

**Submission  
No 10**

**INQUIRY INTO PROPOSED AMENDMENTS TO THE  
INDEPENDENT COMMISSION AGAINST CORRUPTION ACT  
1988**

**Organisation:**

**Name:** Mr Bruce McClintock SC

**Telephone:**

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*Bruce R McClintock SC*

*Selborne Chambers  
6/174 Phillip Street  
Sydney NSW 2000  
Telephone: 61 2 9232 6470  
Facsimile: 61 2 9233 3902  
DX 382 SYDNEY  
brmcclintock@sixthfloor.com.au  
ABN 12 819 922 039*

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Frank Terenzini MP  
Chairman of the Independent Commission Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

Email: [icac@parliament.nsw.gov.au](mailto:icac@parliament.nsw.gov.au)

Dear Sir

**Proposed Amendments to the  
Independent Commission Against Corruption Act 1988**

Thank you for the opportunity to make submissions to your committee as to the proposed amendments to the Independent Commission Against Corruption Act 1988. As you will be aware I completed the independent review of the Independent Commission Against Corruption Act 1988 and delivered my final report in January 2005. A considerable number of the amendments which I recommended to the ICAC legislation were subsequently adopted.

I make the following comments on the three paragraphs of the terms of reference:

1. Whether the Independent Commission Against Corruption Act 1988 should be amended to remove the restriction in s 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

This is a finely balanced issue. On the one hand, one has the fact that the evidence has been obtained under compulsion and is a long standing and fundamental principle of Australian law that no person should be compelled to give evidence against himself. That is the reason for the present structure of s 37 of the ICAC Act. On the other hand, there is the fact that if the witness has made an admission of misconduct which could lead properly to disciplinary proceedings being taken against him or her, it seems artificial that such an

admission should not be taken into account by whichever entity is charged with the disciplinary proceedings.

On balance, I favour removing the prohibition on the use of such evidence in disciplinary proceedings. I should add that I would oppose, and oppose very strongly, any attempt to change the restriction on the use of such evidence in criminal proceedings – there very different considerations apply.

2. Whether the Independent Commission Against Corruption Act 1988 should be amended to remove the restriction in s 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, or compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

For similar reasons to those set forth in response to term of reference 1 above, I support this change.

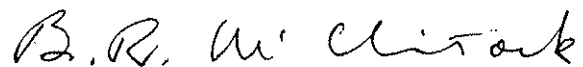
3. If either of the amendments referred to in paragraphs 1 or 2 above are made, whether the Independent Commission Against Corruption Act 1988 should further be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function.

I enclose a photocopy of pages 39 – 43 of my January 2005 report. You will note that in paragraph 3.4.2 I point out that, while ICAC has responsibility for assembling evidence admissible in the prosecution of corruption offences, that makes clear that this is not a principal function – see s 14(1)(a).


I am not entirely clear as to the connection between the first two terms of reference and this term of reference in the perception of the committee. Nevertheless, it appears to me that this change should be made and I support it. The committee will be aware, and indeed I am aware from the conduct of my inquiry, that ICAC does perform the function of assembling evidence for criminal proceedings. That is, of course, a very significant function on any view of the matter. While the change may in some senses be perceived as cosmetic, it seems to me that it would be wise to make the function a specifically primary in the legislation so that emphasis is given to its importance.

Once again I thank you for the opportunity of making these submissions. If there is anything further I can do to assist the committee, whether by giving oral evidence or otherwise, I would be happy to do so. I have a longstanding commitment to the efficacy of the ICAC legislation.

Respectfully submitted



**Bruce R McClintock**



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## 3.4 Criminal prosecutions

### *Introduction*

- 3.4.1 The discharge of ICAC's functions in relation to criminal proceedings has been the subject of criticism in recent years, particularly from the Parliamentary Committee. This criticism has focussed on the relatively low number of criminal convictions arising from findings of corrupt conduct and the long delay between publication of an ICAC investigation report and the initiation of criminal proceedings.
- 3.4.2 The Act confers limited powers on ICAC with respect to criminal proceedings, with the specific intention of separating the function of investigation from that of prosecution. ICAC has responsibility for assembling evidence admissible in the prosecution of corruption offences for provision to the Director of Public Prosecutions, although the Act makes it clear that this is not a principal function.<sup>36</sup>
- 3.4.3 ICAC may make recommendations that consideration be given to the prosecution of particular persons.<sup>37</sup> It is not, however, entitled to make a finding (or form an opinion) that a specified person is guilty of (or has committed) a criminal offence or disciplinary offence. Nor may ICAC recommend (or form an opinion) that a specified person should be prosecuted for a criminal offence.<sup>38</sup> The Act does not confer any function or power on ICAC to initiate or conduct criminal prosecutions.
- 3.4.4 The separation of the function of prosecution from that of investigation was an important consideration for the then Government in establishing ICAC:

