

**Submission
No 18**

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

Organisation: NSW Young Lawyers
Name: Mr Elias Yamin
Position: President Elect
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**Criminal Law Committee
Public Law & Government Committee**

**Submission to the NSW Parliament
Committee on the Independent Commission
Against Corruption**

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Macquarie Street
SYDNEY NSW 2000

By email: icaccommittee@parliament.nsw.gov.au

Contact:

Elias Yamine

President Elect of NSW Young Lawyers

██

Andrew Tiedt

Chair, NSW Young Lawyers Criminal Law Committee

██

Patrick Gardner

Chair, NSW Young Lawyers Public Law and Government
Committee

██

Contributors:

**Vivian Jones, Harry McDonald, Caitlin Akthar, Rhonda
Furner**

1. Preface

New South Wales Young Lawyers is a division of the Law Society of New South Wales. Members include legal practitioners in their first 5 years of practice and/or under the age of 36 and law students. There are currently over 15,000 members.

The NSW Young Lawyers Criminal Committee is responsible for development and support of members of NSW Young Lawyers who practice in or are interested in the Criminal Law. The Committee takes a keen interest in providing comment and feedback on the criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with the criminal law.

The NSW Young Lawyers Public Law and Government Committee is responsible for providing a platform under which our members can discuss issues relevant to work in or with government departments, matters of constitutional and administrative law, and matters of public interest law. The Committee has a keen interest in the role of government in providing a framework that facilitates effective law enforcement. Equally, the Committee takes an interest in any law that might otherwise abrogate expectations of privacy, security and accountability that members of the public ought to expect from their public service.

Summary and Recommendations

The NSW Young Lawyers Criminal Law Committee and the NSW Young Lawyers Public Law and Government Committee's (**the Committees**) response includes recommendations specifically in relation to the following criteria from the Terms of Reference:

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 Committees recommend that:

1. Parliament adopt the 2001 recommendation in favour of expanding the definition of corrupt conduct that the ICAC may investigate.
2. That assembling and gathering of evidence which may be admissible in the prosecution of a criminal offence *not* be added as a principal function of the ICAC, on the basis that its special powers for compelling witness testimony and differing standard of evidence for findings of corruption conflict too significantly with this purpose.

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

It is the view of the Committees that the NSW Law Reform Commission should be requested to provide a report in relation to:

1. Creating statutory offences that replace or complement the current common law offences that relate to corruption, particularly misconduct in public office.
2. Drafting the new offences in such a way that they capture conduct that more accurately reflects modern definitions of corruption.

2. Principal Functions of the ICAC – Gathering Evidence

The Committees note that since 2009, the ICAC has referred 31 matters to the NSW Director of Public Prosecutions (DPP) and sought the DPP's advice on whether prosecutions should be brought against 70 persons¹ Some of those 70 persons were referred to the DPP in connection with multiple offences. As a result of those referrals:

- The DPP declined to commence prosecutions against 22 persons;
- The DPP commenced prosecution of persons, of whom:
 - 36 people were convicted of at least one offence arising from the referral;
 - 4 people were found not guilty or were otherwise discharged without a conviction being recorded;
 - 1 person was convicted but their conviction was quashed on appeal; and
 - 7 persons have not yet been tried or presently being tried.

Sentences received by persons convicted following a referral by the ICAC to the DPP since 2009 have included full-time imprisonment, imprisonment suspended pursuant to good behaviour bonds, home detention, section 10A convictions, monetary fines, community service orders, periodic detention/intensive correction orders.

In addition to the referrals described above, the ICAC has referred a further 9 matters to the DPP and sought the DPP's advice on whether prosecutions should be brought against 34 people. Some of those 34 persons were referred to the DPP in connection with multiple offences. According to the most recent information of the ICAC, the DPP has not yet informed the ICAC whether he intends to bring prosecutions against any of those 34 persons or not.²

For these, and the reasons which will be outlined in section 5, the Committees submit that the ICAC is already effectively serving the purpose of gathering admissible evidence for prosecutions, and that statistically, it has demonstrated good judgment in what it has referred, with relatively few matters not being referred to the DPP on the basis that the ICAC believes it will not be able to provide admissible evidence.

For this reason, the Committees recommend that the ICAC not be given the principal responsibility for gathering and assembling admissible evidence for criminal prosecutions, or for conducting those prosecutions itself.

The bulk of the ICAC's investigations and findings of corruption do not proceed to criminal prosecutions, and there is substantial tension between the ICAC's special powers to compel testimony and the standard of proof it requires for findings of corruption, and its potential responsibility if it is to do more preparatory work for prosecutions themselves.

