposed amendments to the TIA Act and am unaware as to if or when the recommendations are to be implemented.

PART 7: TWO EXTRAORDINARY EVENTS

7.1 OPERATION “HALE”

Operation “Hale” was concerned with the alleged conduct of a Deputy Senior Crown Prosecutor Margaret Cunneen SC, her son and his partner arising from a motor vehicle accident that occurred on the 31st of May 2014. The matter came into the hands of the ICAC and had a tumultuous history culminating in a decision of the High Court of Australia in favour of Ms Cunneen and consequential legislation in this State. Operation Hale will be the subject of a separate report under Section 77A of the *ICAC Act*.

7.2 A MATTER OF LEPIDOPTERY

On the 21st of April 2015 a piece by Mark Coulton appeared in *The Australian* with the headline “It can be a lot of fun: Latham”. The article is attached.

On the 5th of June 2015 I wrote to the present Commissioner in the following terms:

"Dear Commissioner,

Re: Your speech to the NSW Bar Association PDC 24 February 2014

As you no doubt know, on 21 April I copied to Nicole Thomas an email I sent to Jane Needham SC in her capacity as NSW Bar Association President. My inquiry to Ms Needham was whether the Bar Association could provide me with a copy of the "video" of the occasion. I had read the piece by Mark Coulton in The Australian on 1st April: "ICAC 'can be a lot of fun': commissioner Megan Latham". The Bar Association accommodated my request.

There have been further references to your speech since then.

Presently I am assessing a substantial number of communications from many people in relation to operations Spicer, Credo and Jasper.

One person, a Mr Rob Ewin, has written in the following terms:

"A Youtube clip (circulated on social media) of the ICAC Commissioner addressing a business function and making flippant remarks in respect to her responsibility is of major concern to me, especially in relation to her acumen, intentions and professionalism.

In this clip the Commissioner quips that its fun being able to work in a jurisdiction without the requirement of producing evidence. Later in the clip, the Commissioner comments "its like plucking wings off butterflies". Such comments, even if made in jest or on the assumption it was a closed meeting, call into question the integrity and motive of the Commissioner, appear to be consistent with the flippant and arrogant behaviour of the ICAC representatives involved with Operation Spicer."

He communicated as a concerned member of the public.

A Mr John Atkinson has written in a letter to the Premier, a copy of which he provided to me:

"Indeed in the words of the current Commissioner, the Commission gets a "free kick" and dealing with witnesses is like "pulling wings of a butterfly". The presumption of innocence is effectively lost in the thrill of the hunt and in the unrelenting pursuit of media publicity to destroy reputations. My wings have definitely been pulled,

A Mr Bart Bassett has written:

"I was also disgusted to view the footage of Commissioner Latham bragging at a dinner where she spoke about how it was 'fun' to work for her organisation because there were no constraints regarding rules of evidence and the ICAC team know where they are going in a Inquiry and it is like 'pulling wings off butterflies' "

The solicitors for Mr Christopher Hartcher have written:

"We are instructed to enclose a compact disk containing a video recording of comments made my Commissioner Latham on 24 February 2014. Mr Hartcher is concerned that

the comments made by Commissioner Latham are demonstrative of an attitude that denies both natural justice and procedural fairness. Furthermore, that those comments are consistent with Mr Hartcher's concern that the ICAC was not interested in ascertaining the truth, but rather was prosecuting a pre-determined case in Operations Credo and Spicer."

The solicitors for Messrs McGuigan and Poole, Cascade Coal Pty Ltd, Mt Penny Coal Pty Ltd and Glendon Brook Coal Pty Ltd have written:

"The following statements attributed to Commissioner Latham are instructive on the prevailing ICAC culture. Last year it is reported that she made these statements at a NSW Bar Association seminar for young lawyers:

- 'If any of you get tired of adversarial litigation, inquisitorial litigation is fantastic.'*
- 'You are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go and it's a lot of fun.'*
- She declared that the questioning of a witness in an ICAC hearing is 'like pulling wings off a butterfly.'*

I write to invite you to provide me with any statement you may wish to make on this discrete matter.

I will be obliged to note in my Annual Report the fact of your speech, the publicity attending the revelation of it, and the potential for adverse report and recommendation under section 57B(1)(b),(c) and (d) and section 57B(4) (b) and (c) of the ICAC Act at least.

Yours sincerely..."

On the 10th of June I received a reply from the Commissioner in the following terms:

"Dear Inspector,

Re: NSW Bar Association Workshop 24 February 2014

I refer to your letter of 5 June.

I was invited to attend the Bar Association Workshop on cross-examination for barristers of less than five years standing in late 2013, before I was appointed as Commissioner. I had previously taken part in such workshops as a judge of the Supreme Court.

As was the case on those previous occasions, the workshop was to be recorded so that those barristers who were unable to attend could view the workshop at a later date. The recording can only be viewed by a member of the Bar Association logging in and providing a password, after which the recording is streamed to a screen. The recording cannot be downloaded for repeated viewing. Obviously, the aim of these restrictions is to quarantine the content to counsel for Continuing Legal Education purposes.

The workshop spent the better part of an hour discussing the limits on cross examination in an adversarial system, confined by the nature of the issues in dispute, the instructions of the client and the Evidence Act 1995. My closing remarks did no more than highlight

the distinction between the adversarial system and an inquisitorial one, from the perspective of counsel. I did not refer at all to the Commission. The comments were applicable to a number of inquisitorial bodies, such as Royal Commissions, the NSW Crime Commission and the Police Integrity Commission. I was then asked a specific question from the audience which invited an explanation of the role of counsel assisting in any ICAC inquiry. I explained that counsel assisting operates as part of an investigative team, which acquires a significant body of information for the purposes of a public inquiry and provides a rich vein of material for counsel assisting.

