

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

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NEW SOUTH WALES
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Mr Greg Smith SC MP
The Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Smith

Parliamentary Committee on the Independent Commission Against Corruption

Thank you for your letter dated 27 June 2014 inviting submissions from the Association on this reference.

The Association responds to the terms of reference attached to your letter as follows.

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

Section 14 of the *Independent Commission Against Corruption Act 1988* (the Act) already provides that a function of the ICAC should be the gathering and assembling of evidence that may be admissible in the prosecution of a person for a criminal offence.

There is no identifiable reason to make it a principal function of the ICAC alongside those set out in section 12. It is important to the protection and enforcement of the principles of an open democracy and to the promotion of the aim of the ICAC in preventing breaches of public trust in the administration of public office (section 12 of the Act) that the ICAC be enabled to carry out its functions from time to time without some of the rigours and restrictions required by principles that operate in the criminal law jurisdiction and to carry them out thoroughly and expeditiously.

Obviously, issues such as the ICAC's powers of compulsion, and any effect the exercise of those powers might have on the later admissibility of any evidence obtained through that process or through other investigative means, are important considerations to be taken into account.

However, in accordance with section 14 of the Act, consideration should be given where possible to obtaining that evidence in an admissible form. Investigators should be conscious of the prospect of a criminal prosecution and not only be alert to identifying, gathering and forwarding evidence that may support prosecution in due course, but also to not acting in a way that will prejudice any potential prosecution.

It is suggested that consideration be given to introducing protocols of cooperation between the ICAC, the NSW Police Force and the Office of the Director of Public Prosecutions (the ODPP) so that evidence could be gathered in a way such that it can be assessed and preserved in admissible form during the ICAC process, without undermining the power that the ICAC already has by way of its compulsory evidence taking processes.

In that context, careful consideration will need to be given to the difficulties associated with a prosecution arising from an investigation involving compulsory processes, for example of the kind identified in *Lee v The Queen*; *Lee v The Queen* [2014] HCA 20 (21 May 2014) and *QAAB v Australian Crime Commission* [2014] FCA 747.

The effectiveness of relevant ICAC and Director of Public Prosecution processes and procedures, including alternative methods of brief preparation

The ICAC and the ODPP are not comparable entities in the sense that the DPP has no investigative function at all and, importantly, sits independently of the NSW Police Force when exercising its prosecutorial functions. The ICAC is an investigator and makes findings.

If it is contemplated that the ICAC has a role in preparing (or even prosecuting) criminal matters, consideration needs to be given to the standard of proof that is required in criminal matters, prosecutorial guidelines and practice and the ICAC's ability to garner evidence in a form which would be admissible in any criminal trial.

Currently, the ICAC may act upon any material that it regards as reliable. Understandably the material garnered often comes in the form of transcripts of interviews or recordings of conversations, which may be replete with inadmissible and irrelevant material. The ICAC material does not need to be in admissible form for its purposes, given the mandate that it has to enquire into corruption without the restrictions imposed upon it by matters of evidence law.

However, if the ICAC is to prosecute matters itself or to refer matters to the DPP with a recommendation for prosecution, it should not simply refer all material it considers relevant in the hope that a successful prosecution will eventuate. The material garnered and collated needs to be analysed to identify what is admissible, sufficient and reliable.

Adequacy of resourcing

So far as the Association is aware, the funding available for the prosecution of matters referred by the ICAC is probably inadequate. The matters are, by their nature, complex and time-consuming. Vast amounts of material typically need to be analysed with a view to determining what charges may be available and against whom. Often additional investigations may be identified, to be conducted (for example) by police, forensic accountants and other experts.

The DPP must deal with such referrals against an existing workload for which already (as it is understood) resources are inadequate. Given the potentially high profile of any such matters, it is particularly important that any matters that are prosecuted are done so efficiently and effectively.

It is noted that additional funds were provided to the DPP after the Obeid referral. Any additional brief of such size requires substantial additional resources to be applied to it or diverted away from other demands.

In addition it is contemplated that, so far as obligations of disclosure are concerned, additional resources would be required to ensure that whilst the prosecutor of any criminal proceedings was not cognizant of inadmissible material obtained under compulsion through the ICAC process, there was an officer within the prosecution service who was cognizant of all material, so as to fulfill any disclosure obligations to the accused person.

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

'Corrupt conduct' is defined very broadly under section 8 of the Act as follows:

8 General nature of corrupt conduct

(1) Corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),

(b) bribery,

(c) blackmail,

(d) obtaining or offering secret commissions,

(e) fraud,

(f) theft,

(g) perverting the course of justice,

(h) embezzlement,

(i) election bribery,

(j) election funding offences,

(k) election fraud,

(l) treating,

(m) tax evasion,

(n) revenue evasion,

(o) currency violations,

(p) illegal drug dealings,

(q) illegal gambling,

(r) obtaining financial benefit by vice engaged in by others,

(s) bankruptcy and company violations,

(t) harbouring criminals,

(u) forgery,

(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

- (a) matters arising in the State or matters arising under the law of the State, or
- (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

It is important to note that the definition in section 8(1)(a) does not involve any mental element. It is directed to conduct which has the effect of adversely affecting the exercise of official functions. It would not be appropriate to create a criminal offence of this kind, without it being an offence of specific intent.

Section 8(2) of the Act provides that corrupt conduct could include more than 20 acts that are already criminal offences.

The only stated act which is not already a criminal offence is listed at section 8(2)(a) of the Act. It is possible to contemplate an appropriate criminal offence, which does not presently exist, along the following lines:

It will be an offence to deliberately engage in any conduct that adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official function by any public official, or group or body of public officials (**official misconduct**).

'official misconduct' includes but is not limited to any intentional:

- breach of trust;
- fraud in office;
- nonfeasance, misfeasance or malfeasance;
- oppression, extortion or imposition.

Obviously the existing limitations on the definition of 'corrupt conduct' set out in section 9 of the Act would need to be considered in drafting any proposed criminal offence.

In addition to the above, and in the context of any negotiation by or with any public official, consideration might also be given to making it a strict liability offence, similar to that found in section 191 of the *Corporations Act 2001* (Cth), not to disclose any material personal interest in the negotiation.

Finally, in addition to any criminal penalties that might be considered, provisions which allow for:

- the accounting of profits;
- compensation to the State or to any innocent third party; and
- the unwinding of any agreements obtained by official misconduct might also be considered.

Arrangements for the prosecution of corrupt conduct in other jurisdictions

The Western Australian Parliament is currently conducting its own inquiry into the ability of the Corruption and Crime Commission to prosecute its own charges.

Otherwise the Association refers the Committee to the research paper into corruption offences prepared by Lenny Roth for the NSW Parliamentary Research Service in September 2013.

Any other related matters

It is noted that one of the functions of ICAC is to communicate to any relevant authorities the result of any investigations into corrupt conduct: section 13(1)(c) of the Act. Consideration may need to be given as to whether or not that provision ought be amended to allow for the delaying of any such communication unless or until a criminal prosecution has been completed or a decision has been made that one will not be commenced, if that is required to ensure that the criminal prosecution is not compromised.

Should you have any questions in relation to this submission, please do not hesitate to get in touch with me or the Association's Executive Director, Mr Philip Selth at

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Kind regards

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Jane Needham SC
President