It may be more effective to pursue other means that provide the DPP with more targeted information about potential prosecutions, including increased cooperation between these

¹ "ICAC prosecution outcomes", ICAC, 16 July 2014, accessed via <http://icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>

² "ICAC prosecution briefs with the DPP", ICAC, 16 July 2014, accessed via <http://icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>

agencies and the police, where appropriate. It is possible that the ICAC can refer matters to the police under s 53,³ but it is unclear how frequently such a process occurs as a matter of practice. Clearly such a practice would not be universally appropriate, but it may help on occasions where the ICAC forms the view that a conviction is not present on the basis of evidence currently available, but that with further investigation, it may be possible.

Additionally, while not an evidentiary issue per se, the Committees recommend the adoption of a recommendation in the 2001 Review of the ICAC, Stage ii: Jurisdictional Issues, in which The Law Society of NSW and The NSW Bar Association had made a submission that stated that the ICAC definition of “corruption” under section 8 should be changed in such a way as to bring it closely into alignment with the Common Law definition of corruption. Limits on the ability of the ICAC to gather evidence are a moot point if its purview limits the initial investigation in its entirety.

³ *Independent Commission Against Corruption Act (1988) NSW s 53.*

3. Corrupt Conduct – New Criminal Offences

In relation to the creation of new criminal offences to capture corrupt conduct, the Committees advise that there is scope for creation of statutory offences which complement or replace the common law offences, particularly in relation to misconduct in public office, on the basis that the DPP only rarely prosecutes the common law corruption offences and that there are difficulties with these offences. The introduction of such statutory offences would be in line with the approach taken by a number of other Australian states.

The DPP rarely prosecutes common law offences.

In the period 12 February 2009 to 25 July 2014, the ICAC has referred 41 investigations to the DPP to seek advice with respect to the prosecution of specific persons.⁴ Of those, the ICAC is waiting on advice or has not released their decision following advice in relation to 9 investigations.

That leaves 32 referrals in that period for which the prosecution outcomes are known. Of those 32 referrals, the ICAC sought advice in respect of common law offences arising out of 6 investigations.⁵

A summary of the advice and outcomes is set out in the following table:

Date of report	Common law offence referred	Advice from DPP	Outcome
16.12.11	Misconduct in public office	Not to proceed	Not prosecuted
7.12.10	Misconduct in public office	Not to proceed	Not prosecuted
1.09.10	Misconduct in public office	Unknown	Prosecuted for statutory offences only.
13.07.10	Misconduct in public office	Unknown	Prosecuted for misconduct and statutory offences. Plead guilty to statutory offences only.
2.06.10	Misconduct in public office	Not to proceed	Not prosecuted
4.11.09	Misconduct in public office	To proceed	Currently being prosecuted

⁴ Summaries available for download at <http://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>.

⁵ The 6 investigations being those with reports released on 4 November 2009, 2 June 2010, 13 July 2010, 1 September 2010, 7 December 2010 and 16 December 2011.

It can be seen that when the ICAC is of the view that a person should be prosecuted for the common law offence of misconduct in public office, actual prosecution rarely follows.⁶

It could be that in the above matters the *admissible* evidence available to prosecute was insufficient and that this was the cause of the failure to prosecute. However, of the 26 referrals to the DPP made by the ICAC in respect of statutory criminal offences only, the DPP advised not to prosecute any persons involved in only 3 of those investigations. This indicates that in the vast majority of matters that the ICAC refers to the DPP for advice on prosecution, there is sufficient admissible evidence to support a prosecution.

Further, it appears that a lack of *admissible* evidence is less common than expected. Whilst we do not know what advice the DPP gives, the decision of the ICAC whether to refer investigations to the DPP is made public. In the past 14 years⁷ the ICAC has made the decision not to refer investigations where the evidence that supported the corrupt finding would be inadmissible in criminal proceedings. However, this is uncommon. A decision to not make any referral was made on this basis in only 4 investigations since 2000.⁸

It appears therefore that the common law offence of misconduct in public office is much less likely to be prosecuted than statutory offences. It appears more likely that this is a feature of the offence itself, rather than because of a lack of admissible evidence to support a prosecution.

Possible issues with the offences themselves are discussed in the following section.

Issues with the current common law offences.

The Committees note that the current offences relating to corruption in NSW have been suitably described elsewhere.⁹ The Committees do not propose to go over this area in detail but emphasises the following points:

1. There is uncertainty around the common law offences, particularly the common law offence of misconduct in public office.
2. The Commonwealth and all other states (except Victoria) have statutory definitions for offences relating to corruption.
3. The UK has also replaced the common law offence of bribery and is in the process of simplifying the common law offence of misconduct in public office. The

⁶ It is noted that conduct that would constitute other common law offences such as bribery often fits under statutory offences such as those under section 249B of the Crimes Act 1900. It is presumed that the statutory offences are preferred to the common law offences because of issues with the common law offences discussed further below.