*Given the context of my remarks and the fact that they were not made in public, they were not made in the course of carrying out any function under the ICAC Act and they made no reference to any current inquiry, I require particulars of any alleged "abuse of power, impropriety [or] misconduct [or] maladministration". I also require notice of any adverse comment you propose to make so that I may respond in advance of publication. Until that is provided, I do not intend to make any further statement.
Yours sincerely,"*

There has been no further communication between myself and the Commissioner on this subject.

On the 7th of August 2015 the Commissioner gave evidence to the Committee on the Independent Commission Against Corruption of the New South Wales Parliament (see parliament.nsw.gov.au/committees) and what she said on this topic is found particularly at pp 16, 17 & 18.

The relevant part of the Commissioner's address to the Workshop convened by the New South Wales Bar Association is as follows:

*"On a concluding note, can I say if any of you get tired of adversarial litigation, inquisitorial litigation is fantastic. You are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go, and it's a lot of fun.
Thank you.*

(Applause) MR SCULLY: We invite questions. I might start the ball rolling with a question for the Commissioner. I was going to ask, Grant was talking about the Christopher Columbus method of cross-examination. Is there more room for Christopher Columbus in the ICAC context, or at least mini adventures off on tangents?

JUSTICE LATHAM: Well, you actually know where you're heading. The thing about the role of counsel assisting in ICAC is that you're actually part of a team

and there's been a long inquiry and you've actually worked out what you want to get out of the witness. So it's basically by the time you get there it's just, you know, like pulling wings off butterflies.

It's much more difficult for counsel who are representing the relevant witness and there is a very, very limited role for those counsel in terms of their representation of the witnesses. So it's actually not Christopher Columbus; it's really much more not focused but you know exactly what you expect that witness to say and very often they have already given evidence in a compulsory examination."

I accept that the invitation to the Commissioner was addressed to her well before the event which was held at 5.15 pm on the 25th of February 2014 which in fact was after the Commissioner's appointment to her present Office. It is clear from the transcript that the subject was initiated by the Commissioner as a "concluding note" to what she had been saying on the subject of cross-examination generally and that thereafter questions were provoked as to the role of counsel assisting and the like. What is obvious is that at the time of the event that no one would have anticipated its subsequent exposure over a year later.

Exposed however it was and the communications I have received referred to above indicate the impact that exposure had.

My concern was not that the Commissioner spoke those words. At the time she was no doubt quite conscious of her new role as the Commissioner of the ICAC. She chose to say what she said and at that point of time the matter then rested. The matter became public. It became public a year later after the Commissioner had been engaged for that period of time in her new Office.

It is a regrettable fact of life that having become public, it will remain public and no doubt will be agitated and referred to again and again by persons who wish to express an adverse view of the ICAC and the way it operates or has operated. At this point of time in 2015 the matter should rest. It would be churlish of me to say anything further.

PART 8: CONCLUSION

In my conclusion to the Annual Report for the Year 2013-2014 I stated that that year had been an “aberration” by reason of matters peculiar to it. The Year 2014-2015 has in my respectful view been an “aberration” as well. Shortly stated the reason for that description is the consequences of the decision made to challenge the jurisdiction of the ICAC during the course of its inquiry in Operation Hale and all that has flowed from it in terms of litigation, legislation and an unprecedented volume of communications to this Inspectorate.

I decline to make any prognostication as to the Year 2015-2016.

There remains outstanding the report I am to furnish in relation to Operation Hale and a further report I have to furnish to the Premier flowing on from the report of the Independent Panel.

A handwritten signature in black ink, appearing to read "David Levine". The signature is fluid and cursive, with a large initial 'D'.

The Hon David Levine AO RFD QC

INSPECTOR ICAC

October 2015

It can be a lot of fun: Latham

MARK COULTAN

NSW POLITICAL
CORRESPONDENT

The Independent Commission Against Corruption Inspector, David Levine, has said that comments by commissioner Megan Latham describing cross-examination in ICAC as a "free kick" and like "pulling wings off butterflies" underlines the body's extensive powers.

In a video circulated to media last week, Ms Latham addresses a NSW Bar Association seminar on cross examination, last year, urging those present that if they got sick of normal court practice they should give ICAC a try.

"On a concluding note, can I say that if any of you get tired of adversarial litigation, inquisitorial litigation is fantastic," Ms Latham says.

"You are not confined by the rules of evidence. You have a free kick. You can go anywhere you want to go and it's a lot of fun." Because witnesses had already been questioned in private, she said, the role of counsel assisting was like "pulling wings off butterflies". ICAC does not have to follow the rules of evidence of courts, can compel witnesses to answer questions and does not recognise legal professional privilege.

Because of these powers, witnesses usually take an objection to giving evidence, which means their evidence cannot be used against them in any prosecution that might follow.

A parliamentary committee examined the difficulty of obtaining prosecutions of people who were found corrupt by ICAC, but

its work was cut short by the state election.

ICAC usually holds private hearings before starting a public inquiry.

Ms Latham said this process meant that when counsel assisting questioned witnesses in public he or she knew what would be the evidence.

Ms Latham contrasted this process with normal court cases. By that stage, counsel assisting knew what they were trying to get to, and thus it was like "pulling wings off butterflies".

The role of counsel defending those under investigation was much more limited, she said.

ICAC watchdog David Levine said nothing that the commissioner had said was untrue and underlined that ICAC had extraordinary, coercive powers.