



PARLIAMENT OF NEW SOUTH WALES

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**PROSECUTIONS ARISING FROM INDEPENDENT COMMISSION
AGAINST CORRUPTION INVESTIGATIONS**

DISCUSSION PAPER

NOVEMBER 2014

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Membership

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Terms of reference

That the Committee inquire into and report on matters relating to prosecutions arising from Independent Commission Against Corruption (ICAC) investigations, including:

- whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the ICAC;
- the effectiveness of relevant ICAC and Director of Public Prosecution processes and procedures, including alternative methods of brief preparation;
- adequacy of resourcing;
- whether there is a need to create new criminal offences that capture corrupt conduct;
- arrangements for the prosecution of corrupt conduct in other jurisdictions; and
- any other related matters.

Chair's foreword

The ICAC is a powerful and successful agency in the fight against the evil of corruption. Most of its recent inquiries have dominated the media and some of its persons of interest have become household names.

The current inquiry by the Committee was prompted by what were seen as inordinate delays between the time of reporting and the time of commencing prosecutions. The Committee is confident that both the ICAC and the DPP are working much more cooperatively under their current Memorandum of Understanding, but both agree there is room for improvement if the necessary resources are maintained.

With the current Parliament in its final days, the Committee has had inadequate time to finalise its inquiries, particularly into whether new offences should be enacted in addition to current corruption offences or as replacements for common law offences, which are often the subject of prosecutions arising out of ICAC inquiries.

It is hoped that this discussion paper will prompt further consideration of the offences listed in the Areas for further review, with a view to recommendations being made to Government in a future report.

The Committee is indebted to its staff for their assistance in this inquiry and preparing this discussion paper. I also wish to thank those agencies and individuals who made submissions, as well as the Committee members for their valuable contributions.

Greg Smith SC MP
Chair

Areas for further review– list of questions

QUESTION 1 - Should the common law offence of misconduct in public office be abrogated and replaced by a criminal offence under the *Crimes Act 1900*?

QUESTION 2 - Should the common law offence of bribery be abrogated and replaced by a criminal offence under the *Crimes Act 1900*, based on the Model Criminal Code?

QUESTION 3 - Should the common law offence of conspiracy to defraud a public official be abrogated and replaced by a criminal offence under the *Crimes Act 1900*?

QUESTION 4 - Should it be an offence under the *Crimes Act 1900* for public officials to have a private interest in government contracts?

QUESTION 5 - Should there be a reversal of the onus of proof for the offence of receiving corrupt commissions or rewards under section 249B of the *Crimes Act 1900*?

QUESTION 6 - Should witnesses who give evidence in prosecutions for the offence of receiving corrupt commissions or rewards under section 249B of the *Crimes Act 1900* be protected against self-incrimination?

QUESTION 7 - Should a protection be inserted in the *Independent Commission Against Corruption Act 1988* to provide that an individual voluntarily supplying information to the ICAC for the performance of its functions is not subject to any penalty for having breached an Act or rule of law?

QUESTION 8 - Should the ICAC be permitted to seek relief from the requirement under the *Criminal Procedure Act 1986* for statements to be in written form?

QUESTION 9 - Should transcripts of evidence given at ICAC public inquiries be admissible in local court proceedings?

QUESTION 10 - Should there be a requirement for individuals who the ICAC believes can give information relevant to an investigation or prosecution to give all reasonable assistance to the ICAC in connection with the investigation or prosecution?

Chapter One – Background

- 1.1 This discussion paper has been prepared as part of the Committee’s inquiry into prosecutions arising from Independent Commission Against Corruption (ICAC) investigations. In this paper, the Committee outlines key issues and possible reform options for further consideration.

ROLE OF THE DPP AND ICAC IN PROSECUTIONS

- 1.2 The ICAC is a fact-finding and investigative body, not a court or disciplinary tribunal. It does not conduct prosecutions or disciplinary proceedings arising from its investigations. It does however, have a role in prosecutions, in that it refers briefs of evidence to the DPP for consideration of prosecution action. A memorandum of understanding (MOU) between the ICAC and the DPP includes timeframes for the provision of information by ICAC and the provision of advice by the DPP.
- 1.3 The ICAC is required to include a statement in its investigation reports about whether, in relation to each 'affected' person, it is of the opinion that consideration should be given to obtaining the DPP's advice regarding the prosecution of the person for a specified criminal offence; taking disciplinary action against them for a specified disciplinary offence; or taking action against them as a public official on specified grounds, with a view to dismissing, dispensing with their services, or otherwise terminating their services.¹

PROSECUTION PROCESS

- 1.4 The ICAC is responsible for assembling admissible evidence as a part of its investigations into corrupt conduct. At the end of an investigation, ICAC includes in its investigation report a statement on whether consideration should be given to obtaining the DPP’s advice in relation to the prosecution of an ‘affected’ person for a specified offence. The DPP determines whether there is sufficient admissible evidence to prosecute the person. If a brief of evidence is considered insufficient, the DPP requests ICAC to provide more information. If the DPP determines that there is sufficient admissible evidence and that charges should be laid, the ICAC commences the prosecution. On the return date at court a DPP lawyer appears and replaces the Commission's title with the DPP’s and takes the proceedings over. In cases where the DPP determines not to proceed with a prosecution, the ICAC is advised and can request a review of the decision.

STRATEGIES TO IMPROVE THE PROSECUTION PROCESS

- 1.5 The ICAC has implemented a number of strategies to improve the prosecution process and reduce delays. These strategies are summarised below:
- Improved co-ordination and planning to ensure the timely preparation of briefs of evidence during investigations, rather than after an investigation has concluded. The ICAC sought to balance brief preparation with

¹ ICAC Act s74A(2)

investigative work by making the investigation case officer responsible for preparing material for the DPP, and removing them from other duties. More recently, the Deputy Director of the Investigation Division has taken on primary responsibility for brief preparation.

- Amendments to the MOU to clarify the evidence to be provided to the DPP and ensure that only relevant material is provided, and to set out a timetable for the ICAC and the DPP in their handling of briefs of evidence.
- Improved liaison between DPP lawyers and lawyers at the ICAC to resolve issues about briefs, and regular two monthly meetings between the Deputy Commissioner and the Managing Lawyer of the DPP group that is responsible for ICAC prosecutions. The ICAC now briefs the DPP's office on new matters before they are referred to assist with advance planning.
- The ICAC employed a former police officer to assemble briefs and assist investigators and lawyers in ensuring that briefs are better organised and comply with DPP requirements. A DPP lawyer was seconded to the ICAC to oversee the preparation of briefs, review brief preparation processes and train ICAC officers on evidentiary requirements for briefs.

1.6 Additional funding has enabled the ICAC to recruit extra staff, including investigators and a lawyer. The DPP has received additional funding to assist with prosecutions referred by the ICAC.

PROSECUTION OUTCOMES

1.7 The ICAC is required to include in its annual reports the extent to which its investigations have resulted in prosecutions or disciplinary action.² The ICAC has recently begun publishing regularly updated information on prosecution activity relating to ICAC investigations completed in the last five years, including the status of briefs with the DPP and prosecution outcomes for each matter.³ The Commissioner indicated that the ICAC was making information about prosecutions available in a more accessible form 'in order to deal with the public perception about ICAC-related prosecutions.'⁴

1.8 As at June 2014, there were 22 people before NSW courts as a result of referrals to the DPP from the ICAC. 32 people had pleaded guilty or been found guilty of charges arising from ICAC investigations. Of those, four were sentenced to full-time imprisonment, five were sentenced to imprisonment to be served by way of home detention, and eight to imprisonment with the sentence suspended on condition they enter into a good behaviour bond.⁵

² ICAC s76(2)(e)

³ ICAC, Prosecution briefs with the DPP and outcomes, <http://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>, viewed 27 August 2014

⁴ ICAC, Statement regarding the ICAC and prosecutions, Media release, 20 June 2014, <http://www.icac.nsw.gov.au/media-centre/media-releases/article/4606>, viewed 27 August 2014

⁵ ICAC, Statement regarding the ICAC and prosecutions, Media release, 20 June 2014, <http://www.icac.nsw.gov.au/media-centre/media-releases/article/4606>, viewed 28 August 2014