⁷ Investigations that resulted in reports that were released after 1 January 2000.

⁸ Operation Carina – report released 3 November 2011, Operation Kanda – report released 8 September 2010, Operation Torrens – report released 15 November 2007, Operation Orion – report released 30 June 2005.

⁹ Eg, Parliamentary Briefing paper on Corruption Offences, produced by the NSW Parliamentary Research Service and dated September 2013.

UK Law Commission is similarly concerned that the boundaries of the offence of misconduct in public office are uncertain and the offence is subject to a disproportionate number of appeals each year.¹⁰

It is also important to note in respect to the offence of misconduct in public office that the statutory offences that have been brought in by the other states set out offences that vary, but are broader than the common law offence. Western Australia in particular has a very broad corruption offence.¹¹ The definition of corruption in the ICAC Act itself is also very broad.

The benefit of a broad definition is that may avoid issues such as those raised in relation to the proposed prosecution of Mr Ian MacDonald – particularly that there has been no finding made that Mr MacDonald received or was offered a benefit.

The fact that the ICAC has asked the DPP to consider the common law offence of misconduct in public office in respect of 6 investigations in the past 5 years supports the fact that this offence has no suitable statutory alternative.¹²

There appears to be a move amongst the other jurisdictions to make the offence of misconduct in public office more encompassing. That the definition of corruption in the ICAC Act is also broad provides support for the idea that the people of NSW consider that corruption should be defined more broadly, and possibly that a broader definition should be used when prosecuting.

There will always be some ‘gap’ between findings of ICAC and criminal prosecutions

The Committees note that offences designed to punish a wider spectrum of ‘corruption’ cannot address the following issues:

1. There will always be a gap between what can be proved to a criminal standard of proof and what can be proved to a civil standard of proof.
2. There will always be a gap between what the ICAC can find using powers to compel witnesses to answer questions and what can be found in a criminal process where the accused has the right to remain silent.¹³

Similar issues have previously arisen where amendments to s 37 were suggested, which might further diminish the rights of the accused in respect to self-incrimination and proceeds of crime type offences, the rationale for this was that some parties may confess to matters before the ICAC, and that evidence of this would then be unavailable for use in criminal proceedings.¹⁴

¹⁰ <http://lawcommission.justice.gov.uk/areas/misconduct.htm>

¹¹ *Criminal Code (WA)*, s 837

¹² Not including the investigations relating to Mr Ian MacDonald currently being considered by the DPP.

¹³ Subject to limited qualifications, see for example the Evidence Amendment (Evidence of Silence Act) NSW 2013.

¹⁴ Mark Polden, *Silent Corruption – Section 37 of the NSW ICAC Act* (24 April 2009) Public Interest Advocacy Centre pp 3 – 5 <
http://www.piac.asn.au/sites/default/files/publications/extras/09.04.24_Silent_Corruption_ICAC_Act.pdf>

The criminal standard of proof and the right against self-incrimination are fundamental to our legal institutions and this 'gap' between what might be obtained under coercion and what can arise at trial is accepted in all other areas of criminal law.

4. Related Matters

Prosecutions and Broader Public Interest


When considering the efficacy and public value of the ICAC, convictions or prosecutions are a necessary but insufficient metric. The ICAC's value at a preventative level, in providing education and policy support to help avoid institutional corruption works in a manner that would never be adequately recognised by these metrics.

It is essential that the ICAC maintain this role, and not operate solely as a means for investigating matters prior to their prosecution. In this vein, a finding of corruption without any referral still has utility, both as a measure of the prevalence of potentially corrupt behaviour and as a means of alerting the public to the conduct in question, which may have specific implications, particularly in relation to persons who hold elected positions of office.

Equally, an investigation that finds no corruption should be of great relief to the broader public. Openness, transparency and adequate scrutiny of government processes work to help ensure public confidence in the system. With more constrained powers, or a greater responsibility for providing evidence for or conducting prosecutions itself, the ICAC may end up playing a less important role in assuring this transparency, and in helping prevent corruption, rather than just responding to the results of it.

5. Conclusion

The Committees thank the Inquiry for the opportunity to comment on these important issues, and would welcome an opportunity to attend any public hearings that may be held.

Any request for further comment should be made to Elias Yamine (President Elect, NSW Young Lawyers )



Elias Yamine | President Elect
NSW Young Lawyers | The Law Society of New South Wales