

**Submission
No 2**

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

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SUBMISSION TO INQUIRY INTO PROSECUTIONS ARISING FROM ICAC
INVESTIGATIONS

1) INTRODUCTION

- (a) I have been informed that the Parliamentary Committee is inquiring into six particular issues. I shall comment on the first five issues, numbering them in the order in which they appear in the invitation document that the Committee sent to me.
- (b) As Commissioner of ICAC, I appeared before the Parliamentary Joint Committee on three occasions since 2009. Most, if not all, of the issues now raised were canvassed during my appearances before the PJC. Most of the members of this Committee were members of the PJC when I appeared before it and they will be familiar with my views on the issues raised, as I expressed them then in detail. For this reason I shall comment on the issues again now raised as succinctly as possible.
- (c) Before canvassing the particular issues, I wish to make some preliminary remarks.
 - (i) In December 2012 the then Premier stated that because of ICAC, “The State’s citizens can sleep easily at night”. Nothing has changed.
 - (ii) I left ICAC less than six months ago. At that stage it was functioning exceptionally well. The staff were highly professional, skilled and, importantly, committed and dedicated. Virtually all were working effectively and to full capacity. The morale in the Commission was high. Nothing I have learned since then causes me to alter that perception. The Commission remains in the state I have described.
 - (iii) The point is that ICAC was discharging its statutory functions to the optimum extent. Statistics demonstrate that ICAC is the most effective anti-corruption in Australia. It has an international reputation. Hardly a month goes by without some foreign country sending a delegation to ICAC to study how it operates and to learn from it. Shortly before I retired ICAC received a request for advice from an anti-corruption agency in Paris, which stated that it was seeking ICAC’s assistance as its research had

- shown, internationally, that ICAC's work constituted "best practice" in anti-corruption agencies.
- (iv) In these circumstances, I do not think that I am overstating the position by saying that any attempt to change or even tinker with ICAC's functions and powers would be no less than a tragedy.

2) MAKING THE GATHERING AND ASSEMBLING OF EVIDENCE FOR PROSECUTIONS A PRINCIPAL FUNCTION OF ICAC

- (a) The notion of requiring ICAC to gather and assemble evidence for prosecutions is fundamentally inimical to the basic concept of ICAC. ICAC is not a police agency, it does not investigate crimes – we have a police force that does that. ICAC also is not a prosecuting authority - we have the DPP that does that.
- (b) To turn ICAC into an agency that gathers and assembles evidence for prosecutions would have a severe impact on its ability to conduct anti-corruption investigations timeously. New staff would have to be employed and additional premises and other resources would have to be obtained to enable this new principal function to be carried out.
- (c) There is no reason why the police or the DPP should not do the gathering and assembling work required once an inquiry has been completed. The fact is that they refuse to do so. This refusal is something that should be investigated, not adding on to ICAC's duties work that is alien to its basic *raison d'être*.
- (d) The original decision of Parliament to exclude the gathering and assembling of evidence as a principal function of ICAC was principled and wise.
- (e) The nomination of this issue obviously stems from a perceived delay in the prosecution of individuals caught up in ICAC's more recent public inquiries. There are various means of reducing any perceived delay that does not involve altering the character of ICAC.
- (f) In the present case it should be borne in mind that there were compelling reasons that required Operations Jasper and Acacia to be completed before the prosecution of Ron Medich commenced. Had they not been so completed, their completion would have been delayed until after the completion of the Medich criminal trial

and any appeal arising therefrom – a period that could be measured in years. Accordingly, the preparation of the brief had to be deferred until those operations were concluded. Then, some of the senior investigators on those operations were involved in subsequent urgent and important fresh inquiries. It was not in the public interest for those inquiries to be delayed, so the brief preparation was again affected by strategic necessities. This is not an atypical situation.

- (g) The fact is that any focus on gathering and assembling admissible evidence at the cost of prejudicing ongoing anti-corruption inquiries is contrary to the basic function of ICAC.
- (h) Delays in the past have occurred partly because ICAC has not been sufficiently selective in the preparation of the material that it has submitted to the DPP. ICAC has concentrated on improving its performance in this area and the improvements have been substantial.
- (i) Delays in the past have also occurred because of the failure of the DPP to deal sufficiently rapidly with the prosecution. This of course is out of the hands of ICAC.
- (j) Delays have also occurred because of disagreements between ICAC and the DPP as to whether particular prosecutions, and the prosecution of particular charges should proceed. The DPP is an independent body, however, and it has the final say. Disagreements of this kind are inevitable and the two bodies have done their best to maintain a good working relationship.
- (k) There are two practical measures that could be implemented to ensure that prosecutions take place more swiftly.
 - (i) Firstly, whenever an inquiry is completed, the DPP could second two experienced and senior solicitors to ICAC to supervise and manage the gathering and assembling of evidence.
 - (ii) Secondly, DPP solicitors could take the necessary statements. There is a cultural blockage to this suggestion. It is contrary to the practice in the criminal law area where traditionally police, and not solicitors, take witness statements. The practice in

commercial and other civil law areas is the opposite. There, solicitors – and not investigators – take statements. Rationally, there is every reason for solicitors and not police or investigators to take statements – that is because solicitors are trained in the admissibility of evidence (and all statements must be in admissible form), whereas, police and investigators, generally, are not. The DPP employs many solicitors. It escapes me why some of those solicitors are not given the task of converting evidence obtained by ICAC in its public inquiries into statements in admissible form for use in criminal prosecutions. Should this be done, the practical problems to which I have referred will be removed. The objections based on tradition rather than on the exigencies of practice should not be upheld.

3) THE EFFECTIVENESS OF CURRENT PROCEDURES RELATING TO BRIEF PREPARATION

I have dealt with this above.

4) ADEQUACY OF RESOURCING

- (a) While I was Commissioner, I was content with the resourcing on the basis that the additional financial support provided at the instance of the then Premier continued to be made available for the series of important investigations that ICAC was conducting (many of which had not yet been converted into public inquiries at the time I retired).
- (b) Of course, if there are any changes made to ICAC's functions, there will be a need for substantially increased resources.

5) NEW CRIMINAL OFFENCES

The codification of the offence of misconduct in public office would be useful.

6) PROSECUTIONS IN OTHER JURISDICTIONS

- (a) There is little which I wish to say about this issue, save that the functions of the anti-corruption agencies in Western Australia and Queensland differ from those in New South Wales. Speaking under correction, there are certain circumstances under which the Western Australian agency (and I think the Queensland agency as well) can undertake (and has undertaken) prosecutions itself.
- (b) I am implacably opposed to ICAC being given this power. Prosecution by the investigative body is contrary to generally accepted conventions of western democracy. There are two main reasons for this.
- (c) Firstly, the investigator, by its very function, lacks the objectivity which the community is entitled to expect from its prosecutorial body.
- (d) Secondly, anti-corruption agencies are, by the relevant legislation, entitled to compel evidence that is not admissible in criminal trials. If the investigator agency also prosecutes, it will know about this evidence and such knowledge could allow it, at the least, to use that evidence for forensic purposes. That is contrary to all accepted tenets of a fair trial.
- (e) Finally, the Committee should be aware that the more direct involvement of the Western Australian and Queensland anti-corruption agencies in prosecutions has given rise to 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, and New South Wales should be thankful to the authors of the ICAC Act for avoiding these pitfalls. It will be a sad thing indeed if the ICAC Act were at this stage to be amended to alter the purity of ICAC's anti-corruption powers.