Chapter Two – Key issues and proposals for reform

GATHERING EVIDENCE FOR PROSECUTIONS AS A PRINCIPAL FUNCTION OF THE ICAC

The ICAC's current functions

- 2.1 The ICAC's principal functions are to investigate complaints of corrupt conduct; examine laws, practices and procedures to detect corrupt conduct and secure changes in work methods or procedures that may be conducive to corrupt conduct; advise and instruct public authorities and officials about changes in practices and procedures to reduce the likelihood of corrupt conduct; and educate the public and provide information about the detrimental effects of corrupt conduct and the importance of maintaining integrity in public administration.⁶
- 2.2 The ICAC's other functions include gathering and assembling, during or after the discontinuance or completion of its investigations, evidence that may be admissible in the prosecution of a person for a criminal offence in connection with corrupt conduct and furnishing such evidence to the DPP.⁷
- 2.3 In introducing the ICAC Bill in 1988, then Premier Nick Greiner made it clear that the ICAC would not prosecute matters:
- The proposed Independent Commission Against Corruption will not have power to conduct prosecutions for criminal offences or disciplinary offences, or to take action to dismiss public officials. Where the commission reaches the conclusion that corrupt conduct has occurred, it will forward its conclusion and evidence to the Director of Public Prosecutions, department head, a Minister or whoever is the appropriate person to consider action. In doing so the commission can make recommendations. The person to whom the matter is referred is not required to follow the recommendation. ...
- It is important to note that the ICAC will not be engaging in the prosecutorial role. The Director of Public Prosecutions will retain his independence in deciding whether a prosecution should be instituted.⁸

Misconceptions about ICAC's role

- 2.4 It was noted that there is a misconception about the ICAC's role in terms of prosecutions. The Inspector of the Crime Commission, the Hon Graham Barr QC observed that members of the public wrongly believe that ICAC proves the guilt of those that it investigates, and this perception needs to be addressed through education about the ICAC's and DPP's differing functions:

⁶ ICAC Act s13

⁷ ICAC Act s14(1)(a)

⁸ New South Wales, Legislative Assembly, *Debates*, 26 May 1988, pp677-678 (Nick Greiner, Premier)

... the public should be made to understand that the Commission is not a prosecutor and that it is the responsibility of the DPP to assess for itself the strength, which of course includes admissibility, of the evidence in deciding whether to prosecute and for what.⁹

- 2.5 Mr Andrew Patterson, a former chief investigator at the ICAC, agreed that public education would address public misunderstanding about the difference between corruption investigations and criminal investigations, and help the public to understand ‘why when a public official or politician is found by the ICAC to have acted corruptly, they are not automatically and immediately charged with a criminal offence as well.’¹⁰

ARGUMENTS AGAINST ALTERING THE ICAC’S FUNCTIONS

Contrary to the ICAC’s primary purpose

- 2.6 Former ICAC Commissioner, the Hon David Ipp AO QC, stated that ‘the original decision of Parliament to exclude the gathering and assembling of evidence as a principal function of ICAC was principled and wise’. Mr Ipp argued that requiring the ICAC to gather and assemble evidence would be ‘fundamentally inimical’ to the concept of ICAC, as the Commission is not a law enforcement agency that investigates crime, or a prosecuting authority.¹¹
- 2.7 Former ICAC Commissioner the Hon Jerrold Cripps QC similarly did not favour a change to the Commission’s functions, arguing that the ICAC ‘is not, nor was it ever intended to be, a criminal law enforcement agency (like the Police) and it is not, and should not be, permitted to prosecute people for criminal offences.’ Mr Cripps observed that turning the ICAC into a criminal law enforcement agency is not the solution to the problem of delays in prosecutions; instead the focus should be on ensuring that decisions about prosecutions are made soon after the ICAC has published its investigation report.¹²
- 2.8 The Hon Justice Peter Hall agreed that the ICAC’s current functions are appropriate, given that it is not a law enforcement body: ‘the Commission has not been established by the Act as a statutory investigative agency with the functions of a commission charged with criminal investigative functions...’¹³
- 2.9 Mr Bruce McClintock SC also argued that ICAC’s purpose is not and should not be to obtain criminal convictions. Convictions are an ‘incidental benefit’ of the Commission’s main purpose and rationale to investigate corruption and make findings about whether it has occurred:

Together with its corruption prevention and education functions, it should remain ICAC’s principal function to make and publicise findings about corruption in the public administration of New South Wales.¹⁴

⁹ Submission 5, Inspector of the Crime Commission, p3

¹⁰ Submission 15, Mr Andrew Patterson, pp2-3

¹¹ Submission 2, The Hon David Ipp AO QC, pp2-3

¹² Submission 12, The Hon Jerrold Cripps QC, p1

¹³ Submission 21, The Hon Justice Peter Hall, pp3-4

¹⁴ Submission 11, Mr Bruce McClintock SC, p2

- 2.10 The PIC commented that if a commission of inquiry like ICAC has the principal functions of investigating and preventing corrupt conduct, it is 'not practical or consistent with the exercise of those functions for the gathering and assembling of admissible evidence for the prosecution of a person for a criminal offence to also be a 'principal' function of the ICAC, as opposed to an 'other' function.'¹⁵
- 2.11 The DPP stated that royal commissions and anti-corruption bodies 'have a very particular primary role in our society, that is, to expose the truth'. Compelled evidence cannot be used in criminal prosecutions and in cases where there is no admissible evidence about a hidden crime 'the truth may be the only thing that can be brought to light.'¹⁶

Hindering the ICAC's investigative work

- 2.12 The PIC argued that a prosecutorial role is inimical to the investigative function of a body like the ICAC and the PIC, and would potentially impede investigations. Commissions of inquiry commence investigations without necessarily knowing whether an offence has been committed or where the investigation will lead. In the case of ICAC this occurs if corrupt conduct is suspected or alleged. Undertaking an investigation with an offence or prosecution in mind could limit the scope of the investigation, and the opportunity to reveal relevant evidence:

Because a commission of inquiry will usually not commence an investigation with a specific criminal offence in mind, and may never gather evidence of a standard necessary to prove the commission of a criminal offence, it would be contrary to the interests of the investigation for the agency to proceed from the outset with prosecution of a particular offence in mind. To do so would risk a narrowing of the lines of inquiry and the loss of opportunity to uncover evidence relevant to the purpose of the investigation. ...

A wide ranging inquiry may not only reveal additional lines of inquiry but may indeed lead to a result whereby an initial suspect or suspects are cleared of any wrongdoing and responsibility shifts to another party.¹⁷

- 2.13 The ICAC submitted that an emphasis on gathering evidence for prosecutions may impede its investigations. Requiring its staff to assess the admissibility of evidence could influence decisions on the direction of an investigation and limit the ICAC's ability to fully expose corruption:

It is imperative to the work of the Commission that lines of inquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis which required Commission staff to assess the potential admissibility of evidence might well influence a decision to follow a particular line of inquiry in circumstances where the resources of the Commission have to be allocated in accordance with its principal functions. Such a constraint could compromise the capacity of the Commission to fully expose corruption.¹⁸

¹⁵ Submission 14, Police Integrity Commission, pp7-8

¹⁶ Submission 4, Director of Public Prosecutions, p1

¹⁷ Submission 14, Police Integrity Commission, pp3-4

¹⁸ Submission 8, ICAC, pp3-4

- 2.14 Former Commissioner David Ipp agreed that an evidence gathering primary function would have a substantial impact on the Commission's ability to undertake investigative work in a timely way. He pointed out that ICAC would require additional staff, new premises and other resources to carry out this role.¹⁹
- 2.15 The Accountability Round Table²⁰ pointed to the fundamentally different roles currently undertaken by the ICAC and DPP and argued against changing the ICAC's role. The proposal would carry the risk of 'compromising, and limiting ICAC's role as objective investigator and the performance of it; and complicating that role by adding that extra task.'²¹
- 2.16 Mr Bruce McClintock argued that including a prosecutorial role as a major function of the ICAC would prejudice the Commission's investigative function, by 'forcing it to focus on the collection of admissible evidence rather than what it should be focussing on, that is, the collection of material that is sufficiently cogent to found a finding of corruption, whether or not it is admissible in a criminal trial.'²²
- 2.17 Mr Greg McCarry, former magistrate, observed that giving the ICAC an evidence gathering role would not remove delays in the commencement of prosecutions, and could in fact serve to delay prosecutions by adding to the ICAC's workload: 'imposing a duty on the Commission to gather admissible evidence may only serve to delay the Commission in the performance of its functions.'²³

Incompatibility of investigative function and prosecutorial role

- 2.18 Another argument against conferring a prosecutorial role on the ICAC centres on the distinction between proceedings of investigative bodies with coercive powers and judicial proceedings. The ICAC noted that:

The powers of the Commission to compel production of documents and the attendance of witnesses, the availability of covert forms of surveillance, the absence of any rules of evidence, and the abrogation of the right to silence and the right against self incrimination for the purposes of an inquiry under the Act are all hallmarks of an investigative body with coercive powers. There is a sharp divide which is recognised in theory and in practice between investigative proceedings and judicial proceedings. The powers of the Commission derive firmly from the former,

¹⁹ Submission 2, The Hon David Ipp AO QC, pp2-3

²⁰ The Accountability Round Table group include academics, lawyers, politicians, journalists and other individuals, concerned about the state of democracy and standards in government and parliament across Australia. Its current membership includes: Lyn Allison, Carmel Benjamin AM, The Hon Jim Carlton AO, The Hon Stephen Charles QC, The Hon Dr Ken Coghill, Barry Everingham, The Hon Alan Goldberg AO QC, Bruce Grant, Dr Genevieve Grant, The Hon David Harper AM QC, Prue Innes, The Hon Dr Barry Jones AC, Adjunct Professor Colleen Lewis, Anne Mancini, The Hon Dr Race Mathews, Professor Barbara Norman, Des Pearson AO, The Hon Kevin Rozzoli AM, Professor Charles Sampford, Angela Smith, The Hon Tim Smith QC, Dr Julia Thornton, Professor Emeritus David Yencken AO, Professor Spencer Zifcak.

