

**Submission
No 7**

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

Name: Mr Nicholas Cowdery AM QC

Date Received: 1/08/2014

Dear Committee

Thank you for the invitation dated 27 June 2014 to make a submission to the inquiry.

As a member of its Criminal Law Committee, I have been involved in the preparation of the NSW Bar Association's submission to the inquiry and I am in general agreement with it. I add the following matters, in brief.

Attached is an article that I submitted for publication in the Sydney Morning Herald on 10 June 2014 – it may have been edited slightly for publication. It states my views in broad terms.

Independence is a foundation of proper prosecution. 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. That is why it is essential for those tasks to remain with an independent Director of Public Prosecutions. Accordingly, there is much value in the ICAC adhering to its roles of investigation and education.

Furthermore, it is the Office of the DPP that has the requisite specialty and expertise to conduct the prosecution function appropriately.

(Both those matters also point to the inappropriateness of having police conducting prosecutions, but that is probably for another time).

I hope this may be of assistance. I would be happy to assist further, if requested.

Regards

Nicholas Cowdery AM QC
Visiting Professorial Fellow, UNSW
Adjunct Professor, University of Sydney
Former Director of Public Prosecutions, NSW

COMMENT

Nicholas Cowdery AM QC

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It has been reported that the NSW Attorney General, Brad Hazzard, has “declared” that criminal prosecutions must flow from corruption findings against Eddie Obeid so that the public should not lose confidence in the ICAC. He is quoted as saying: “In a legal sense, if prosecutions are recommended, prosecutions should flow”. He made some other comments to which I shall return. Commentators and letter writers have taken up the refrain.

The Attorney is new to the job and it is clear he still has some learning to do. The proposition quoted above is just plain wrong. It is necessary to examine why.

The ICAC’s job is to investigate allegations of corruption, as it is defined broadly in the Act. ICAC is an investigator, not a prosecutor. It gathers information from a wide range of sources, some publicly revealed, some not. Some of that information, when it is put into proper form, can be used in criminal prosecutions, some cannot. ICAC makes findings about corruption – that is not synonymous with crime, although conduct uncovered may also be criminal. So ICAC can recommend to the DPP or other prosecutors that criminal prosecution be considered.

ICAC has done that in relation to Mr Obeid and others, but now the DPP’s job begins. We can be confident that the ICAC has done its job well, regardless of any further action taken by others. We can also be confident that the DPP will do his job well.

That job entails: examining all the material assembled by ICAC, assisted by its report and any summaries provided with its recommendations, to identify what amongst it can become legally admissible evidence in a criminal prosecution; identifying what charges may be supported by that evidence (not necessarily identical with ICAC’s recommendations); determining if there is a reasonable prospect of conviction (the prosecution test); then charges may be laid. All of that takes much time and effort by a team of competent professionals in the DPP’s Office. It might also be necessary to ask ICAC’s investigators to pursue further evidence in some respects to fill any gaps or strengthen the case and that can add to the delay. (And the DPP pays no attention to expostulations of the kind uttered by Mr Obeid about there being a 1% chance of prosecution – he would say that, wouldn’t he?)

Mr Hazzard is also quoted as saying that he, the Premier and the government are all keen to see that all necessary resources are provided to ensure that the process can move forward. Good. Let’s see additional special funding provided to the DPP, as happened last August, to enable priority to be given to the case among the many other demands on the cash-strapped Office.

That deals with the immediate matter, but there are broad issues of concern here. First, NSW has had an independent DPP since 1987 and the Office has served the State extremely well. Although the Attorney General retains parallel powers of prosecution, a wise Attorney should leave such matters to the specialist. There is certainly no place for the Attorney to step in on cases like this one (or at all, except in extraordinary circumstances).

Secondly, the Attorney should not be seen to be telling the DPP what to do. The DPP knows what is required and the community should be confident that he will do it according to well established principles and guidelines, acting on the legally admissible evidence – as happens daily.

Thirdly, in cases like this, there is an added danger in the Attorney's conduct. He is a Liberal and it is a former Labor Minister in the sights. DPPs exist to act independently from inappropriate pressure from politics, the media and the community and work hard to maintain that separation. Mr Hazzard should be mindful of that and of the lasting perception he may inaccurately (and no doubt unintentionally) create of political bias in the DPP if he exhorts the DPP to prosecute and the DPP does.