

**Submission
No 14**

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

Organisation: Police Integrity Commission
Name: The Honourable Bruce James QC
Position: Commissioner
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Greg Smith SC MP
Committee Chair
Committee on the Independent Commission Against Corruption
Parliament of New South Wales
Macquarie Street NSW 2000

Attn: Dora Oravec

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 inquiry into prosecutions arising from Independent Commission Against Corruption investigations.

Please find enclosed the Commission's submissions.

The Commission's contact officer for this matter is Michelle O'Brien, Commission Solicitor, who can be contacted on [REDACTED]

Yours sincerely

[REDACTED]

**The Hon Bruce James QC
Commissioner**

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Prosecutions Arising from Independent Commission Against Corruption Investigations

Submission by the Police Integrity Commission to the Inquiry by the Committee on the Independent Commission Against Corruption

August 2014

Introduction

The Police Integrity Commission was established in 1996 by the *Police Integrity Commission Act 1996*. That Act was modelled largely on the *Independent Commission Against Corruption Act 1988*.

The creation of the Police Integrity Commission ("the PIC") followed the Royal Commission into the New South Wales Police Service. In the Interim Report on the Royal Commission, Commissioner James Wood QC recommended that a Police Corruption Commission should be established with coercive powers 'equivalent to those possessed by ICAC'.¹ Under the *Police Integrity Commission Act 1996* ("PIC Act"), the PIC was given coercive powers necessary to prevent, detect and investigate police misconduct², consistent with those already held by the royal commission and the Independent Commission Against Corruption ("ICAC")³.

Both the PIC and the ICAC have as one of their '*principal*' functions the investigation of corrupt conduct (by police officers and public officials respectively).⁴ The assembling of evidence for the prosecution of a person for a criminal offence against a law of the State appears as an '*other*' function in a later section of each Act.⁵

Reflecting the need for significant coercive powers to uncover corruption, and the inquisitorial nature of both Commissions' functions, the PIC and the ICAC are not bound by the rules or practice of evidence and can inform themselves on any matter in such manner

¹ New South Wales, Royal Commission into the New South Wales Police Service, *Interim Report* (February 1996) 94, 110.

² The definition of '*police misconduct*' included but was not limited to corruption and the commission of a criminal offence.

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 April 1996, 444 (Paul Whelan).

⁴ *Police Integrity Commission Act 1996*, s 13; *Independent Commission Against Corruption Act 1988*, s 13.

⁵ *Police Integrity Commission Act 1996*, s 15(1)(a); *Independent Commission Against Corruption Act 1988*, s 14(1)(a).

as considered appropriate.⁶ Both bodies were given wide powers to obtain information, documents and other things,⁷ to hold public and private hearings,⁸ to summon witnesses to appear,⁹ and to compel witnesses to answer questions.¹⁰ The PIC Act and ICAC Act create offences for failing to attend a Commission hearing or for giving false or misleading evidence at a hearing.¹¹

The PIC and the ICAC may not make a finding or form an opinion that a person is guilty of a criminal offence or disciplinary offence, nor recommend that a person be prosecuted for a criminal offence or disciplinary offence.¹² A recommendation can be made that a person be considered for prosecution for a specified offence. As stated above, the assembling of evidence that may be admissible in the prosecution of a person for a criminal offence, and the furnishing of evidence to the Director of Public Prosecutions ("DPP"), is an '*other*' function of the PIC and the ICAC.¹³

The speeches which accompanied the introduction of the *Independent Commission Against Corruption Bill* to the Legislative Assembly in 1988 refer to the fact that the ICAC would not exercise a prosecutorial role:

*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. ... It is important to note that the independent commission 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.*¹⁴

⁶ *Police Integrity Commission Act 1996*, s 20; *Independent Commission Against Corruption Act 1988*, s 17.

⁷ *Police Integrity Commission Act 1996*, ss 25, 26; *Independent Commission Against Corruption Act 1988*, ss 21, 22.

⁸ *Police Integrity Commission Act 1996*, ss 32, 33; *Independent Commission Against Corruption Act 1988*, ss 30, 31.

⁹ *Police Integrity Commission Act 1996*, s 38; *Independent Commission Against Corruption Act 1988*, s 35.

