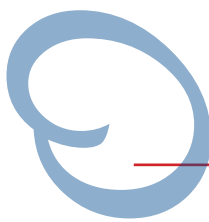




New South Wales



Office of the Inspector

**of the Independent Commission
Against Corruption**

**Report of an audit of the
ICAC's compliance
with section 12A
of the ICAC Act 1988**

28 June 2007

Mr Peter Primrose MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Richard Torbay MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker,

In accordance with section 77A of the *Independent Commission Against Corruption Act 1988* ("the Act"), I, as the Inspector of the Independent Commission Against Corruption ("the ICAC"), hereby furnish to each of you for presentation to the Parliament the report on an audit undertaken by the Inspector on the ICAC's compliance with s. 12A of the Act.

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

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

Yours sincerely,



Graham Kelly
Inspector

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1. INTRODUCTION

Section 57B (1) (a) of the Independent Commission Against Corruption Act 1988 (“the ICAC Act” or “the Act”) authorises the Inspector of the Independent Commission Against Corruption (“the Inspector” and “the Commission” or “the ICAC”) to “audit the operations of the Commission for the purpose of monitoring compliance with the law of the State.”

This is a report of an audit of the Commission’s compliance with s. 12A of the Act.

2. SECTION 12A OF THE ACT

Section 12A of the Act provides:

Serious and systemic corrupt conduct

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

The term ‘serious and systemic corrupt conduct’ is capable of supporting more than one interpretation. It could be construed as requiring the Commission to direct its attention to corrupt conduct that is both serious and systemic; or it could be construed as establishing two priorities for the Commission – serious corruption and systemic corruption – with corrupt conduct that is either serious or systemic attracting the application of s. 12A.

Whilst on either construction the Commission would no doubt seek to give the highest priority to corrupt conduct that was both serious and systemic (and, therefore, perhaps the alternative constructions would not produce significantly different results in practice), the latter construction would

require the Commission to direct its attention to a wider range of matters than the former construction.

The Commission has advised the Inspector in writing that it prefers the latter construction. Although the Inspector expresses no view on the correctness of that construction this audit has proceeded on the basis of that construction: in other words, the Commission's compliance with s. 12A has been, on this occasion, audited against the Commission's preferred construction of the section.

3. THE COMMISSION'S ASSESSMENT PROCESS

The Commission has an Assessments Section, staffed by Assessment Officers. The Assessments Section is responsible for reviewing complaints received by the Commission and for preparing "assessments" that are used to assist the Commission in deciding which matters it should investigate. Section 12A is of particular importance to the work of the Assessments Section.

When the Commission receives an allegation of corrupt conduct, the allegations, and any information or evidence received with it, are referred to an Assessment Officer. The Assessment Officer examines the allegation and supporting material (if any), and may sometimes make some additional inquiries. An "Assessment," in the form of a report, is then prepared.

The Assessment report is then reviewed by an Assessment Panel constituted by all members of the Commission's Executive team, except the Commissioner and the Executive Director, Corporate Services. The Assessment Panel is therefore constituted by the following persons: the Deputy Commissioner, the Executive Director, Legal, the Executive Director, Strategic Operations Division and the Executive Director, Corruption Prevention, Education and Research Division. Prior to June 2006,

Assessment reports, after being reviewed by the Assessment Panel, were submitted to the Operations Review Committee (“the ORC”) for its determination. Since the abolition of the ORC, in June 2006, Assessment reports are submitted only to the Assessment Panel for review.

Assessment Panel members can endorse the recommendation made in an Assessment report or can recommend an alternative course of action. The Commission has advised that for a recommendation to be accepted it must be endorsed by at least two panel members. Any disagreement between panel members is resolved by convening a meeting of the Assessment Panel. If consensus cannot be reached through such a meeting, the matter is referred to the Commissioner for resolution.

Decisions of the Assessment Panel and any comments made by it are recorded in the ICAC’s complaints database. The Manager, Assessments, conveys the Assessment Panel’s decisions and any comments to Assessment Officers, who are then required to retain a copy of the Assessment Panel’s decisions and comments on the file.

4. THE AUDIT PLAN AND PROCESS

On 5 May 2006 the Inspector wrote to the Commissioner of the Commission (“the Commissioner”) enclosing the draft terms of an audit plan. The Inspector invited the Commissioner to comment on the draft terms prior to the plan being finalised.

On 10 May 2006 the Commissioner responded in writing to the Inspector’s letter. The Commissioner advised that he noted the objectives of the audit and the draft terms but that the Commission did not wish to make any comment on the draft terms.