²¹ Submission 20, Accountability Round Table, p2

²² Submission 11, Mr Bruce McClintock SC, p2

²³ Submission 1, Mr Greg McCarry, p3

whereas the rules of evidence and procedure that are critical to a fair trial are definitive of the latter.²⁴

- 2.19 According to the NSW Young Lawyers ‘there is substantial tension between the ICAC’s special powers to compel testimony and the standard of proof it requires for findings of corruption, and its potential responsibility if it is to do more preparatory work for prosecutions themselves.’²⁵
- 2.20 The NSW Bar Association stated that ‘there is no identifiable reason’ to make gathering evidence for prosecutions a principal function of the ICAC alongside its existing functions. The Association observed that ICAC should be able to carry out its functions without being subject to the limitations that operate in the criminal law jurisdiction:
- It is important to the protection and enforcement of the principles of an open democracy and to the promotion of the aim of the ICAC in preventing breaches of public trust in the administration of public office ... that the ICAC be enabled to carry out its functions from time to time without some of the rigours and restrictions required by principles that operate in the criminal law jurisdiction and to carry them out thoroughly and expeditiously.
- Obviously, issues such as the ICAC’s powers of compulsion, and any effect the exercise of those powers might have on the later admissibility of any evidence obtained through that process or through other investigative means, are important considerations to be taken into account.²⁶
- 2.21 Former Director of Public Prosecutions, Nicholas Cowdery AM QC, stressed the importance of prosecutorial independence and stated that ‘it is simply not possible for investigators and lawyers working in the ICAC to adopt independent views (in the proper sense of the word) about either the preparation or conduct of prosecutions of persons investigated.’ For this reason, these tasks should continue to be undertaken by an independent Director of Public Prosecutions, which has the specialty and expertise to conduct prosecutions.²⁷

Prosecutions are an insufficient measure of ICAC’s effectiveness

- 2.22 Former ICAC Inspector, Mr Harvey Cooper noted that prosecution is not the only sanction that can result from ICAC’s findings of corrupt conduct, which in themselves result in ‘public humiliation and shame’. The Australian Tax Office, the NSW Crime Commission, and the Australian Securities and Investments Commission have power to take action against wrongdoers, and ICAC can recommend disciplinary action against public officials who it finds have engaged in corrupt conduct.²⁸
- 2.23 The Hon Justice Peter Hall commented that it is erroneous to use the number and success of prosecutions as a measure of the ICAC’s performance. This error partly results from a mistaken perception that findings of corrupt conduct against a

²⁴ Submission 8, ICAC, p4

²⁵ Submission 18, NSW Young Lawyers, p4

²⁶ Submission 9, NSW Bar Association, pp1-2

²⁷ Submission 7, Mr Nicholas Cowdery AM QC, p1

²⁸ Submission 3, Mr Harvey Cooper AM, pp1-2

person are equivalent to a conclusion that the person should be prosecuted. In fact, the ICAC cannot express an opinion that a person is guilty of a criminal offence, nor can it recommend that a person be prosecuted for an offence.²⁹

2.24 The NSW Young Lawyers submitted that ‘convictions or prosecutions are a necessary but insufficient metric’ of the value and efficacy of ICAC’s work. They argued that the value of the ICAC’s prevention and education work is not adequately recognised by this measure. The ICAC’s role should not be solely to investigate matters before prosecution, as corruption findings are useful in measuring corrupt behaviour and alerting the public to corrupt conduct:

... a finding of corruption without any referral still has utility, both as a measure of the prevalence of potentially corrupt behaviour and as a means of alerting the public to the conduct in question, which may have specific implications, particularly in relation to persons who hold elected positions of office.³⁰

2.25 The Young Lawyers emphasised the importance of public confidence through transparency and adequate scrutiny of government processes. Limiting the ICAC’s powers, or giving it greater responsibility for providing evidence or conducting prosecutions, may result in the ICAC ‘playing a less important role in assuring this transparency, and in helping prevent corruption.’³¹

2.26 The Australian Commission for Law Enforcement Integrity also observed that prosecutions in isolation are not a useful measure of an anti-corruption body’s effectiveness, but form part of a suite of measures to deter corruption: ‘prosecutions and disciplinary outcomes — along with corruption detection and investigation programs — undoubtedly contribute to the deterrence effect that form part of a robust corruption prevention and accountability strategy.’³²

2.27 The Commissioner of the Independent Broad Based Anti-corruption Commission (IBAC), Mr Stephen O’Byrne QC, observed that an anti-corruption agency’s performance should not be assessed solely by the number of prosecutions that result from its investigations, ‘as not all investigations will result in adequate evidence to support charges. In addition, the absence of charges does not mean that disciplinary or other actions have not been taken by the agency involved in the investigation where an allegation is proven.’³³

2.28 ICAC submitted that a perceived lack of prosecutions has not led to a loss of confidence by the public in its work, citing its surveys of community perceptions of corruption and the ICAC. The Commission argued that the public generally appreciates that its work is focused on the investigation and exposure of corruption and that public inquiries are effective in achieving that aim.³⁴

²⁹ Submission 21, The Hon Justice Peter Hall, pp4-5

³⁰ Submission 18, NSW Young Lawyers, p10

³¹ Submission 18, NSW Young Lawyers, p10

³² Submission 16, Australian Commission for Law Enforcement Integrity, p7

³³ Submission 6, IBAC, p1

³⁴ Submission 8, ICAC, p2

Duplicating the work of prosecuting bodies

- 2.29 Mr Greg McCarry, former magistrate, argued that a change to the ICAC's principal functions would duplicate the functions of existing prosecutorial authorities, and could impede the ICAC in performing its functions:

... there is little to be gained by giving the Commission any specific or additional role in assembling evidence that would be admissible in criminal prosecutions. This would come close to duplicating the function of existing investigatory and prosecuting bodies and would inhibit the Commission in the way it goes about its quite different statutory role.³⁵

- 2.30 The Director of Public Prosecutions, Mr Lloyd Babb SC, agreed that altering the ICAC's functions would be a significant change that could duplicate existing law enforcement agencies' roles:

... re-ordering of the principal functions of ICAC has the potential to fundamentally alter the character of the body and make it just another law enforcement agency, in circumstances where NSW and Australia are already well served by existing agencies.³⁶

Changing the ICAC's functions is unnecessary

- 2.31 The Inspector of the NSW Crime Commission, the Hon Graham Barr QC, stated that elevating gathering and assembling evidence to one of the ICAC's primary functions was unnecessary. The function of gathering and assembling evidence should be 'seen for what it is, namely an incidental though important function by the Commission that may assist prosecutors to do their work'.³⁷

- 2.32 The NSW Young Lawyers also recommended against a change to the ICAC's primary functions, arguing that the ICAC is performing its evidence gathering functions effectively:

... the ICAC is already effectively serving the purpose of gathering admissible evidence for prosecutions, ... statistically, it has demonstrated good judgment in what it has referred, with relatively few matters not being referred to the DPP on the basis that the ICAC believes it will not be able to provide admissible evidence.³⁸

³⁵ Submission 1, Mr Greg McCarry, p3

³⁶ Submission 4, Director of Public Prosecutions, p1

³⁷ Submission 5, Inspector of the Crime Commission, p2

³⁸ Submission 18, NSW Young Lawyers, p4

SUPPORT FOR CHANGING ICAC'S FUNCTIONS

ICAC should be responsible for gathering evidence

- 2.33 Mr Glen Unicomb, formerly a senior investigator at ASIC, emphasised that ICAC should be responsible for gathering admissible evidence, regardless of whether this task is a principal or secondary function of the Commission:
- ... the critical issue is not whether the gathering and assembling of evidence in admissible form should be a principal or ancillary function of ICAC. What is important is that ICAC is clearly identified as the party responsible for undertaking such an exercise and adequately resourced to perform this work ...³⁹
- 2.34 In Mr Unicomb's view, matters that involve serious corruption and substantial profit must result in a brief of evidence being submitted for advice from the DPP regarding criminal charges. A failure to refer a brief to the DPP in a timely way could 'bring into question whether merely 'naming and shaming' individuals is a sufficient outcome, particularly given that ICAC inquiries are very expensive and time consuming.'⁴⁰
- 2.35 Mr Unicomb argued that bringing prosecutions is a crucial way for the Commission to perform its corruption prevention function through deterrence. Public confidence in the ICAC and its findings could be affected if prosecutions are not undertaken in appropriate cases.⁴¹
- 2.36 He went on to argue that while it would be possible to refer material gathered by ICAC to the police to prepare a brief, this would not be an efficient way to deal with matters of such complexity. According to Mr Unicomb 'ICAC staff are best placed to assemble a brief in a more efficient and timely manner.' ICAC officers, and not the DPP or police, should be responsible for gathering evidence as they have the skills to gather the evidence, and knowledge of the facts, witnesses and persons of interest amassed during an investigation.⁴²