¹⁰ *Police Integrity Commission Act 1996*, s 40; *Independent Commission Against Corruption Act 1988*, s 37.

¹¹ *Police Integrity Commission Act 1996*, ss 106, 107; *Independent Commission Against Corruption Act 1988*, ss 86, 87.

¹² *Police Integrity Commission Act 1996*, s 16; *Independent Commission Against Corruption Act 1988*, ss 13(4), 74B.

¹³ *Police Integrity Commission Act 1996*, s 15(1); *Independent Commission Against Corruption Act 1988*, s 14(1).

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 677-8 (Mr Greiner).

And:

*Concerns have been expressed by the Opposition and by the Council for Civil Liberties on the question of natural justice also. The first thing to note is that the commission is not a prosecutorial authority. Any prosecutions that result from its investigations will be dealt with before the criminal courts in the ordinary way.*¹⁵

When the *Police Integrity Commission Bill* was introduced to Parliament there was only passing reference to the function of referring evidence to the ODPP for consideration of prosecution, however it was noted that the new Commission would take over the ICAC's functions in the investigation of serious police misconduct and corruption in the State.¹⁶ A member of the Opposition stated:

*I am pleased to note that several clauses of the Police Corruption Bill come from the Independent Commission against Corruption Act and that the ICAC legislation has been used as a model for the Police Corruption Commission.*¹⁷

The name of the Commission was subsequently changed to the Police Integrity Commission and the new Act commenced on 1 July 1996. Given the similarities between the PIC and the ICAC in the conduct of investigations and the subsequent furnishing of briefs to the DPP for consideration of prosecution,¹⁸ the PIC is in a good position to comment on the interplay between the investigation and prosecution functions and the factors impacting on the assembly of briefs of evidence for consideration by the DPP.

The Process of Investigation and Prosecution

When a commission of inquiry commences an investigation it is often not known if an offence has been committed, or where the investigation will lead. The scope of the investigation is limited only by its terms, or stated purpose. In the case of the ICAC an investigation will normally commence if corrupt conduct is suspected or alleged. In the case of the Commission an investigation will commence if police misconduct is suspected or alleged. This differentiates investigative commissions from traditional police forces because a police force will usually only commence an investigation when a crime has been reported,

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 May 1988, 842 (Mr Greiner).

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 April 1996, 445 (Mr Whelan).

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 1996, 1262 (Mr Schultz).

¹⁸ The ICAC has more expansive education and prevention functions, consistent with its broader responsibility for all public sector agencies in NSW (except the NSWPF and NSWCC).

with the aim of bringing the perpetrator to justice. A successful prosecution is generally the sole aim of a typical police investigation.

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.

In "Investigating Corruption and Misconduct in Public Office" Justice Peter Hall QC wrote:

Section 13 [of the ICAC Act] sets out the Commission's principal functions which include its investigative function. As the Commission is primarily an investigative body, its investigations are intended to facilitate the action of others in combating corrupt conduct. It is not itself a law enforcement agency: Balog v Independent Commission Against Corruption (1990) 169 CLR at 636. In many respects, it may be regarded as a body in the nature of a permanent royal commission with special supplementary functions.¹⁹

In *Douglas v Pindling* the Privy Council explained the difference between the evidence gathering undertaken for the purposes of a criminal trial and that of a commission of inquiry:

By contrast a commission of inquiry starts with no specific issues or charges. It has only its terms of reference, which may be extremely wide, as they are in the present case. Its function is inquisitorial, not adversarial. It must pursue lines of inquiry and in doing so may find that other lines of inquiry appear to be requisite, including investigation into some individual's or company's bank account.²⁰

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. This occurred in the Commission's Operation Banff investigation, where a vial of a patient's blood, which was intended to be collected by NSW Police from a public hospital for the purposes of blood alcohol testing, went missing in contentious circumstances and suspicion fell on the police and the hospital staff. The

¹⁹ Peter M Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (The Lawbook Company, 2004) 108.

²⁰ [1996] AC 890, 901 (Keith, Jauncey, Browne-Wilkinson, Nicholls and May LJJ).

Commission conducted a public hearing and ultimately found no evidence of wrongdoing on the part of the involved police or hospital staff.