The final terms of the audit plan were:

4.1 Objective

The objective of the audit is to assess whether the ICAC is complying with its obligations under section 12A of the Independent Commission Against Corruption Act (“the ICAC Act”) in relation to the assessment of complaints received by the ICAC.

Section 12A of the ICAC Act states:

In exercising its functions, the Commission is, as far as practicable, to divert its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role of other public authorities and public officials have in the prevention of corrupt conduct.

4.2 Outcome

To have an informed view that the ICAC is either complying or not complying with its obligations under section 12A of the ICAC Act, in relation to the assessment of complaints received by the ICAC.

4.3 Scope

The scope of this project includes a review of the ICAC’s handling of a sample of complaints received since 1 July 2005 and its decisions about whether to commence an investigation. This includes reviewing:

- Decisions to commence an investigation under the Act;
- The classification of complaints as Information, Outside Jurisdiction, and Intelligence;
- Preliminary inquiries;
- The handling of matters under s. 53 of the Act;
- Reports provided to the Assessment Panel and to the Operations Review Committee;
- Decisions of the Assessment Panel;
- Decisions of the Operations Review Committee;
- The actions taken by the Corruption Prevention, Education and Research Division; and
- The ICAC’s policies, practices and procedures for the identification of complaints requiring investigation under the ICAC Act.

4.4 Methodology

In consultation with the ICAC and its officers, the Office of the Inspector will identify a list of files to be audited. The ICAC will produce the relevant files to the Office of the Inspector.

Following the review of the files the Office of the Inspector may request further information from the ICAC and its officers about its handling of particular files. The Inspector may request information in writing or orally at meetings with relevant ICAC officers.

The Inspector will provide a confidential preliminary report to the Commission at the conclusion of the audit including draft findings and recommendations.

The Inspector will invite and consider comments and submissions from the ICAC before completing a final report.

On September 2006, this Office forwarded to the Commission a draft document on the result of the audit and invited a response from the Commission. The Commission responded in a letter dated 23 November 2006 and, after the Inspector wrote to the Commissioner on 4 December 2006, in a further letter dated 12 December 2006. This report has been finalised taking into account those responses.

5. THE SAMPLE OF COMPLAINTS AUDITED

A sample of 215 complaints was audited. The sample comprised approximately 12% of the 1,783 complaints received and assessed by the Commission between 1 July 2005 and 30 April 2006. The 215 complaints audited were chosen at random from a larger group of complaints that the Commission had assessed as not warranting investigation.

6. DOCUMENTS AND INFORMATION PROVIDED

The Commission provided the Inspector with its files relating to the majority of the 215 complaints. In a small number of cases the Commission had not created a paper file. In these instances electronic records concerning the complaint, as stored on the Commission's computer database system, were examined.

Ms Maria Plytarias, the then Manager of the Assessments Section, provided requested information and advice about the Commission's policies and procedures. Also provided were a copy of the Assessment Section's "Procedures Manual for the Management of Enquiry Files"— which contained a document titled "Assessment Procedures Manual (Updated 1 August 2005)" ("the Manual") — and a copy of an earlier version of the Manual, which had been updated to 3 November 2004.

The Manual is used to guide Assessment Officers in their work. The Manual appears to be the principal document containing relevant policies and procedures for the assessment process. Assessment Officers also use a Complaint Assessment Checklist to determine whether or not complaints are to be investigated. The Checklist appears to support the objectives of s. 12A by identifying relevant factors such as ICAC resource allocation and skills required in pursuing the matter (weighed up against the value in pursuing).

7. THE COMMISSION'S CLASSIFICATION SYSTEM

The Manual sets out a system for the classification of complaints. The categories are:

- Section 10 Complaints
- Protected Disclosures
- Section 11 Reports
- Information

- Outside Jurisdiction
- Inquiry
- Intelligence Reports
- Dissemination
- Own Initiative (Section 20 matters)
- Section 13 Referral

The 215 complaints that were audited by this Office were classified by the Commission as follows:

- 20 (9.3%) as Outside Jurisdiction
- 20 (9.3%) as Information
- 75 (34.9%) as Section 10
- 50 (23.3%) as a Protected Disclosure
- 50 (23.3%) as Section 11

8. THE RESULTS OF THE AUDIT

In respect of 98% of the complaints audited by this Office, the Commission's assessment process complied with the objectives of s. 12A of the Act (as that section is construed by the Commission) in that the complaints that were assessed as not warranting investigation appeared to raise no issues of corrupt conduct that was either serious or systemic.