Reducing delays in prosecutions

- 2.37 Mr Andrew Patterson submitted that the ICAC should be able to undertake prosecutions itself, in order to expedite prosecutions and remove delays in the current process. The ICAC should have the ability to charge and prosecute persons if there is admissible evidence arising from an investigation. This function should be completely distinct from the ICAC's role to expose corrupt conduct. According to Mr Patterson, the Commission should have a legal team which conducts the entire prosecution process:

I believe the ICAC should have a distinct legal team which deals with prosecution briefs of evidence. Once the ICAC lawyers are satisfied that they have a criminal brief of evidence for prosecution, then the ICAC Commissioner should have the power to issue a warrant for criminal arrest, and then the NSW Police can effect the arrest, pursuant to the Commissioner's warrant. From that point onwards, the ICAC lawyers

³⁹ Submission 13a, Mr Glen Unicomb, p2

⁴⁰ Submission 13, Mr Glen Unicomb, pp2-3

⁴¹ Submission 13a, Mr Glen Unicomb, p2

⁴² Submission 13, Mr Glen Unicomb, pp2-3 and Submission 13a, p2

conduct all the prosecutorial functions in the criminal courts. This removes the DPP from the process, and enables the ICAC's criminal matters to be prosecuted in a very expeditious manner.⁴³

PROSECUTIONS IN OTHER JURISDICTIONS

- 2.38 Anti-corruption agencies in other states such as Western Australia and Queensland have functions that differ from the ICAC's. Former ICAC Commissioner, David Ipp, did not support models in other jurisdictions where anti-corruption bodies have a role in undertaking prosecutions, arguing that giving investigative bodies with coercive powers a role in prosecutions is contrary to accepted principles of prosecutorial independence and a fair trial. According to Mr Ipp 'the investigator, by its very function, lacks the objectivity which the community is entitled to expect from its prosecutorial body.'⁴⁴
- 2.39 Mr Ipp noted that the role of comparable agencies in Western Australia and Queensland in conducting prosecutions had resulted in 'inordinate criticism of their conduct and at least in WA, in very poor relations with the Inspector. This phenomenon is almost an inevitable result of the anti-corruption agency becoming more closely involved in the prosecution process...'⁴⁵
- 2.40 Victoria's IBAC was set up in 2013. While its functions do not include bringing criminal proceedings for alleged corruption offences arising out of an investigation, it has the power to bring criminal proceedings 'for an offence in relation to any matter arising out of an IBAC investigation'.
- 2.41 According to IBAC, the power to commence criminal proceedings is 'discretionary and is carefully exercised'. Two broad considerations are relevant to a decision to commence a prosecution: whether the available evidence is sufficient to justify the laying of charges (whether there is a reasonable prospect of success/conviction); and whether, in light of the evidence and the surrounding circumstances, the public interest requires a prosecution to be pursued.⁴⁶
- 2.42 While IBAC may bring criminal proceedings for relevant offences, the nature of the charge will determine the agency that conducts the prosecution. For summary offences and indictable offences where IBAC has initiated proceedings in the summary jurisdiction, IBAC retains responsibility for prosecution and may request the VDPP to take over the matter; however the VDPP is not bound to do so. The VDPP prosecutes charges for indictable offences where IBAC has initiated proceedings in the indictable jurisdiction. IBAC transfers the matter to the VDPP after the filing of charges.⁴⁷

⁴³ Submission 15, Mr Andrew Patterson, p2

⁴⁴ Submission 2, The Hon David Ipp AO QC, p5

⁴⁵ Submission 2, The Hon David Ipp AO QC, p5

⁴⁶ Submission 6, IBAC, pp5-6

⁴⁷ Submission 6, IBAC, pp5-6. Victoria's *Public Prosecutions Act 1994* governs the conduct of prosecutions. The VDPP has the role to prepare and conduct proceedings for any indictable offence in the County Court of Victoria, Supreme Court of Victoria and High Court of Australia. Therefore, the VDPP prosecutes indictable charges arising out of IBAC investigations that proceed via a committal proceeding. The VDPP may also take over and conduct proceedings in respect of any summary offences if it considers it desirable to do so (this rarely occurs in practice).

- 2.43 Irrespective of which agency prosecutes a charge, IBAC determines the charges to be laid. IBAC may seek the DPP's advice on the appropriateness of an indictable charge and whether the evidence is sufficient, but is not required to do so. However, if the VDPP prosecutes an indictable offence on IBAC's behalf, the VDPP will make prosecutorial decisions.⁴⁸

COMMITTEE COMMENT

- 2.44 The views put to the Committee supported the current approach embodied in the legislation. Under this approach, the gathering and assembling of evidence able to be used in prosecution proceedings constitutes a secondary function of the Commission. The intent of Parliament when ICAC was established was to create a body focussed on the investigation and exposure of corrupt conduct. To vary this approach so as to place greater emphasis on obtaining and preparing evidence for subsequent prosecution would potentially detract from the ICAC's investigative role and may be inconsistent with its broad coercive powers.
- 2.45 The Committee accepts that if assembling evidence is not the primary function of the ICAC then it is inappropriate to assess the ICAC's performance solely on the basis of prosecutions that arise from its activities. There are other important outcomes from ICAC investigations such as disciplinary action against public sector employees and systemic reforms to decrease the scope for corruption.
- 2.46 While the ICAC should gather and assemble evidence that arises from its activities, this role should not detract from its primary role of being an investigative, 'truth-seeking' body, rather than being another law enforcement body.

HOW TO BETTER CAPTURE CORRUPT CONDUCT

- 2.47 The Accountability Round Table reasoned that new offences are warranted if prosecutions referred by ICAC did not proceed because 'the facts found by ICAC did not satisfy all the elements of the available criminal offences, but those facts, if proved, plainly involved a breach of the public trust attaching to the particular public office.' New offences or lesser forms of existing criminal offences may need to be created, and civil remedies could also be considered if public officers have failed in the performance of their fiduciary duties.⁴⁹
- 2.48 However, the Committee had regard to the views of the former Commissioner, the Hon Jerrold Cripps QC and Mr Bruce McClintock SC. Mr Cripps did not support new offences, arguing that 'rather than contemplating the creation of new criminal offences, the problem if it exists, is adequately addressed by paying attention to existing criminal offences that are available. For example, the offence of unjust enrichment and, more particularly, the common law offence of misconduct in public office.'⁵⁰ Mr Bruce McClintock agreed that there is no need to create new criminal offences to capture corrupt conduct.⁵¹

⁴⁸ Submission 6, IBAC, pp5-6

⁴⁹ Submission 20, Accountability Round Table, pp3-4

⁵⁰ Submission 12, The Hon Jerrold Cripps QC, p4

⁵¹ Submission 11, Mr Bruce McClintock SC, p3

QUESTION 1 - Should the common law offence of misconduct in public office be abrogated and replaced by a criminal offence under the *Crimes Act 1900*?

QUESTION 2 - Should the common law offence of bribery be abrogated and replaced by a criminal offence under the *Crimes Act 1900*, based on the Model Criminal Code?

QUESTION 3 - Should the common law offence of conspiracy to defraud a public official be abrogated and replaced by a criminal offence under the *Crimes Act 1900*?

Codifying existing common law offences

Misconduct in public office

- 2.49 The elements of the common law offence of misconduct in public office are:
- (1) a public official;
 - (2) in the course of or connected to his public office;
 - (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
 - (4) without reasonable excuse or justification; and
 - (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.⁵²
- 2.50 There was support for codifying the offence. Former Commissioner David Ipp stated that the codification of the offence of misconduct in public office 'would be useful'. The ICAC Inspector, the Hon David Levine AO QC agreed, favouring the Victorian formulation of the offence.⁵³
- 2.51 The ICAC recommended that the *Crimes Act 1900* be amended to make provision for a new offence of misconduct in public office. In support, the Commission stated that it regularly seeks the DPP's advice on prosecuting persons for this offence, and it is likely that ICAC investigations will continue to result in similar recommendations. The Commission also submitted that a codified offence would provide a clear and accessible statement to the public of the offence, including the possible penalty it attracts:
- ... members of the public should readily have available, via legislation, a succinct and clear statement of the offence of misconduct in public office and the maximum penalty that may be imposed where the offence is found to be committed. This is consistent with the notion that the criminal law should be accessible and comprehensible, and that members of the public (and in this particular case, public officials) are informed of the seriousness with which society regards breaches of public duty and are able to regulate their conduct accordingly.⁵⁴

⁵² Submission 8, ICAC, p6

⁵³ Submission 2, The Hon David Ipp AO QC, p5; Submission 17, Inspector of the ICAC, p2