The Commission concluded that the vial had been taken from the hospital by the patient, who had an interest in the blood not being tested, as his presence at the hospital was the result of an accident in which a vehicle he was driving collided with a number of parked cars. The matter generated significant publicity and speculation as the patient was a Supreme Court judge at the time of the incident.

The PIC's report to Parliament in Operation Banff concluded that the judge was the only individual to have engaged in misconduct and recommended that consideration be given to his prosecution for doing an act with intent to pervert the course of justice contrary to s 319 of the *Crimes Act 1900*.²¹ The DPP declined to prosecute, having already accepted pleas of guilty to police charges of negligent driving and driving under the influence of alcohol.

The above matter demonstrates the importance of waiting until the end of an investigation before an informed assessment can be made as to what evidence should be compiled for the purpose of prosecution. Although the charge recommended by the Commission was not pursued by the DPP, the matter nevertheless is regarded as an effective utilisation of the Commission's powers, as the public hearing and subsequent report to Parliament enabled the facts to be revealed in a transparent manner and removed the shadow of suspicion which surrounded the police and hospital staff. From the point of view of the public interest, such an outcome is of arguably equal value to a successful prosecution as the public was able to have confidence that all the necessary inquiries had been independently undertaken and the truth of the matter had come out.

Of course the majority of investigations do not end with the subject(s) of the initial allegations being exonerated. Nevertheless, 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.

²¹ Police Integrity Commission, Report to Parliament Operation Banff, December 2006

That is why the preparation of briefs for consideration of criminal charges is generally not commenced by the PIC or ICAC until the completion of the investigation. It is simply not practical to do so at any earlier stage while the process of establishing the facts is still proceeding.

In *National Companies and Securities Commission v News Corp Ltd* the High Court said of the investigation by a commission of inquiry:

It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.²²

Another reason why evidence in admissible form, such as signed statements, may not be obtainable until the end of an investigation is that witnesses are often unwilling to assist until they have been compelled to give evidence at a hearing of the commission. The PIC often submits briefs to the DPP which contain a transcript of evidence given earlier by a witness at a PIC private hearing, accompanied by a statement in admissible form signed by the witness stating that the evidence contained in the accompanying transcript is the evidence the witness would be prepared to give in court. In those instances it is often the case that, if the PIC had not exercised its coercive powers to compel the witness to give evidence at a hearing of the commission, then the statement for the criminal brief would never have been given by the witness. 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.

Some witnesses, such as experts are content to provide evidence in admissible form when they first provide an expert report. When such investigations lead to prosecutions then the necessary work has already been done so far as the expert's report is concerned and it can go straight into a brief without further delay (assuming the expert is not required to provide additional opinion).

²² (1984) 156 CLR 296, 323-324 (Mason, Wilson and Dawson JJ), quoted in *MF1 v National Crime Authority* (1991) 33 FCR 449, 462.

An example of that process occurred in PIC's Operation Calyx, which concerned the actions of NSWPF officers in the investigation of the police shooting of Adam Salter in Sydney on 18 November 2009. The PIC obtained a report from a blood spray expert for use in its investigation. After a public hearing and report to Parliament the PIC sent a brief to the DPP for consideration of charges against a number of police officers. The expert's report already bore the appropriate endorsement and jurat so no further work was necessary to put it into admissible form.

In the case however of non-expert witnesses (who form the bulk of the witnesses in PIC criminal briefs), the experience of the PIC is that the very nature of its investigations, and the fact that not all of the evidence adduced by it will comply with the rules of evidence, meant that much brief preparation must be deferred until the completion of the investigation.

Ellicott J in *Ross v Costigan* said:

*In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken. In *McGuinness v Attorney-General (Vict.)* (1940) 63 C.L.R. 73, 86, Latham C.J. said: 'The Royal Commissioner was appointed to inquire into a specified subject matter, namely, the suggested bribery of Members of Parliament. He was not appointed to determine an issue between the Crown and a party, or between other parties. The commission was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation – an inquisition as distinct from the determination of an issue.'²³*

Submission

Because of its experience in operating within a legislative structure modelled on that of the ICAC, it is the PIC's view that if a commission of inquiry such as the ICAC is to perform the

²³ (1982) 59 FLR 184, 201 (Ellicott J)

principal functions of investigating and preventing corrupt conduct as required by s 13 of the ICAC Act then 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.