Submission No 12

PROSECUTIONS ARISING FROM INDEPENDENT COMMISSION AGAINST CORRUPTION INVESTIGATIONS

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Submission to the NSW Parliamentary Joint Committee

Question One: "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 short answer to this question is 'it should not'.

The principal function of the ICAC is to investigate and expose corrupt conduct in the public sector. It is not, nor was it ever intended to be, a criminal law enforcement agency (like the Police) and it is not, and should not be, permitted to prosecute people for criminal offences (which is left to the DPP). It can, however, make recommendations that consideration be given (by the DPP) as to whether identified criminal proceedings should be commenced based on its findings.

In the discharge of its principal function, the ICAC moves with commendable speed and efficiency. Public inquiries take days not weeks. The ICAC is given special powers for it to investigate and expose corrupt conduct - that being its principal function. Those powers are not, generally speaking, available to the Police force. For example, people called before the ICAC inquiries must answer all questions asked of them. They do not have the privilege to refuse to answer questions pursuant to the right of silence, the privilege against self-incrimination, legal professional privilege or any other privilege. If, however, objection is taken by a witness at an inquiry to answer questions based upon the traditional common law rights referred to above, the questions and answers cannot be used in criminal, disciplinary or civil proceedings. Recently, the legislation was amended to allow questions and answers given in an inquiry, when objection was taken, to be admissible in disciplinary proceedings. They are still not admissible in civil proceedings, although I have never understood the reason why this should be so.

For the work of the ICAC to be effective, its recommendations should be dealt with as soon as possible after the report is issued. Speed is of the essence. That has not been the case. In recent months, concern has been expressed that it has taken an inordinate length of time for recommendations made by the ICAC to be the subject of a decision by the DPP. The solution to the problem is not to turn the ICAC into a criminal law enforcement agency. It is to ensure that the decisions as to whether prosecutions should follow are made soon after the ICAC has published its report.

I know of no-one who suggests that the ICAC should actually prosecute in the criminal courts. Nor do I think it should undertake investigations purely for the purpose of gathering evidence for future criminal trials, unless of course that evidence is gathered for the principal purpose of investigating and exposing corrupt conduct. In my opinion, and contrary to present practice, once the ICAC has published its reports and handed over the information to the DPP, it has fulfilled its function and, generally speaking, it should move to the next investigation. But that is not what happens. The ICAC undertakes investigative functions for the purpose of the criminal proceedings as requested by the DPP, it lays the charges, serves subpoenas, prepares criminal law briefs and an officer of the Commission attends in Court when the criminal proceedings are underway. This happens because the DPP and the Police will not further investigate criminal conduct arising out of the ICAC's findings. The DPP claims that it cannot investigate at all and the Police have claimed, so I am told, that the ICAC matters are too complicated.

There may be some areas where the DPP would not be competent to further investigate alleged criminal conduct. But as far as I can see, there is nothing in their charter

precluding them from undertaking many of the post-report functions presently being undertaken by the ICAC. Moreover, it is difficult to understand why the DPP cannot, for example, take statements. After all, by the time the ICAC has made its findings, the DPP knows what those findings are and knows that if true they would constitute a criminal offence - that being the criterion by which 'corrupt conduct', in most cases, is defined. The Police force is a highly skilled agency and the notion that it is unable to investigate the crimes identified by the ICAC is difficult to understand.

If the ICAC were turned into a criminal law enforcement agency to give effect to the proposal that its primary function should be to gather evidence for criminal trials, it is hard to see how the present extraordinary powers the ICAC has, and which are essential for its present functions, could be maintained. For example, I doubt whether it is seriously suggested that the Police could conduct public open inquiries requiring people to answer questions before criminal charges are laid.

People have referred to the Hong Kong ICAC in support of a claim that turning the NSW ICAC into a criminal law enforcement agency would not cause a great deal of trouble. The Hong Kong ICAC has nothing in common with the NSW ICAC except the name. It must be remembered that the Hong Kong ICAC was brought into existence as a specialised criminal law enforcement agency to investigate police corruption in Hong Kong. The serious police corruption, there identified, was so widespread that investigations and prosecutions for corrupt conduct could not be left to the police force. It was for that reason that the Hong Kong ICAC became a specialised criminal law enforcement agency. Since then, it has extended its jurisdiction into corruption in the private sector. However, the privileges against self-incrimination, the right of silence, legal professional privilege etc are retained. Furthermore, for a population of approximately 7 million people, the Hong Kong ICAC has a budget of something in excess of AUD$100 million and employs a very large number of people. In NSW, we have a police force that is not as corrupt as the Hong Kong police force was. It is competent to investigate all allegations of corrupt conduct, particularly where the allegations make clear that the facts found by the ICAC amount to a criminal offence.

Question Two: The effectiveness of relevant ICAC and DPP processes and procedures including alternative methods of brief preparation.

I have already expressed the opinion that the ICAC undertakes most post-report functions required to be undertaken for a successful criminal prosecution. If present practice continues it is difficult to accept that there would be any increase in the speed of decision-making by the DPP. The practice has been going on for years and inevitably, each side blames the other for delays. The failure of the DPP to make decisions in a timely manner has caused the present disquiet. Mr Obeid, a senior Minister of the Crown, was found to have engaged in corrupt conduct and appropriate recommendations made, he has still not received a decision as to whether he will be prosecuted for a criminal offence. Indeed he has boasted to the media that he cannot be prosecuted. This has had adverse consequences for the DPP and the ICAC.