⁵⁴ Submission 8, ICAC, pp6-7

- 2.52 The ICAC observed that a statutory offence would enable the elements of the offence to be revised and modernised, to ensure its relevance to the structures and arrangements of today's public service and government. For instance, the lack of certainty around the application of the common law offence to private individuals who temporarily perform public functions could be clarified.⁵⁵
- 2.53 The NSW Bar Association noted that official misconduct is the only offence listed in the definition of corrupt conduct in the ICAC Act that is not already a criminal offence. It suggested the following criminal offence of official misconduct:
- It will be an offence to deliberately engage in any conduct that adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official function by any public official, or group or body of public officials.⁵⁶
- 2.54 Official misconduct could be defined to include, without limitation, any intentional breach of trust; fraud in office; nonfeasance, misfeasance or malfeasance; oppression, extortion or imposition. The limitations on the definition of 'corrupt conduct' in the ICAC Act would need to be considered in drafting any proposed criminal offence.⁵⁷
- 2.55 The NSW Young Lawyers supported the introduction of new criminal offences, noting that the DPP rarely prosecutes misconduct in public office recommended by the ICAC: 'when the ICAC is of the view that a person should be prosecuted for the common law offence of misconduct in public office, actual prosecution rarely follows'. This suggests that there are difficulties with these offences.⁵⁸
- 2.56 Having assessed the outcomes of recent ICAC matters referred to the DPP, the Young Lawyers reasoned that the difficulties with prosecuting the current common law offence are unlikely to be due to a lack of admissible evidence, and are more likely to be a feature of the offence itself. The Young Lawyers observed that there is uncertainty around relevant common law offences, particularly the offence of misconduct in public office.⁵⁹
- 2.57 Statutory offences would also be consistent with the approach in other Australian states. The Commonwealth and other Australian states (apart from Victoria) have statutory corruption offences. The UK has replaced the common law offence of bribery and is currently simplifying the common law offence of misconduct in public office, to address concerns that the parameters of the offence are unclear and it is subject to a disproportionate number of appeals.⁶⁰
- 2.58 The Young Lawyers recommended a broad offence, in line with other states and with the broad definition of corrupt conduct in the ICAC Act.⁶¹

⁵⁵ Submission 8, ICAC, pp6-7

⁵⁶ Submission 9, NSW Bar Association, p5

⁵⁷ Submission 9, NSW Bar Association, p5

⁵⁸ Submission 18, NSW Young Lawyers, pp6-7

⁵⁹ Submission 18, NSW Young Lawyers, pp7-8

⁶⁰ Submission 18, NSW Young Lawyers, pp7-8

⁶¹ Submission 18, NSW Young Lawyers, p8

- 2.59 The DPP cited a number of existing offences that can be used to prosecute corruption, and stated that 'there is no real need to create new criminal offences to cover corrupt activity'. However, Mr Babb suggested that consideration should be given to codifying the common law offence of misuse of public office, on the basis that all serious criminal offences should be included in the Crimes Act. The common law offence is strictly indictable and carries a penalty which is at large, which technically means a maximum of life. Therefore, the DPP argued that if the offence were to be codified it should remain a very serious offence attracting a maximum penalty of 10 to 14 years.⁶²
- 2.60 Mr Babb submitted that a codified offence should 'attempt to retain the breadth and flexibility of the current common law offence'. Corrupt conduct has an extremely large range of seriousness, and the DPP argued that a codified offence should be included in Table 1 of the *Criminal Procedure Act 1986* to allow low level offences to be dealt with in the Local Court 'if it is judged that there is sufficient sentencing scope in that jurisdiction'.⁶³

Bribery and conspiracy to defraud a public official

- 2.61 The ICAC also recommended the codification of the common law offences of bribery and conspiracy to defraud a public authority or official. Bribery has been described as 'receiving or offering of an undue reward by or to any person in a public office, in order to influence that person's behaviour in that office and to incline that person to act contrary to the known rules of honesty and integrity'.
- 2.62 Proving the offence of conspiracy to defraud involves establishing that two or more persons agreed to use dishonest means to bring about a situation prejudicing or imperilling the rights or interests of another or the performance of a public duty.⁶⁴
- 2.63 The ICAC argued that the rationale for legislating the common law offence of misconduct in public office also applies to common law bribery and conspiring to defraud a public authority or public official. The Commission observed that these common law offences have no specified penalty and the exact limits of the offences are therefore difficult to determine. For instance there is a lack of clarity about whether the payment of money to induce a public official to wield influence arising from their office, rather than to exercise their public official functions in a particular way, constitutes the common law offence of bribery. There is also uncertainty about whether statutory corrupt commission offences in the Crimes Act apply to members of parliament who are not ministers of the Crown.⁶⁵
- 2.64 According to the DPP, it should be borne in mind that existing bribery offences are based on model offences developed for the Model Criminal Code, which have

⁶² Submission 4, Director of Public Prosecutions, pp3-4

⁶³ Submission 4, Director of Public Prosecutions, pp3-4

⁶⁴ Submission 8, ICAC, p8

⁶⁵ Submission 8, ICAC, p8

been implemented by the Commonwealth and other jurisdictions to harmonise Australian criminal law.⁶⁶

Other jurisdictions

- 2.65 The Commonwealth and other states have statutory offences dealing with misconduct by public officials. Under the Criminal Code Act it is an offence, punishable by up to five years imprisonment, for Commonwealth public officials to exercise their official duties or use the influence they possess by reason of their office to benefit or harm someone dishonestly. The ACT and Queensland Criminal Codes contain similar offences. The Queensland offence carries a penalty of seven years imprisonment and 14 years for an aggravated offence.⁶⁷
- 2.66 In Victoria, there are various common law and statutory offences which could encompass 'corrupt' activity. These include the common law offences of misconduct in public office,⁶⁸ bribery of a public official and (attempt to) pervert the course of justice, as well as other statutory offences.⁶⁹
- 2.67 South Australia's Criminal Law Consolidation Act requires proof of a public officer acting 'improperly' rather than 'dishonestly', defined as acting 'contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community'. The offence carries a penalty of seven years imprisonment (10 years for an aggravated offence). Queensland and the Northern Territory have a separate 'abuse of office' offence, which appears to apply to public officers who abuse their office in the absence of a dishonest intention.⁷⁰
- 2.68 The Commonwealth and other states have expanded the definition of 'public official' for the offence of misconduct in public office to encompass contractors. South Australia's legislation includes a person who personally performs work for the Crown, a state instrumentality or a local government body as a contractor, an employee of a contractor or otherwise directly or indirectly on behalf of a contractor.⁷¹
- 2.69 The Commonwealth Criminal Code contains an offence comparable to common law bribery: a person dishonestly provides or promises (or offers to do so or cause it to occur) a benefit to another person (including the public official), with the intention of influencing the public official to exercise their duties as a public official.⁷² It is also an offence for a public official to ask, receive or agree to receive a benefit with the intention that the exercise of their official duties will be influenced; or induce, foster or sustain a belief (in another person) that the

⁶⁶ Submission 4, Director of Public Prosecutions, pp3-4

⁶⁷ Submission 8, ICAC, pp6-8

⁶⁸ Under Victorian legislation, the common law offence of misconduct in public office is punishable by up to 10 years imprisonment: see ICAC submission.

⁶⁹ Obtaining property by deception (s81 of the Crimes Act 1958 (Vic)); obtaining financial advantage by deception (s82 of the Crimes Act); false accounting (s83 of the Crimes Act); falsification of documents (s83A of the Crimes Act); secret commission offences (ss176, 177, 178, 179, 180 of the Crimes Act).

⁷⁰ Submission 8, ICAC, pp6-8

⁷¹ Submission 8, ICAC, pp6-8

⁷² Although the accused person must intend to influence the performance of duties, it is not necessary for them to know that the person was a public official or that the duties were public official duties: Submission 8, ICAC, pp6-8.

exercise of duties will be influenced. The maximum penalty for the offence is 10 years imprisonment.

- 2.70 The Criminal Code offences are wide enough to apply to a public official who dishonestly enters into an agreement to obtain a benefit for another person. The Code also contains conspiracy offences, including conspiracy to defraud the Commonwealth and conspiring to defraud a public official.⁷³ The DPP noted that the creation of any new criminal offences would have implications for the Model Criminal Code and the normalisation of Australian criminal law.

Proposed new criminal offence

Public officials having a personal interest in government contracts

QUESTION 4 - Should it be an offence under the *Crimes Act 1900* for public officials to have a private interest in government contracts?

