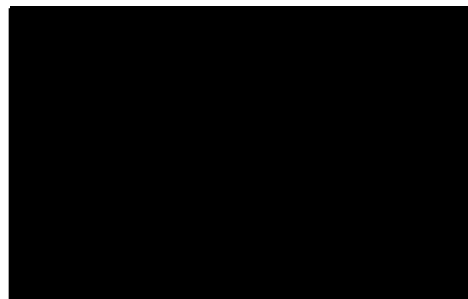


**PROSECUTIONS ARISING FROM INDEPENDENT  
COMMISSION AGAINST CORRUPTION  
INVESTIGATIONS**

**Name:** Mr Bruce R. McClintock SC

**Date Received:** 1/08/2014

**Bruce R McClintock SC**



1 August 2014

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

Greg Smith SC MP  
Chair the Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Smith

**Prosecutions arising from Independent Commission Against Corruption  
Investigations**

Thank you for your invitation to make submissions to the Inquiry into prosecutions arising from Independent Commission Against Corruption (ICAC) investigations.

By way of background, I should mention that I conducted the Independent Review of the ICAC Act 1988 in 2004 providing my Final Report to the Governor in January 2005. In addition, I have appeared on many occasions before ICAC since the early 1990s, shortly after its creation, both as counsel assisting and on behalf of persons summonsed to give evidence before it.

I wish only to address the first and fourth bullet points in the Committee's Terms of Reference that is:

- *Whether gathering and assembling evidence that may be admissible in the prosecution of a person of a criminal offence should be the principal function of the ICAC.*
- *Whether there is a need to create new criminal offences that capture corrupt conduct.*

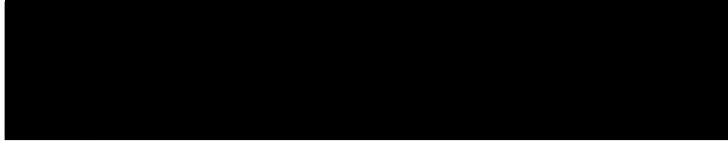
As to the first bullet point, that is whether gathering and assembling evidence that may be admissible in the prosecution of a person of a criminal offence should be a principal function of the ICAC, I dealt with related issues in my 2005 Report in Chapter 3 thereof and I refer the Committee to that. As to the specific question, I do not believe any change to the legislation which would make this matter a principal function of ICAC is warranted. ICAC's purpose is not, and should not be, to obtain criminal convictions. That is only an incidental benefit (if it occurs) of its primary purpose and original rationale, that is, to investigate corruption and make findings that it has occurred in circumstances where a criminal conviction cannot be obtained. Together with its corruption prevention and education functions, it should remain ICAC's principal function to make and publicise findings about corruption in the public administration of New South Wales. That is not the same function as gathering evidence for criminal prosecutions and to substitute that as a major or principal function of the ICAC would prejudice that important function, by forcing it to focus on the collection of admissible evidence rather than what it should be focussing on, that is, the collection of material that is sufficiently cogent to found a finding of corruption, whether or not it is admissible in a criminal trial.

Lying behind that term of this enquiry is the disquiet some feel that findings of corruption by ICAC are not followed by conviction. That disquiet reveals a misunderstanding of the role of ICAC and ignores the fact that, unlike the courts, it is not bound by the rules of evidence. As a result, it can make findings based on material which would not be admitted in a criminal trial. When I was counsel assisting ICAC in an enquiry into Randwick Council in the 1990s, I had a classic example of this situation where, on the material before it, ICAC was well warranted in making a specific finding that a bribe had been paid to a council officer but where that material could not have been admitted in a criminal trial, principally because of the rules against hearsay. It would not have made any difference in that situation whether gathering admissible evidence was a principal function of ICAC or not. As indicated, I oppose such a change.

As to the fourth bullet point, I am unable to see any need to create new criminal offences to capture corrupt conduct.

Finally, I am happy to give evidence at any parliamentary enquiry into these important issues—I have done so before. I am also happy to provide any further assistance the Committee may require.

Yours sincerely

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**Bruce R McClintock**

- 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 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.

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

- 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 well as behaviour. For this reason, implementation of ICAC's corruption resistance strategies and corruption prevention recommendations may be considered a key indicator of the performance of ICAC.
- 3.4.24 ICAC reports that the majority of corruption prevention recommendations made in investigation reports have been implemented in some form by the public sector organisations concerned, and that a wide range of public sector organisations have, or are, implementing a range of corruption resistance strategies promoted by ICAC.<sup>50</sup>
- 3.4.25 ICAC submitted to the review *'that there is no justification to change or modify its principal functions as a fact-finding investigative body to one where its primary or principal functions are directed more to securing criminal convictions.'*
- 3.4.26 I agree with ICAC's submission. I do not propose to recommend any changes to the Act to make it a primary function of ICAC to obtain criminal convictions.
- 3.4.27 Where ICAC has admissible evidence that a known person has committed a corruption offence however, it is clearly in the public interest that ICAC take all reasonable steps to facilitate the prosecution of the person for that offence. Where ICAC has recommended that consideration be given to prosecution, it is not inappropriate to examine whether or not prosecution has resulted.
- 3.4.28 In a recent report, the Parliamentary Committee analysed the action taken following findings of corrupt conduct by ICAC.<sup>51</sup> According to this analysis, less than half of the persons against whom a finding of corrupt conduct was made by ICAC were subsequently convicted of a criminal offence (although it is not clear whether recommendations that consideration be given to prosecution were made in each case). The Parliamentary Committee stated:

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

<sup>50</sup> See ICAC research report *Profiling the NSW Public Sector: Functions, risks and corruption resistance strategies*, January 2003 [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

ICAC website – RECOS [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

<sup>51</sup> Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials*.