However, four of the complaints audited exposed some issues with respect to achieving the objectives of s. 12A. These four cases will now be discussed in more detail. It is fair to emphasise that the four cases do not involve substantial injustice to individuals nor amount to any major failure by the ICAC in the pursuant of its mandated functions.

8.1 COMMISSION FILE E05/2042

This is a complaint which, if substantiated, would constitute serious corrupt conduct pursuant to s. 12A. On 1 November 2005 an anonymous complainant, who advised he was an ex-police officer, telephoned the Commission and alleged that a developer/hotelier (whom the complainant named) was dealing in drugs and providing free lunches to the mayor of the

local government council (which the complainant also named). The complainant alleged that the developer offered bribes to council officers for favourable treatment by them regarding decisions about his hotel. At the time of lodging the complaint the complainant stated that he would provide the Commission with further information. The complainant, however, did not contact the Commission again.

Perhaps without the knowledge of the complainant, the Commission obtained a mobile telephone number on which the complainant might have been contacted, but the Commission did not seek to contact the complainant again.

The Commission's report to the ORC, presented at the ORC's meeting on 3 February 2006, stated:

As the complainant did not wish to disclose his identity the ICAC cannot make any further clarifying enquiries with him. As such, the ICAC cannot fully address this matter. It would appear warranted, however, to refer this matter to council for its information.

The report did not reveal that the Commission had on its file a telephone number through which the complainant might have been contacted or traced.

On 15 December 2005 the Commission decided not to take any further action on the basis that it had received no further information from the complainant. The Commission, pursuant to s. 19 of the Act, subsequently referred the complaint to the General Manager of the relevant council, describing the referral as being "for information".

There are two issues emerging from this matter:

- i. The Commission's ORC report gave the impression that it could not contact the complainant when the true position was that it was in

possession of a telephone number possibly connected to the complainant. The Commission had decided not to use or investigate that number. In this respect the material placed before the ORC was misleading in a material particular.

- ii. It is not clear on what basis the Commission referred this matter “for information” pursuant to s. 19. The Commission’s practice of referring matters pursuant to s. 19 without providing any context or information to the authority or officer to whom the matter is being referred is problematic. It would be more consistent with the objectives of s. 12A if the Commission provided the context of a referral, for example, explaining why a matter was referred, why the Commission did not act in a matter itself and what, if any, inquiries it made regarding the veracity of the allegations. Such information would assist the authority or the official to whom a matter has been referred to make an informed decision on whether or not to investigate.

8.2 COMMISSION FILE E05/2063

This is a complaint in which, if substantiated, would constitute serious corrupt conduct pursuant to s. 12A. In this matter the complainant, who was an employee of a public utility corporation, alleged that a named senior officer of the corporation improperly used his position:

- to recruit members of his family to positions within the corporation;
- to pay hush money to a number of senior managers whom he dismissed; and
- to claim \$85,000 as reimbursement of stamp duties paid by him to relocate his home in order to take up the position when in actual fact he did not change his principal place of residence.

The Commission’s file on this matter revealed that the Assessments Section had made some preliminary inquiries. Those preliminary inquiries showed that three earlier complaints had been made to the Commission

about different alleged conduct of the same senior officer. Like the complaint recorded on Commission file E05/2063, these three earlier complaints had been closed before the file was examined by this office.

In regards to this complaint the Commission's file showed that the Assessments Section had made inquiries of the corporation about policies which related to the matters being alleged, namely, policies concerning:

- the corporation's internal policy on recruitment, relocation and dismissal; and
- a request for a copy of the corporation's policy in relation to voluntary relocation.

However, the Commission did not make inquiries on issues of fact to see how the corporation's policies had been applied in this particular case. For example, such inquiries could have included:

- whether or not the senior officer in fact changed residence and was therefore entitled to claim relocation costs; and
- whether or not the senior officer had employed family members as alleged.

It is not clear why the Commission did not seek to ascertain whether or not there was any factual substance to the matters alleged. The allegations made by the complainant might have been able to be verified through relatively straightforward inquiries.

The Commission's report to the ORC, presented at the ORC's meeting on 3 February 2006, stated that the basis for not investigating further was that there was "limited information" provided and the information was insufficient to ascertain whether or not the allegations had any substance.

The Commission's letter to the complainant stated that:

In the absence of any information to suggest the involvement of corrupt conduct, the ICAC does not propose to make this matter the subject of a formal ICAC investigation.