- 2.71 The ICAC recommended a new offence covering public officials who have a personal interest in a contract with the public authority by which they are employed or engaged.
- 2.72 The Commission noted that public sector procurement is especially vulnerable to corruption, with several recent ICAC investigations involving public officials with a direct financial interest in a company using their public official functions to award contracts to that company. Other examples of this conduct are public officials using their position to influence another public official to unwittingly award a contract to their company or business, and public officials using inside or commercially privileged information to obtain an advantage in the awarding of contracts. ICAC investigations reveal the serious nature of this kind of conduct, and the difficulty with prosecuting it due to the lack of an appropriate offence.⁷⁴
- 2.73 The Commission argued that there is a lack of understanding in the public sector of the conflict of interest involved in this kind of conduct, and a criminal offence should be created to reflect community attitudes about the seriousness of such conduct:

... There can be no justification for a public official being allowed to benefit from their public official position in this way. Departmental codes of conduct appear only concerned that the secondary employment is declared and, in many cases, the conflict is dismissed by both the public official and the department on the basis that the public official's partner or close family member is said to be operating the business. There appears to be little comprehension by public official supervisors of the actual and perceived conflict of interest and inherent misuse of the public official's position.

At present there is no criminal offence in NSW that is specifically directed to this type of conduct; conduct that ordinary, reasonable members of the public would

⁷³ Submission 8, ICAC, pp8-9

⁷⁴ Submission 8, ICAC, pp9-10

consider of a criminal nature and appropriate for the law to recognise as such as has occurred in other Australian jurisdictions.⁷⁵

2.74 In Queensland it is an offence for a public official to knowingly acquire or hold, other than as a member of a 'registered joint stock company' of more than 20 persons, a private interest in any contract or agreement with respect to a matter concerning a department in which the official is employed. Offenders are liable to imprisonment for three years.⁷⁶ Western Australia's corruption offence covers circumstances in which a public officer, without lawful authority or a reasonable excuse, and to gain a benefit or cause a detriment, pecuniary or otherwise:

(a) acts upon any knowledge or information obtained by reason of his office or employment; or

(b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or

(c) acts corruptly in the performance or discharge of the functions of his office or employment.⁷⁷

Existing corrupt commissions offence - reversing the onus of proof and protection for witnesses

QUESTION 5 - Should there be a reversal of the onus of proof for the offence of receiving corrupt commissions or rewards under section 249B of the *Crimes Act 1900*?

QUESTION 6 - Should witnesses who give evidence in prosecutions for the offence of receiving corrupt commissions or rewards under section 249B of the *Crimes Act 1900* be protected against self-incrimination?

2.75 ICAC recommended an amendment to reverse the onus of proof solely in relation to the offence of 'corrupt commissions or rewards' under section 249B of the Crimes Act and to provide protection against self-incrimination for witnesses who give evidence in prosecutions for the offence.⁷⁸

2.76 The Committee understands that by this proposal, the ICAC is referring to the onus of proof for such an offence, having first established that a corrupt commission was received or solicited.

2.77 The Commission noted that in Victoria, Queensland and Western Australia, the equivalent 'corrupt commissions or rewards' offence contains two provisions to facilitate prosecution of the offence. Witnesses who testify in proceedings for the offence are given protection against self-incrimination (subject to certain conditions). Furthermore, if it is proven that a benefit was received or solicited by, or offered to an agent without the assent of the principal, the onus of proof is

⁷⁵ Submission 8, ICAC, pp9-10

⁷⁶ *Criminal Code Act 1899* (Qld) s89

⁷⁷ *Criminal Code Act Compilation Act 1913* (WA) s83

⁷⁸ Submission 8, ICAC, p10

on the agent to show that the offence was not committed. The ICAC argues that these provisions acknowledge the reluctance of witnesses to testify in corruption cases where they may incriminate themselves:

These provisions recognise the highly secretive conduct of persons involved in this type of offence, that evidence of it is unlikely to be found in any document or other tangible thing, and the most useful witnesses will be unwilling to testify or otherwise assist the prosecution of such offences because they have themselves been involved in some aspect of aiding or facilitating the offence. Further, it flows from the very nature of the offence, that if true, the illicit character of a benefit received by a person is a matter wholly within that person's own knowledge and the person who gave that benefit.⁷⁹

- 2.78 The Commission noted that reversal of the onus of proof has been implemented for similar reasons in the unexplained wealth and restraining order provisions of the Criminal Assets Recovery Act.⁸⁰
- 2.79 The DPP observed that some jurisdictions including the United Kingdom have recognised the seriousness and difficulty of proving bribery and corrupt payments, and have introduced a reverse onus of proof. Under the UK's *Prevention of Corruption Act 1916*, if it is proved that any money, gift, or other consideration has been offered or received by a person in public office, the money, gift or consideration is deemed to have been paid or given corruptly unless the contrary is proved.⁸¹

Amendment to the ICAC Act

QUESTION 7 - Should a protection be inserted in the *Independent Commission Against Corruption Act 1988* to provide that an individual voluntarily supplying information to the ICAC for the performance of its functions is not subject to any penalty for having breached an Act or rule of law?

Protection for voluntarily supplying information to ICAC

- 2.80 The ICAC supported an amendment to the ICAC Act to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to ICAC for the purpose of the Commission's functions.
- 2.81 A number of secrecy and confidentiality provisions prohibit public officials from disclosing information obtained in the course of their employment, except in certain circumstances. ICAC receives a large amount of complaints and information from public officials who are not authorised or required to report information to the Commission, and where the voluntary disclosure of information breaches a secrecy or confidentiality law. The Commission also notes that private individuals who provide information to ICAC voluntarily may be at risk of incurring civil liability due to contractual or employment undertakings into which they have entered.

⁷⁹ Submission 8, ICAC, p11

⁸⁰ Submission 8, ICAC, p11

⁸¹ Submission 4, Director of Public Prosecutions, p3

- 2.82 The ICAC Act gives limited protection to persons who provide information to the Commission, only in cases where the ICAC has used its power to require or obtain the information.⁸² However this provision does not apply in situations where people voluntarily disclose information about corrupt conduct of which the ICAC is unaware and not investigating. According to the ICAC, an amendment would give additional protection to people who disclose information to the ICAC.⁸³
- 2.83 Other Australian corruption commissions provide varying degrees of protection for the voluntary provision of information in relation to a complaint, report or investigation. Under Queensland's *Crime and Corruption Act 2001*, no obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to a person, by any Act or rule of law, applies to the disclosure of information to the CCC for the performance of its functions.⁸⁴
- 2.84 A person who discloses information under the provision does not, only because of the disclosure: contravene a provision of an Act requiring the person to maintain confidentiality in relation to the disclosure of information; or incur any civil liability, including for defamation; or become liable to disciplinary action.⁸⁵

Committee comment

- 2.85 Several inquiry participants supported the codification of common law offences such as misconduct in public office and bribery, to facilitate prosecutions arising from ICAC investigations. It was argued that statutory offences would provide the public with a clear statement of the elements of the offences, and the maximum penalties the offences could attract. Codifying these offences would also bring New South Wales in line with the Commonwealth and other states, which have introduced statutory offences in this area.
- 2.86 The argument was made that misconduct in public office is difficult to prosecute, and that a statutory offence has a number of advantages. Codification would provide an opportunity to address uncertainty in the application of the common law offence, for example, clarifying that it covers individuals such as contractors who temporarily perform public duties. The Committee also notes the DPP's comment that all serious criminal offences should be included in the Crimes Act. While the common law offence is strictly indictable, a statutory offence could reflect the wide range of conduct covered by the offence, and allow for low level offences to be dealt with summarily in the Local Court.
- 2.87 The ICAC argued that the rationale for codifying misconduct in public office also applies to the common law offences of bribery and conspiracy to defraud a public official.
- 2.88 The ICAC also supported the creation of a new offence to address conflicts of interest. The ICAC drew the Committee's attention to the widespread lack of understanding of conflicts of interest in the public sector, for example, public employees holding a financial interest in a business and using their official

⁸² ICAC Act s109

⁸³ Submission 8, ICAC, pp11-12

⁸⁴ *Crime and Corruption Act 2001* (Qld) s343

⁸⁵ Submission 8, ICAC, pp11-12

position to award contracts to that business. In order to signal the seriousness of this conduct and to ensure that prosecutions take place, the ICAC suggested the introduction of a new offence to criminalise public officials having an interest in government contracts. On an initial assessment, it appears to the Committee that it would be desirable to clarify that public servants who personally benefit from their official duties through conflicts of interest are committing a criminal offence.