*'The proposed Independent Commission Against Corruption will not have power to conduct prosecutions for criminal offences or disciplinary offences, or to take action to dismiss public officials. Where the commission reaches the conclusion that corrupt conduct has occurred, it will forward its conclusion and evidence to the Director of Public Prosecutions, department head, a Minister or whoever is the appropriate person to consider action....It is important to note that the independent commission will not be engaging in the prosecutorial role. The Director*

<sup>36</sup> See section 14(1)(a) of the Act.

<sup>37</sup> See section 13(5) of the Act.

<sup>38</sup> See section 74B and section 13(4) of the Act.

*of Public Prosecutions will retain his independence in deciding whether a prosecution should be instituted.*<sup>39</sup>

- 3.4.5 When amending the Act to clarify the power of ICAC to make findings of corrupt conduct following the High Court's decision in *Balog v ICAC*,<sup>40</sup> the then Government again emphasised ICAC's limited role in relation to criminal proceedings:

*'It is not for the commission to determine criminality. Nor is it the commission's role to conduct prosecutions for criminal or disciplinary offences. The Director of Public Prosecutions and other authorities are charged with that responsibility and the commission should not be able to pre-empt the decisions of those authorities to prosecute or not to prosecute.'*<sup>41</sup>

### **Role of the DPP**

- 3.4.6 While the framers of the legislation intended that the Director of Public Prosecutions (DPP) would have responsibility for determining whether to prosecute a matter and to conduct the prosecution, the situation in actual fact is a little different. The DPP, Mr Nicholas Cowdrey AM QC, does not institute criminal prosecutions arising from ICAC investigations. That is ultimately a matter for ICAC. He described his role in relation to ICAC in the following terms:

*'The Office of the DPP provides advice on the appropriate charges to lay and whether a prosecution has reasonable prospects. It conducts the prosecution. However, it does not lay charges. It is ICAC's decision to lay charges or not. The Office of the DPP does not investigate any matters. Where the brief of evidence is considered deficient, requisitions are sent to ICAC for more information.'*<sup>42</sup>

- 3.4.7 The relationship between ICAC and the DPP has been formalised in a memorandum of understanding. This memorandum confirms that it is ICAC's decision whether or not to commence criminal proceedings and that ICAC officers must issue and file the documents to commence

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<sup>39</sup> The Hon Nick Greiner, Second Reading Speech for ICAC Bill 1988 *Hansard* Legislative Assembly 26 May 1988 at page 678.

<sup>40</sup> (1990) 169 CLR 625.

<sup>41</sup> Mr Dowd, then Attorney General, Second Reading Speech for ICAC (Amendment) Bill 1990 *Hansard* Legislative Assembly at page 10201.

<sup>42</sup> Interview with the DPP held during the course of this review.

the Court proceedings. The memorandum provides that the DPP will take over the prosecution of proceedings instituted by ICAC on or before the first Court date.

- 3.4.8 To facilitate the commencement of criminal prosecutions by ICAC, employees of ICAC have been declared by regulation to be 'public officers' for the purposes of the *Criminal Procedure Act 1986*.<sup>43</sup> This enables ICAC employees to issue court attendance notices to commence proceedings for summary and indictable offences in the same manner as police officers.
- 3.4.9 ICAC's role in initiating criminal prosecutions sits uncomfortably with the prohibition on ICAC forming an opinion that a person should be prosecuted for a criminal offence,<sup>44</sup> as well as the clearly expressed intention of the framers of the legislation that it would be the responsibility of the DPP to decide whether or not to institute a criminal prosecution.
- 3.4.10 ICAC advises that it does not initiate criminal prosecutions without first seeking the advice of the DPP. ICAC generally commences proceedings in accordance with the advice given by the DPP. There has been one occasion, however, where the advice of the DPP was not followed. In this case, the DPP recommended the laying of criminal charges for breach of a non-publication order under section 112 of the Act, but ICAC declined to do so.<sup>45</sup>
- 3.4.11 There has been no instance brought to the attention of the review of ICAC initiating criminal proceedings contrary to the advice of the DPP. Were ICAC to do so, the DPP could terminate the prosecution.<sup>46</sup>
- 3.4.12 I have given consideration to amendments to the Act to reflect the original intention that ICAC should not have the power to initiate or conduct prosecutions. However, in the absence of any change in position by the DPP, there is no suitable alternative person or body to make the decision as to prosecution and I do not think such amendments are practicable.
- 3.4.13 I am concerned, however, that the current statutory regime does not recognise, in an open and transparent manner, the actual position in