Nonetheless pursuant to s. 19 of the Act the Commission referred the complaint to the Chairman of the Board of the corporation “for information.” About the time of the referring of the matter to the Chairman of the Board on 18 January 2006, a telephone conversation occurred between the Chairman and a Senior Assessment Officer of the Commission. The Case Note Report for this conversation shows that the Chairman queried what, if any, follow-up action should occur and whether or not the Chairman should or could discuss the complaint with the senior officer of the corporation against whom the allegations had been made. The Senior Assessments Officer indicated that the Commission did not require the Chairman to take any action in particular and that any discussion between the Chairman and the senior officer “was a matter for them.”

The conversation between the Commission officer and the Chairman may have been taken by the Chairman to suggest a lack of seriousness to the allegations. This risked a matter potentially involving serious corruption being ignored.

The Commission’s handling of this complaint was unreasonable in the following ways:

- not following up on straightforward inquiries despite there being sufficient information to do so; and
- citing to the ORC a lack of detail as a basis for not investigating complaints.

This last point was not only unreasonable, it was also somewhat misleading.

The Commission’s referral of the complaint to the named public utility would also have been more consistent with the objectives of s. 12A had it provided some context about the potential seriousness of the complaint if the allegations were found to be true.

8.3 COMMISSION FILE E06/0148

This is a complaint in which, if substantiated, would constitute serious corrupt conduct pursuant to s. 12A. This complaint alleged that a named Local Aboriginal Land Council had been involved in fraud and misappropriation.

The Commission's report to the ORC, presented at the ORC's meeting of 7 April 2006, gave the following reasons for not investigating this complaint:

The audit report has previously been provided (E05/1937) directly to the ICAC by 'Concerned Elders and Members of the [named] Local Aboriginal Land Council.' That matter was considered by the ICAC and it was determined that the allegations be referred to the New South Wales Aboriginal Land Council for appropriate action.

As the Minister for Aboriginal Affairs has the power to appoint an investigator to conduct an investigation, the Minister is the most appropriate person to deal with the issues raised in the Audit report. The matter will therefore be referred to the Minister for Aboriginal Affairs. No further action is warranted by the ICAC.

The matter was subsequently referred to the Minister for Aboriginal Affairs under s. 19 of the Act.

It appears that no consultation or discussion took place between the Commission and the Minister's office about how this complaint would be handled. Given the seriousness of the complaint it would appear to have been reasonable to expect that the Commission would consult with the Minister's office as to how the complaint would be handled. Some steps calculated to ensure that the allegations was dealt with by someone, and did not fall between the cracks, would have been appropriate.

The concerns about the Commission's handling of this complaint are therefore essentially concerns as stated earlier in this report about its

current practice of referring matters under s. 19 in a manner that is inconsistent with the objectives of s. 12A.

8.4 COMMISSION FILE E05/1431

The Commission's handling of this complaint undermined compliance with s. 12A to the extent that there may have been no consideration of appropriate public authorities such as the police to investigate as required under s. 12A of the ICAC Act.

This complaint was made by an anonymous person who was concerned that a named employee of a named statutory authority was stealing the statutory authority's supplies and equipment. The complainant also alleged that the named employee was re-selling stolen material to others.

The Commission's report to the ORC, presented at the ORC's meeting of 7 October 2005 stated:

The allegations, if substantiated, amount to corrupt conduct. However, as the matter is not one which could be classified as serious and systemic and as the [named statutory authority] has the capacity to properly investigate such matters, it is recommended that the ICAC not investigate the matter but refer it to the [named statutory authority] for its information.

No reasons were recorded for why the Commission did not consider referring this complaint to the police as an appropriate body to investigate the complaint. No consideration seems to have been given (or, at least recorded as having been given) to whether or not a simple referral of the matter to the statutory authority might prejudice a police investigation.

9. ANALYSIS AND CONCLUSIONS

In 98% of the files audited the ICAC assessment process complied with s. 12A of the ICAC Act in that complaints which did not concern serious or systemic corrupt conduct were not investigated. The ICAC did, however, mislead the ORC on one occasion, in a material particular. Greater care needs to be taken to avoid any misleading statements in Assessment reports in the future.

10. RECOMMENDATION

It is recommended that the ICAC develop a policy to ensure that appropriate information and context is provided to public agencies and officials where referrals are made under s. 19. For example such information could include:

- Any inquiries made by the ICAC;
- The reasons why the ICAC did not investigate; and
- The likelihood of serious and or systemic corrupt conduct existing if the allegations were substantiated.

This will enable agencies and officials to make an informed decision about whether or not to investigate a matter referred under s. 19.



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