- 2.89 The ICAC also proposed a reversal of the onus of proof for the offence of receiving corrupt commissions under the Crimes Act, as well as protection against self-incrimination for witnesses who assist with prosecutions for this offence. The ICAC supported its proposals by referring to the difficulty in proving corrupt commissions offences, which are by nature secretive and difficult to prove. Witnesses to the offence may be unwilling to co-operate with a prosecution as they are often involved in the offence. The ICAC acknowledged that reversing the onus of proof is a departure from the presumption of innocence and the privilege against self-incrimination. However, it was argued that a departure from these principles has been sanctioned in the Criminal Assets Recovery Act (CAR Act), which reverses the onus of proof in its unexplained wealth and restraining order provisions.⁸⁶
- 2.90 The Committee considers that reversing the onus of proof for offences associated with corrupt commissions or rewards would be a significant step, requiring careful consideration and caution. While similar provisions have been implemented in relation to unexplained wealth and some drug offences, the Committee notes that reversing the onus of proof is an unusual measure in our criminal justice system. The CAR Act was implemented to enable the confiscation of wealth and assets amassed through involvement in serious crime. Significantly, the relevant provisions do not require a conviction and proceedings under the CAR Act are civil not criminal. In contrast, the corrupt commissions or rewards offence is a criminal offence with a maximum sentence of 7 years imprisonment. Consequently, a reversal of the onus of proof in such matters appears to the Committee to be less appropriate.
- 2.91 The Committee notes that the ICAC referred to provisions in other Australian jurisdictions which give protection against self-incrimination to witnesses. This is in addition to providing that, where it is established that a benefit was received or solicited by, or offered to, an agent without the principal's assent, the onus of proof is on the agent to show that the offence was not committed. Therefore, having reached the threshold question that the corrupt commission was received or solicited, the onus of proof is reversed. Protecting witnesses against self-incrimination would make it easier to obtain evidence regarding an offence. The Committee notes that section 128 of the *Evidence Act 1995* can be used to protect witnesses in criminal cases from self-incriminatory answers. In certain circumstances, a Court may grant a certificate to protect a witness from self-incrimination.

⁸⁶ *Criminal Assets Recovery Act 1990*, s28B(3). The objects of the Act include enabling the current and past wealth of a person to be recovered as a debt to the Crown if the Supreme Court finds there is a reasonable suspicion that they have engaged in a serious crime related activity, unless the person can establish that the wealth was lawfully acquired.

- 2.92 The Committee recognises the challenges associated with proving that a corrupt commission was solicited or received, given the nature of the offence. The proposal to reverse the onus of proof for this offence raises the question of whether the offence warrants such a response, and if so, how such a provision could be worded to ensure an appropriate balance between facilitating prosecutions and preserving the presumption of innocence. The Committee considered that these matters need further examination before any recommendations for change are made.

CHANGES TO ICAC AND DPP PROCESSES

Greater role for DPP solicitors

- 2.93 Former ICAC Commissioner David Ipp proposed that two experienced DPP solicitors be seconded to the ICAC to oversee the gathering and assembling of evidence upon the conclusion of an ICAC inquiry. Mr Ipp also suggested that DPP solicitors take any statements that are required. Although there is cultural resistance to this change as it is normal practice in criminal law for police investigating a crime to take witness statements, Mr Ipp noted that solicitors take statements in commercial and civil law areas.⁸⁷
- 2.94 Mr Ipp observed that DPP solicitors have the training to ensure statements are prepared in admissible form, while investigators and police do not. If DPP solicitors were tasked with converting evidence obtained by ICAC into admissible statements, practical impediments to prosecutions would be overcome.⁸⁸
- 2.95 DPP lawyers have served on secondment at the ICAC, and the ICAC acknowledged that 'a more formalised system of secondments between the DPP and the Commission, and between the Crown Solicitor's Office and the Commission, is capable of improving the quality and timeliness of brief preparation'.⁸⁹
- 2.96 However, there are potential difficulties with seconded DPP solicitors taking on brief preparation work following the conclusion of an ICAC inquiry. The ICAC noted that DPP lawyers would need to be quarantined from any subsequent prosecution, to ensure that evidence is not compromised:

The assistance of those solicitors in the preparation of a brief at the end of an investigation is an attractive prospect, but the need to ensure that any future prosecution is not compromised by direct or derivative use of material known to the seconded solicitor (although not disclosed to the DPP), once that solicitor has completed the secondment and returned to the DPP, presents practical problems in adopting that approach.⁹⁰

⁸⁷ Submission 2, The Hon David Ipp AO QC, pp3-4

⁸⁸ Submission 2, The Hon David Ipp AO QC, pp3-4

⁸⁹ Submission 8, ICAC, pp4-5

⁹⁰ Submission 8, ICAC, pp4-5

ICAC gathering evidence in admissible form during investigations

QUESTION 8 - Should the ICAC be permitted to seek relief from the requirement under the *Criminal Procedure Act 1986* for statements to be in written form?

QUESTION 9 - Should transcripts of evidence given at ICAC public inquiries be admissible in local court proceedings?

QUESTION 10 - Should there be a requirement for individuals who the ICAC believes can give information relevant to an investigation or prosecution to give all reasonable assistance to the ICAC in connection with the investigation or prosecution?

Issues raised by inadmissibility of evidence

- 2.97 Material gathered by ICAC during its investigations may not be admissible in criminal prosecutions, as the ICAC is not bound by the rules of evidence. This material needs to be collated and analysed to determine what is admissible and reliable for a criminal prosecution.⁹¹
- 2.98 Issues with the admissibility of evidence can result in delays in prosecutions. Evidence heard during ICAC public inquiries does not meet the requirements of the *Evidence Act 1995* and *Criminal Procedure Act 1986*. According to the DPP, this could be addressed if ICAC obtained admissible witness statements during its initial investigation, meaning that witnesses would not have to be reinterviewed after a public inquiry for a statement to be prepared. This also applies to proof of service evidence and continuity of exhibits.⁹²
- 2.99 Former Commissioner Jerrold Cripps QC did not agree that the admissibility of evidence given before ICAC can result in problems with prosecutions. Mr Cripps observed that only evidence taken under objection cannot be used in criminal proceedings, however evidence of serious corrupt conduct 'goes well beyond questions and answers in the witness box by the person later charged with an offence.' Other evidence can include legally authorised telephone intercepts and the evidence of other people.⁹³

Benefits of gathering and furnishing admissible evidence during investigations

- 2.100 The Hon Justice Peter Hall observed that the ICAC may furnish evidence that may be admissible in a criminal prosecution to the DPP at any time during the course of its investigations. Reasons for the ICAC furnishing evidence to the DPP during an investigation rather than at its conclusion include the desirability or need for the DPP to consider the evidence at a reasonably early stage in the investigation, or the possible need for evidence to be referred to a law enforcement agency. In addition, the scope, purpose and likely length of an investigation, and the nature, magnitude or complexity of the matter being investigated may make it advisable for the DPP to be provided with evidence on an ongoing basis. For example, if the

⁹¹ Submission 9, NSW Bar Association, pp2-3

⁹² Submission 4, Director of Public Prosecutions, p2

⁹³ Submission 12, The Hon Jerrold Cripps QC, pp2-3

evidence establishes the possible commission of an offence that may be the subject of a criminal prosecution.⁹⁴

- 2.101 Mr Glen Unicomb submitted that the ICAC should compile briefs of evidence during investigations so that briefs are provided to the DPP in a timely way. ICAC could consult investigative agencies such as ASIC and the ACCC, which often compile briefs while investigations are underway. ASIC gathers evidence, examines witnesses and prepares draft statements during investigations. This approach means that, although the exact nature and extent of misconduct may not be evident until the end of an investigation, relevant and admissible evidence and the preparation of statements is not held up until the investigation is concluded.⁹⁵
- 2.102 Mr Unicomb acknowledged that some brief preparation work may need to occur after important investigative decisions have been made, such as who will be considered for prosecution and who will be giving evidence. However, other tasks could be done during the investigation, including taking statements in admissible form, which 'often facilitates the identification of critical evidentiary issues and gaps and can bring a focus and clarity to the investigation.' Furthermore, in some cases it may be quicker and easier for ICAC to take written statements prior to holding public inquiries or releasing reports, as persons (including those who are clearly witnesses) 'may be less willing to co-operate after those events'.⁹⁶
- 2.103 In Mr Unicomb's view, commencing the preparation of a brief of evidence at the conclusion of an inquiry can cause significant delay and compromise the success of any resulting criminal proceedings. Delays also 'fail to meet community expectations in bringing timely prosecutions for cases involving serious corruption.'⁹⁷
- 2.104 However, while furnishing admissible evidence to the DPP during the course of an investigation does seem to have appeal, the information provided to the Committee found that this approach is not without difficulty.

Difficulties with gathering admissible evidence during investigations

- 2.105 The ICAC noted that statements taken from witnesses can be overtaken by evidence received during the inquiry. The Commission argued that removing requirements for evidence to be provided in written statement form would assist in cases where witnesses were unco-operative, and that enabling transcripts of witnesses' public inquiry evidence to be admissible in local courts would assist with brief preparation:

... whilst Commission officers take statements on occasions from prospective witnesses, those statements are invariably overtaken by the evidence adduced at an inquiry. A public inquiry often substantially changes or undermines the utility of a statement which was taken at a preliminary stage. The Commission does not always

⁹⁴ Submission 21, The Hon Justice Peter Hall, pp8-9

⁹⁵ Submission 13, Mr Glen Unicomb, p3 and Submission 13a, pp4-5

⁹⁶ Submission 13, Mr Glen Unicomb, p3 and Submission 13a, pp4-5

⁹⁷ Submission 13, Mr Glen Unicomb, p3

receive the fullest cooperation from individuals who may be asked to make a further statement at the end of an inquiry.

