

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

**Organisation:** Director of Public Prosecutions  
**Name:** Mr Lloyd Babb SC  
**Position:** Director  
**Date Received:** 29/07/2014

OUR REFERENCE  
J.Pheils [REDACTED]

## DIRECTOR'S CHAMBERS



YOUR REFERENCE  
D14/15996

DATE

29 July, 2014

Mr Greg Smith SC MP  
Committee Chair  
Committee on the ICAC  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Smith

### **Prosecutions arising from Independent Commission Against Corruption Investigations**

Thank you for your letter dated 27 June 2014 inviting me to make a submission to the above Inquiry.

My responses to the terms of reference are set out below.

#### **[1] 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 principal functions of the ICAC are currently set out in s.13 of the *Independent Commission Against Corruption Act 1988 (ICAC Act)* and reflects the nature of the body as a standing Royal Commission into corruption with additional corruption prevention and educative functions.

Section 14 of the *ICAC Act* provides for other functions of the Commission including the furnishing of admissible evidence to the DPP for possible criminal prosecutions.

Royal Commissions and anti-corruption bodies like ICAC have a very particular primary role in our society, that is, to expose the truth. As a society governed by the rule of law, including the right to silence, it has always been recognised that the price of truth is almost always a guarantee that compelled evidence cannot be used in subsequent criminal prosecutions.

In reality, where no admissible evidence exists in relation to a hidden crime, the truth may be the only thing that can be brought to light.

It is a matter of policy for the Parliament, but the 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.

**[2] The effectiveness of relevant ICAC and Director of Public Prosecution processes and procedures, including alternative methods of brief preparation;**

The Memorandum of Understanding (MOU) between the ICAC and the Office of the Director of Public Prosecution (ODPP) was signed on 17 May 2011.

In my view this MOU has been quite successful in improving the turnaround time of ICAC matters referred to my Office.

The MOU:

- established timeframes for the furnishing of evidence and provision of advice;
- discusses what should be included in a brief of evidence; and
- sets out processes of how to deal with requisitions.

The MOU also outlines how prosecutions will be handled in the Local and Superior Courts.

In relation to high profile matters, there is often a heightened public expectation where the ICAC has referred matters to my Office. There does not appear to be a widespread understanding, however, that there is inevitably a hiatus between the handing down of the ICAC report and the provision of a full brief of evidence to the ODPP.

Perhaps the ICAC website can be more precise as to the actual time a full brief of evidence has been provided to my Office so that the public is not under the misapprehension that the ODPP is working on the matter from the moment that the ICAC report and any referrals are made public.

There has been recent public comment that the ODPP could advise on referrals within a short period of time based on the evidence collected for the public ICAC hearing. With the greatest respect this opinion is misconceived given the requirements of the *Criminal Procedure Act 1986* and the *Evidence Act 1995*. The material gathered by the ICAC for the purposes of a public inquiry are largely inadmissible according to the requirements of these Acts.

Some of these issues could be mitigated if the initial ICAC investigation produced an admissible witness statement in the first instance. Such an approach would mean that witnesses would not have to be reinterviewed after the hearing to complete a statement.

The same may be said in relation to other formal matters such as proof of service evidence and continuity of exhibits which does not matter so much at an ICAC hearing where the *Evidence Act 1995* does not apply, but often delays and complicates matters further down the line.

In light of the High Court case of *Lee v The Queen*, the ICAC should also be mindful of the use of compulsory private hearings.

ICAC might consider taking statements or recorded interviews at the outset from witnesses who are not likely to be the subject of allegations, and only proceeding to private hearings where the witnesses are compelled to answer questions if the witness refuses to assist investigators.

### **[3] Adequacy of resourcing.**

In relation to ICAC matters specifically, the ODPP has been greatly assisted by the additional funding provided to establish a special unit to deal with the most recent ICAC Inquires which are large complex matters that have the potential to run for several years.

It would have been difficult to absorb the proper handling of these matters into existing resources and the establishment of the special unit will allow these matters to be dealt with expeditiously.

### **[4] Whether there is a need to create new criminal offences that capture corrupt conduct;**

The common law offence of "Misconduct in public office" is an existing offence that broadly covers criminal activity that would generally be described as "corruption".

There are many other offences that are used to prosecute behaviour that the community would describe as "corruption" including:

- The bribery offences in Part 4A of the *Crimes Act 1900*;
- Fraud, forgery and embezzlement offences.
- The computer offences in Part 6 of the *Crimes Act 1900*.
- Many specific offences located in particular acts such as the "Neglect of duty offence" in the *Police Act 1990*.

As such there is no real need to create new criminal offences to cover corrupt activity.

However, the following proposals might be considered.

As a general rule all serious criminal offences should be contained in the *Crimes Act 1900*. Consideration should therefore be given to codify the common law offence of "Misuse of public office".

If Misuse of public office is to be codified I would suggest the following:

As a common law offence the offence is strictly indictable and carries a penalty which is at large. This technically means a maximum of life. A codified offence should remain a very serious statutory offence carrying a maximum penalty of between 10 - 14 years.

As the corrupt conduct has an extremely large range of seriousness a codified offence should also be included on Table 1 so as to allow low level offending to be dealt with in the Local Court if it is judged that there is sufficient sentencing scope in that jurisdiction.

A codified offence should attempt to retain the breadth and flexibility of the current common law offence.

I note that some jurisdictions such as United Kingdom view bribery and corrupt payments as so serious, yet difficult to prove, that a reverse onus has been introduced where, if it is proved that any money, gift, or other consideration has been offered or received by a person in public office, such money, gift or consideration is deemed to have been paid or given corruptly unless the contrary is proved (see *Prevention of Corruption Act 1916*, s.2).

The current NSW Bribery offences are based on the model offences developed for the Model Criminal Code. These offences have been implemented by the Commonwealth and other jurisdictions as part of an effort to harmonise Australian criminal law. This fact should be borne in mind if it was proposed to amend these offences.

**[5] Arrangements for the prosecution of corrupt conduct in other jurisdictions; and**

Each jurisdiction has its own particular anti-corruption framework. An excellent summary of international jurisdictions anti-corruption bodies and laws can be found in Nicholls *et al*, *Corruption and Misuse of Public Office* (Second Edition, Oxford University Press, 2011).

**[6] Any other related matters.**

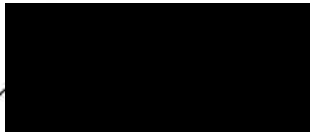
All Australian bodies that exercise compulsory examination powers have potentially been effected by the High Court case of *Lee v the Queen* [2014] HCA (21 May 2014).

Although *Lee's Case* deals with the powers of the NSW Crime Commission the *obiter* in the judgement has potential wider application to all such bodies including the ICAC.

*Lee's Case* and other cases such as *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2013) will inevitably lead to more litigation in this area and may require legislative amendment in the future.

Thank you for the opportunity to make a submission to this Inquiry.

Yours faithfully



**Lloyd Babb SC**  
**Director of Public Prosecutions**