*'In a sample of 69 persons who were subject to investigation and a finding of corrupt conduct by the Independent Commission Against Corruption over the period 1998-2003, 29 (42%) were subsequently convicted of an offence, 40 (58%) were not prosecuted or the prosecutions were unsuccessful (and in several cases the successful prosecution related not to alleged corrupt conduct but to an offence committed during the Commission's investigation, eg perjury). In contrast, in a sample of 21 persons for whom internal disciplinary action was recommended by the Independent Commission Against Corruption, 19 (90%) were subject to successful disciplinary action and only 2 (19%) had the action dismissed. The reason for lack of successful prosecutions needs identification.'*<sup>52</sup>

- 3.4.29 The review met with the DPP to discuss the issue of criminal prosecutions following ICAC investigations. The DPP estimated that of the 232 matters that he received from ICAC for advice, 99 (or 43%) have not proceeded for prosecution.<sup>53</sup> The reasons for not proceeding to prosecution are various. They include insufficient evidence, for example, where evidence upon which ICAC has based a finding is inadmissible in criminal proceedings because, for example, of section 37(3) of the Act, or because of perceived unreliability of prosecution witnesses. The DPP may advise that proceedings should not be commenced for discretionary reasons. These are applied on the basis that the prosecution would not be in the public interest, for example, because of the triviality of the alleged offence or due to the personal circumstances of the alleged offender. The DPP advised that since 1991, there have been prosecutions for 119 offences arising from ICAC investigations; of these 81 offences were proven.
- 3.4.30 ICAC informed the review that in the last five years it has *'increased its focus on obtaining evidence in such form as to be admissible in later prosecution proceedings.'* ICAC states that this has had the result of increasing the percentage of persons against whom prosecution action has been commenced to 65% (of all matters referred by ICAC to the DPP for consideration of prosecution action) in the last five years.
- 3.4.31 Neither prosecution nor, still less, conviction, will necessarily follow from a finding of corrupt conduct. This is because ICAC's coercive powers, while available to it to facilitate its investigation of corrupt conduct, do not necessarily or even probably produce information which is admissible in criminal proceedings. Thus, it is inevitable that a proportion of cases where ICAC finds corrupt conduct will not result in any prosecution, even that its findings were appropriate on the information available to ICAC. Nonetheless, and despite efforts in recent years, the number of criminal convictions secured as a result of ICAC's investigations remains somewhat low.

<sup>52</sup> Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials* at page 5.

<sup>53</sup> All figures supplied by the DPP have been computer generated. They are approximate figures only.

- 3.4.32 I do not consider that this reflects the inappropriateness of ICAC's findings. Aside from the finding by ICAC in 1992 against the then Premier, the Honourable Nick Greiner (which was declared a nullity on appeal), no person or body has suggested to me that specific findings of corrupt conduct made by ICAC have been inappropriate.
- 3.4.33 It may be that ICAC needs to continue to develop its capacity to deliver briefs of admissible evidence to the DPP. In particular, it may be possible for there to be a higher correlation between the persons referred to the DPP by ICAC for consideration of prosecution action and the persons against whom a criminal conviction is ultimately made. The Parliamentary Committee has closely monitored the discharge of this function by ICAC in recent years and will no doubt continue to do so. I do not consider that any legislative changes are required to address this matter at this stage, aside from the matters referred to at recommendation R3.4 below.

### **Delay**

- 3.4.34 Both ICAC and the DPP acknowledge that the initiation of criminal proceedings following an ICAC investigation has been adversely affected by delay.
- 3.4.35 Delay between the commission of a criminal offence and its prosecution is a significant problem. Convictions may be more difficult to obtain as witnesses disappear and memories fade. The affected person's reputation, employment, and family suffer while awaiting the exercise of prosecutorial discretion.
- 3.4.36 Delay in the context of ICAC investigations may arise due to:
- Delay in ICAC forwarding a brief of evidence to the DPP following the release of its investigation report.
  - Delay in the provision of advice by the DPP following receipt of the brief from ICAC.
  - Delay in ICAC responding to requests from the DPP for further information.
- 3.4.37 The Parliamentary Committee has expressed concern about the delay between the provision of briefs of evidence to the DPP and the initiation of criminal proceedings. Following its recent examination of ICAC's 2002-2003 annual report, the Parliamentary Committee recommended that:
- 'The Commission hold discussions with the DPP to examine practical steps to remedy inordinate delays between the date briefs are received and the date a decision is made on whether or not to initiate proceedings.'*<sup>54</sup>
- 3.4.38 The review has held discussions with ICAC and the DPP about the issue of delay. Both ICAC and the DPP acknowledge that there have been delays

<sup>54</sup> Parliamentary Committee Report on Examination of the 2002-2003 Annual Report of the Independent Commission Against Corruption (September 2004) recommendation no 3 page xi.