It is not infrequently maintained that the problem is not as simple as people think it is. For example, it has been said by the DPP that its function is different, whereas the ICAC makes its findings based on the civil standard of proof i.e., on the balance of probabilities the decisions of the DPP are made with respect the criminal onus of proof i.e., beyond

reasonable doubt. It has also been said that the ICAC receives a large amount of information by the exercise of its compulsory powers and that is not available to the DPP.

As to these matters, I know of no occasion when there has been a recommendation by the ICAC with respect to criminal proceedings that a decision has been made on the balance of probabilities. Decisions as to whether people have engaged in corrupt conduct and whether recommendations should be made as to future prosecutions are not made lightly and, as far as I am aware, are not made at all unless the ICAC is convinced that the facts have been made out with certainty. I would also point out that it is only those questions and answers given at compulsory hearings where objection is taken that cannot be used in the criminal proceedings. It is of course possible that once ICAC has received an admission in a public inquiry of corrupt conduct, it will simply move on to the next matter for consideration. But mostly, the evidence in public inquiries dealing with serious corrupt conduct goes well beyond questions and answers in the witness box by the person later charged with an offence. The evidence comes from many sources such as legally authorised telephone intercepts, the evidence of other people, etc.

There is also a practical reason why the present practice should cease. You have two agencies, the DPP and the ICAC, both independent of Government and each other, both working towards the same end but neither having authority or control over the other - it is no wonder the present system doesn't work. It does have some control over the police force. At least it could make the police undertake functions that should be undertaken by it and, I think, it could audit the work undertaken by the police.

If the Government will not compel the DPP to exercise functions that are open to it i.e., investigating by taking statements and the like and/or will not compel the Police to undertake functions available to it i.e., the investigation of crime, then the Government should give consideration to establishing a specialised separate body having the function to investigate and prosecute criminal charges arising out of the ICAC reports and to be answerable to a Committee of the Parliament. A separate body may involve further expense, but its establishment would free the ICAC from undertaking post-report investigations (which it should not be doing) and allow it to investigate more matters. Moreover and more importantly, it should result in criminal charges, if they are to be preferred, be commenced within weeks (not years) after exposure by the ICAC.

Question three: Adequate resourcing - I make no comment about this. This depends largely on how the ICAC is to function. Recently, I am told the ICAC was given additional funds for the purpose of allowing the Obeid matter to be dealt with expeditiously but to date no decision has been made, notwithstanding that is more than one year since the report was published. As far as I am prepared to express an opinion on the matter, when I was Commissioner for the ICAC I did not think resourcing was a problem and if on occasions extra money was required for special purposes that money was forthcoming.

Whether there is a need to create a new criminal offence that captures corrupt conduct.

There is a tendency in NSW to rush to legislation whenever a problem, real or imagined, is said to arise in the criminal law system. In the past, the legislation has in my opinion, had the effect of complicating the criminal law without any evident improvement in the effectiveness of prosecutions. When Commissioner I did not come upon a case in which I felt there was a need to create a special offence arising out of corrupt conduct. It is to be recalled that a finding of corrupt conduct cannot be made unless the facts which are found would, if true, amount to a criminal or disciplinary offence. Most findings of serious corrupt

conduct are dependent on findings that if the facts were made out, a criminal offence had been committed.

Rather than contemplating the creation of new criminal offences, the problem if it exists, is adequately addressed by paying attention to existing criminal offences that are available. For example, the offence of unjust enrichment and, more particularly, the common law offence of misconduct in public office.

The offence of misconduct in public office has in recent years been reluctantly and sparingly adopted by the DPP. It has been quite commonly used in Victoria. Why it has not met with DPP approval is unclear to me. There are, however, two decisions in the Hong Kong Supreme Court in which the common law offence (which is the same as the common law offence in NSW) has been identified and clarified by decisions of Mr Justice Mason, then an acting Judge of the Hong Kong Supreme Court and formerly Chief Justice of Australia. The learned Judge identified the ingredients of the offence viz., there has been wilful misconduct (in a serious manner) in relation to a public official and without reasonable excuse or justification. The 'wilful misconduct' does not necessarily have to be a criminal offence in itself. People who occupy high public office in NSW such as Ministers of the Crown have public trust obligations, breach of which can found a charge of misconduct in public office. For example, in the Hong Kong case referred to above, a senior police officer was found to have engaged in misconduct in public office by visiting a brothel, the owner of which was at the time subject to police investigation. Recently, a Minister of the Crown was found by ICAC to have improperly signed an agreement for the purchase of land after an election had been called and before the new election was held. He knew his actions were in violation of the well recognised conventions because he backdated the letter to give the appearance that the letter was written before the election was called. A recommendation was made that consideration be given to prosecution for the offence of misconduct in public office. That was not adopted by the DPP although I do not know the reason why.

If the Committee wishes, I would be prepared to attend and answer questions.