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<sup>43</sup> See *Criminal Procedure Act 1986* sections 3 and 173; *Criminal Procedure Regulation 2000* reg 12B.

<sup>44</sup> See sections 13(4) and 74B of the Act.

<sup>45</sup> ICAC sent a warning letter instead.

<sup>46</sup> *Director of Public Prosecutions Act 1986* s9.

relation to criminal prosecutions arising from ICAC investigations. To this end, the Act should be amended to authorise ICAC, after considering the advice of the DPP, to institute criminal proceedings arising from its investigations.

- 3.4.14 ICAC opposes this amendment on the basis that it is unnecessary. In my view however, it is important for the Act to reflect accurately and openly the actual role performed by ICAC.
- 3.4.15 This amendment would also put beyond doubt that the common law rule that any person may commence proceedings alleging the commission of an offence<sup>47</sup> does not apply to ICAC.
- 3.4.16 Section 13(4), which provides that ICAC may not form an opinion that a person should be prosecuted for a criminal offence, may also require amendment to make it clear that this provision is subject to the proposed provisions governing the institution of criminal proceedings by ICAC.
- 3.4.17 The power of ICAC to recommend under section 74A of the Act that consideration be given to the prosecution of a specified person also requires revision in light of the fact that it is ICAC that decides, after receiving advice from the DPP, to initiate criminal proceedings.
- 3.4.18 Section 74A of the Act currently requires ICAC to include in a report to Parliament on the results of its investigation, in relation to each person against whom substantial allegations have been made, a statement as to whether or not in all the circumstances ICAC is of the opinion that consideration should be given to the prosecution of the person for a specified criminal offence.
- 3.4.19 It would be more transparent if this provision were to be amended to require ICAC to include a statement as to whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought as to whether the person should be prosecuted for a specified criminal offence.
- 3.4.20 These amendments will recognise the current practice adopted by ICAC and the DPP in relation to the institution of criminal

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<sup>47</sup> See *Brebner v Bruce* (1950) 82 CLR 161. This rule may be modified by statute. For example, proceedings for some offences may only be commenced by, or with the consent of, a particular public official. In addition, the Director of Public Prosecutions has the power to take over and terminate prosecutions.



proceedings. However, these amendments do not address the complaints about delay and insufficient criminal convictions. These matters are discussed below.

**Recommendation R3.2:** That, consistent with the current practice adopted by ICAC and the DPP, the Act be amended to provide expressly that ICAC may, after considering the advice of the DPP, institute criminal proceedings arising from its investigations.

**Recommendation R3.3** That section 74A of the Act be amended to change the statement about prosecution that ICAC is required to include in a report under section 74 from 'whether or not in all the circumstances it is of the opinion that consideration should be given to prosecution' to 'whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought.'

### ***Criminal convictions***

- 3.4.21 Some submissions to the review have expressed concern that there are insufficient criminal convictions arising from findings of corrupt conduct by ICAC.<sup>48</sup> This is said to reflect either the inappropriateness of ICAC's findings and recommendations, or that public officials are not being properly brought to account for their corrupt activities.
- 3.4.22 The number of criminal prosecutions is, however, an imperfect indicator of the performance of ICAC. The principal function of ICAC is to investigate and expose corrupt conduct, not to obtain criminal convictions. ICAC was established because of the difficulties with obtaining criminal convictions for corruption offences. Its focus generally will, and should be, on those matters where it is more important to ascertain what happened than to obtain a criminal conviction.
- 3.4.23 The exposure of corruption by ICAC serves an important deterrent and educative purpose. Importantly, ICAC's investigations are conducted with a view to ascertaining whether any laws, policies, practices or procedures require change in order to minimise opportunities for corruption.<sup>49</sup> ICAC's investigations are designed to modify systems as

<sup>48</sup> See also the Parliamentary Committee's Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials* at pages 5-6.

<sup>49</sup> See section 13(2) of the Act.