

**Submission  
No 5**

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

**Organisation:** Office of the Inspector of the NSW Crime Commission  
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**Position:** Inspector of the Crime Commission  
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The Hon Greg Smith SC, MP  
Chair  
Committee of the Independent Commission against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Smith

**Prosecutions arising from Independent Commission against Corruption Investigations**

Thank you for your letter of 27 June 2014. I make the following submissions.

**Whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal should be a principal function of the ICAC.**

As the *Independent Commission against Corruption (ICAC) Act 1988* (ICAC Act) stands, two functions of the Independent Commission against Corruption (ICAC) other than its principal functions are provided by s14(1):

- (a) to gather and assemble, 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 against a law of the State in connection with corrupt conduct and to furnish such evidence to the Director of Public Prosecutions,
- (b) to furnish, during or after the discontinuance or completion of its investigations, other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

The apparent effect of making these functions principal functions would be to bring sections 15 and 16 to bear on their exercise. The sections provide:

**s15 Task forces**

The Commission may, in connection with its principal functions:

- (a) arrange for the establishment of task forces within the State, and
- (b) seek the establishment of joint task forces with authorities of the Commonwealth or other States or Territories, and
- (c) co-operate with State task forces, Commonwealth task forces, joint task forces or other task forces, and
- (d) co-ordinate or co-operate in co-ordinating any such task forces.

### **s16 Co-operation with other agencies**

(1) In exercising its principal functions relating to the investigation of conduct, the Commission:

(a) shall, as far as practicable, work in co-operation with law enforcement agencies, and

(b) may work in co-operation with the Auditor-General, the Ombudsman, the Australian Crime Commission, the Australian Bureau of Criminal Intelligence and such other persons and bodies as the Commission thinks appropriate.

(2) In exercising its other principal functions, the Commission shall, as far as practicable, work in co-operation with the Auditor-General, the Ombudsman, educational institutions, management consultants and such other persons and bodies as the Commission thinks appropriate.

(3) The Commission may consult with and disseminate intelligence and information to law enforcement agencies, the Australian Crime Commission, the Australian Bureau of Criminal Intelligence and such other persons and bodies (including any task force and any member of a task force) as the Commission thinks appropriate.

(4) If the Commission disseminates information to a person or body under this section on the understanding that the information is confidential, the person or body is subject to the secrecy provisions of section 111 in relation to the information.

(5) In this section:

"law enforcement agency" means:

(a) the NSW Police Force, or

(b) a police force of another State or Territory, or

(c) the Australian Federal Police, or

(d) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the State, another State or a Territory.

Persons more experienced in the field may have a better informed view, but I do not see the need for the Commission to be establishing or seeking the establishment of task forces or co-operating with them for the purpose of gathering evidence that comes before it in the ordinary way. If such forces are necessary they will have been established already as the Commission exercises its principal functions as envisaged by s13. This is consistent, I think, with the principal objects of the ICAC Act as set forth in s2A: the Commission is to investigate, expose and prevent relevant corruption and to educate relevant authorities and officials and members of the public about corruption and its effects. By the same section the Commission is to be given special powers of inquiry. However, it is not a principal object of the Act to give the Commission power to gather evidence to prosecute. So the function of gathering and assembling evidence is seen for what it is, namely an incidental though important function by the Commission that may assist prosecutors to do their work. In my opinion, there is no need to raise this function to the level of a principal function.

I hope that the Committee does not consider it impertinent for me to add a comment. Not long ago, amid considerable publicity, the Commission exercised its power under subs14(1)(a) by sending to the New South Wales Director of Public Prosecutions (the DPP) material said to constitute, as I understand it, evidence which the Commission considered would be admissible in a criminal trial. The Commission may also have offered the opinion that the evidence warranted the commencement of criminal proceedings, though I am not sure about that – my knowledge of the matter comes solely from what I have read and heard in the reports of the news media. Following that publicity there has been much comment, some of it uninformed and critical of the DPP, comparing the success of the Commission in exposing corruption with the lack of any resulting prosecution.

In my opinion not nearly enough has been done to educate members of the public about the significantly different functions of the Commission as an investigator and the DPP as a prosecutor. Many of the public comments of which I am aware appear to have accepted that the guilt of those investigated by the Commission had already been proved or as good as proved. I commend to the Committee the need to disabuse members of the public of such notions.

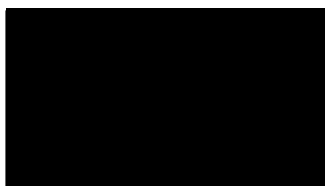
As I have said, the Commission should exercise its function of gathering and assembling evidence that may be admissible. However, the public should be made to understand that the Commission is not a prosecutor and that it is the responsibility of the DPP to assess for itself the strength, which of course includes admissibility, of the evidence in deciding whether to prosecute and for what.

I do not otherwise wish to comment on the effectiveness of relevant ICAC and DPP processes and procedures.

**Whether there is a need to create new criminal offences that capture corrupt conduct**

I am not aware of any need to create new criminal offences that involve corrupt conduct. Thank you for the opportunity to provide this submission.

Yours faithfully



The Hon Graham Barr QC  
**Inspector, New South Wales Crime Commission**  
22 July 2014