It may be appropriate in such cases to seek relief from the strict requirements applying to the reception of evidence by way of written statements under the *Criminal Procedure Act 1986* (see generally sections 77 to 87). If the transcript of the evidence of a witness at a public inquiry was admissible in local courts, a significant barrier to the preparation of briefs might be removed.⁹⁸

2.106 The PIC also commented on the factors that can make it difficult to obtain evidence in admissible form early in an investigation. Witnesses may be unwilling to assist until they are compelled to do so, meaning that admissible evidence such as signed statements cannot be obtained until the end of an investigation. The use of coercive powers to compel evidence means that witnesses are more likely to be willing to provide statements in admissible form:

... Following a PIC hearing, particularly if it has been held in public, a witness will usually be less fearful about signing a statement for use against someone else in a prosecution, as the fact of the witness being compelled to give the evidence provides a level of comfort (or cover) to the witness.⁹⁹

2.107 The PIC observed that 'the common element in all inquiries conducted by commissions such as ICAC and the PIC is that the nature of the misconduct being investigated may not fully reveal itself until the end of the investigation and, until that time, it is inimical to the task being undertaken by the inquirers to expect the evidence to be simultaneously gathered in admissible form in order to support a prosecution for a potential, as yet unidentified, criminal charge.'¹⁰⁰

Measures to facilitate gathering of evidence

2.108 Mr Glen Unicomb highlighted the following provisions in Commonwealth legislation, which assist the ASIC in assembling briefs of admissible evidence:

- ASIC can require persons to provide "all reasonable assistance" in connection with an investigation or potential prosecution: 'these powers are particularly useful in seeking to obtain witness statements from persons who ... are unwilling to volunteer their assistance in relation to the investigation or prosecution of other persons'.¹⁰¹
- Statements made by persons at compulsory examinations are admissible in any administrative, civil or criminal proceedings (subject to significant safeguards): 'these provisions are very valuable in securing admissible evidence from persons who are unwilling or unable to testify'.¹⁰²
- Facilitating the admissibility of documents and copies of documents.¹⁰³

⁹⁸ Submission 8, ICAC, p5

⁹⁹ Submission 14, PIC, p6

¹⁰⁰ Submission 14, PIC, p5

¹⁰¹ *Australian Securities and Investments Commission Act 2001* (Cth) ss19(2)(a) and 49(3)

¹⁰² *Australian Securities and Investments Commission Act 2001* (Cth) ss 76 to 79

¹⁰³ *Australian Securities and Investments Commission Act 2001* (Cth) s80, *Corporations Act 2001* (Cth) s 1305

- 2.109 Mr Unicomb also referred to the implications of *Lee v the Queen* and *X7 v Australian Crime Commission* on the conduct of compulsory examinations and a defendant's right to a fair trial:

The issue of concern ... was whether publishing an accused's transcript of a compulsory examination may put at risk the prospect of a fair trial. The provision to the prosecution of the accused's defence may compromise the fundamental common law principle requiring the prosecution to prove the guilt of an accused.¹⁰⁴

- 2.110 The Committee notes that *Lee v the Queen* and *X7 v the Australian Crime Commission* raise uncertainty about the legal position in this area.
- 2.111 The DPP noted the impact of *Lee v the Queen* on compulsory examinations held in private. Mr Babb suggested that ICAC could take statements or record interviews with witnesses against whom allegations have not been made, and only conduct compulsory examinations if a witness has refused to assist investigators.¹⁰⁵

Special prosecutor to undertake prosecutions

- 2.112 Former ICAC Commissioner Jerrold Cripps considered that if the DPP and Police will not take statements and undertake further investigation of ICAC matters, a separate prosecutorial agency should be established to investigate and undertake criminal prosecutions arising from ICAC investigations. This would mean the ICAC would not have to undertake post-report investigations and could instead investigate more matters. It would also mean that criminal prosecutions could be commenced more quickly.¹⁰⁶
- 2.113 The Hon Justice Peter Hall observed that special prosecutors or task forces have been established at the conclusion of royal commissions and commission of inquiry, to deal with resulting criminal prosecutions:

An example ... may be seen in the *Special Prosecutor Act 1988* (Qld) established to deal with proceedings referred by the Fitzgerald Commission of Inquiry ... The former Act ... made provision for the Special Prosecutor to prepare, institute and conduct proceedings and for the Special Prosecutor to request further investigation by police in relation to criminal proceedings under consideration and/or conducted by the Special Prosecutor ...¹⁰⁷

Committee comment

- 2.114 The Committee heard a number of suggestions aimed at overcoming potential difficulties with admissibility of evidence gathered during ICAC investigations. It was proposed that transcripts of evidence given at ICAC public inquiries be admissible in local court proceedings, and that the ICAC, in appropriate circumstances, should not have to meet the current requirement for statements to be in written form. The ICAC stated that these measures would remove

¹⁰⁴ Submission 13, Mr Glen Unicomb, pp4-5

¹⁰⁵ Submission 4, Director of Public Prosecutions, p2

¹⁰⁶ Submission 12, The Hon Jerrold Cripps QC, p3

¹⁰⁷ Submission 21, The Hon Justice Peter Hall, p10

obstacles in preparing briefs of evidence where witnesses are unwilling to provide written statements at the conclusion of a public inquiry.

- 2.115 A further suggestion to overcome a lack of co-operation from witnesses is based on provisions in the ASIC Act. It would involve a requirement for individuals that the ICAC believes can give relevant information to provide all reasonable assistance in connection with its investigations. The Committee holds the view that such a proposal should receive further consideration.

ADEQUACY OF RESOURCING

- 2.116 Former ICAC Commissioner David Ipp commented that while additional funding has been provided for specific investigations, any changes to ICAC's functions would result in a need for 'substantially increased resources.'¹⁰⁸
- 2.117 The ICAC submitted that secondments are of great assistance to the Commission's legal division, and increase its efficiency. The division has not seen a real increase in staff since January 2010. ICAC lawyers perform a range of duties related to the conduct and planning of investigations and the loss of two temporary positions 'will significantly impact upon the efficiency of the Legal Division.' The ICAC submitted that a permanent secondment of two solicitors from suitable agencies is needed to maintain current work levels. This would aid with brief preparation, contribute to skill sharing across agencies and to professional development of relevant personnel.¹⁰⁹
- 2.118 The DPP stated that that his office has been 'greatly assisted' by additional funding to establish a special unit to handle recent ICAC inquiries that are complex and may continue for several years. Mr Babb noted that it would have been difficult to handle these matters within the office's existing resources, and the additional funding will enable the matters to be dealt with in a timely way.¹¹⁰
- 2.119 The NSW Bar Association expressed the view that funding is probably inadequate for prosecuting ICAC-referred matters, which are complex and time-consuming, involving analysis of vast amounts of material, and potential further investigation and expert analysis in determining what charges may be laid and against whom. The Association acknowledged the importance of efficient and effective prosecutions of high profile matters. Large matters such as the Obeid referral require 'substantial additional resources to be applied ... or diverted away from other demands.'¹¹¹
- 2.120 Mr Glen Unicomb noted that in order for ICAC to prepare briefs of evidence concurrent with investigations, further resources are likely to be required. Mr Unicomb echoed the Bar Association in highlighting the specialised and complex work involved in these prosecutions:

... establishing corrupt conduct to the prosecution standard of beyond reasonable doubt requires investigators and lawyers with highly specialised skills and

¹⁰⁸ Submission 2, The Hon David Ipp AO QC, p4

¹⁰⁹ Submission 8, ICAC, pp5-6

¹¹⁰ Submission 4, Director of Public Prosecutions, p3

¹¹¹ Submission 9, NSW Bar Association, p3

experience. It is critical that appropriately skilled and experienced investigators and lawyers are available to ICAC, particularly in the most high profile and complex corruption cases.¹¹²

Committee comment

- 2.121 The Committee notes that recent funding increases have assisted the ICAC and the DPP in their work on ICAC-referred prosecutions. Nonetheless, it is clear that brief preparation and evidence gathering are resource intensive activities that involve complex and highly specialised work, and staffing and resourcing will continue to be matters for both agencies to manage.
- 2.122 The Committee heard a number of proposals for change, aimed at facilitating the prosecution of corrupt conduct by enacting legislation to place common law offences in statute, reversing the onus of proof, protecting witnesses and easing requirements around the admissibility of evidence gathered by the ICAC.
- 2.123 The Committee concluded that more detailed consideration needs to be undertaken of the important issues set out in this discussion paper. The Committee accepts that it is desirable to facilitate action to combat and reduce corrupt conduct. However, it also considers that significant changes to the criminal law and to the ICAC's processes need to be carefully examined to avoid unintended consequences, and complicating or inhibiting prosecutions. In this regard, public hearings and the taking of evidence by the Committee in the next Parliament would be useful, and should involve hearing as witnesses some prominent practitioners at the criminal bar.

¹¹² Submission 13, Mr Glen Unicomb, p4