

**Submission
No 24**

**REVIEW OF THE INSPECTOR'S REPORT TO THE
PREMIER: THE INSPECTOR'S REVIEW OF THE
ICAC**

Organisation:

Name: The Hon Peter Hall

Position:

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Submission to Inquiry by the Parliamentary Committee on the Independent Commission Against Corruption, Parliament of New South Wales into the ICAC Inspector's Report to the Premier: The Inspector's Review of the ICAC

Introduction

1 On 6 June 2016, I was invited by Mr Damien Tudehope, Chair, on behalf of the Parliamentary Committee on the Independent Commission Against Corruption (ICAC) to make a submission to the Inquiry. The submission set out below addresses issues referred to in paragraph 1 of the Terms of Reference for the Inquiry. Paragraphs 1 is in the following terms:

The extent, nature and exercise of the ICAC's current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform.

2 In Part H, *Hearings in Public*, to his Report to the Premier dated 12 May 2016, the Inspector of the Independent Commission Against Corruption stated that the conduct of ICAC hearings in public (a reference to inquiries held in public under s 31 of the ICAC Act) is a matter of "substantial concern..." at [77]. The Inspector proceeded to discuss the matter at paragraphs [78] to [86] of his report, 12 May 2016.

3 The Inspector in the Executive Summary to his report dated 12 May 2016, made a recommendation in the following terms: "*1. The examinations conducted by the ICAC should be in private*": (see paras 77-87), Recommendation 1 (p 2). The Inspector further recommended at p 3 of the Executive Summary:

"4. In the event that 'public' inquiries are retained, or even if private examinations replace them, there should be a requirement that ICAC when determining whether or not the public interest is served, to have regard to and to specify the elements of the public interest to be served and to consider whether the public interest would be better served by referring the matter to another public authority or to the DPP."

4 In the *Report to Premier*, the Inspector further stated:

3. Shortly stated, the principal recommendation I, as the current holder of the Office of Inspector make, are that the proceedings of the ICAC be

conducted in private except in the exceptional circumstances referred to in the cognate legislation of the State of South Australia. All interests safely can be protected by such a process and the not uncommon criticism of public hearings as theatre and the cause of disproportionate reputational damage will be eliminated. I make no express recommendations in relation to the jurisdiction of the ICAC as part of this Report, but for myself, would suggest that at some time consideration be given to the removal of Local Government and Universities from the jurisdictional reach of the ICAC.

82. I am however comfortable to express my preference for non-public hearings at the end of which – in other words at the end of the whole investigation, if no corrupt conduct is found – nobody is hurt. Equally, if at the end, serious corrupt conduct is found (s 74BA(1)), it publicly can be exposed in relation to specified individuals and identified conduct.

Jurisdiction and Powers of the ICAC

- 5 In recent times there have been significant reviews of the ICAC Act that have led to amendments being made to it. They include the 2005 Final Report of Mr Bruce McClintock – Independent Review of the Independent Commission Against Corruption Act 1998, and the Report of the Independent Panel – Review of the Jurisdiction of the ICAC (The Hon. Murray Gleeson AC (Chair) and Mr McClintock SC, dated 30 July 2015) (“the Independent Panel”).
- 6 As the Independent Panel, *supra*, observed, the concept of “corrupt conduct” is central to the Act’s specification of the ICAC’s functions and powers: at 2.7.1. In relation to the issue the subject of paragraph 1 of the Terms of Reference, there is a necessary interrelationship between the jurisdiction of the ICAC in respect of corrupt conduct and the powers conferred upon it including the power to conduct a public inquiry under s 31 of the ICAC Act.
- 7 The power to conduct a public inquiry is but one of several coercive powers conferred by the Act upon the Commission. Examination of a particular power is usually best undertaken in the context of the Act and the scheme established by it. The interrelationship between jurisdiction and the power is thereby made clear.

- 8 Part 3 of the ICAC Act contains provisions that define the Commission's jurisdiction (including the provisions of s 7, 8 and 9).
- 9 Part 4 of the Act contains provisions that confer coercive investigative powers upon the Commission (including the power to conduct a public inquiry under s 31).
- 10 By ss 8 and 9 of the ICAC Act, corrupt conduct is defined in broad terms. Section 8 prescribes the general nature of corrupt conduct. However, s 9(1) states that such conduct is not corrupt conduct unless it could constitute or involve a criminal offence or a disciplinary offence.
- 11 The power under s 31 in the Commission to conduct a public inquiry taken in conjunction with the broad definition of corrupt conduct in ss 8 and 9 of the ICAC Act provides the Commission with the capacity to conduct a public inquiry in cases other than those that could involve a criminal offence.
- 12 There is, of course, a significant difference between conduct of a public official involving an act or acts and a state of mind that could constitute a criminal offence on the one hand, and on the other, conduct that is not criminal in nature even though it may involve, for example, various forms of partiality or preference in the exercise of a public power. It is possible to envisage cases involving various forms of improper conduct that could constitute a disciplinary offence but about which members of the public would consider it to be wholly inappropriate to describe or stigmatise as "corrupt" according to the ordinary sense of that word.
- 13 It has been argued now over a considerable period of time that the definition of "corrupt conduct" in the ICAC Act is too broad. Indeed it has been noted that in a report of the Parliamentary Committee on the ICAC concern was expressed over the width of the definition: *Parliamentary Committee on the Independent Commission Against Corruption, Parliament of NSW Review of the ICAC - Stage II: Jurisdictional Issues* (2001) 1-3, 15-24.

14 The Independent Panel in its abovementioned report observed:

“7.2.2 The Review [a reference to a Review of the Parliamentary Committee dated November 2001] recorded Ms Moss as pointing out that the current definition of corrupt conduct was obviously an effort to be exhaustive and not to miss anything, but that the time had come to reconsider that approach and to define the expression “in such a way as to adequately cover that which is generally regarded to be corrupt, but excludes that conduct that is not ordinarily thought of in that way”. She said:

‘If you were to set out today to establish a new anti corruption commission, having the benefit of the lessons of our experience you may well define our terms and jurisdiction very differently. However, with an organisation that has been in operation for 12 years, it is very hard to make changes in these areas without looking like you are weakening the Commission’s jurisdiction and its ability to fight corruption.’”

15 Ms Irene Moss AO was ICAC Commissioner between 14 November 1999 and 13 November 2004.

16 In the Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report it was also observed:

4.2.11 Reports of the Parliamentary Committee on the ICAC have reflected concerns with the width of the definition. There were some suggestions that, for the purpose of public findings, the expression “corrupt conduct” might be replaced by “misconduct” or “improper conduct”. Suggestions such as this were never taken up, but they reflect an unease with the definition of corrupt conduct where the public would assume that a finding of corrupt conduct meant what it said, and was not based on some artificial construct.

17 The broad definition of “corrupt conduct” extends well beyond the legal and often the accepted meaning of that expression in ordinary discourse. The Independent Panel in its abovementioned report observed:

“4.1.2 When used to characterise the conduct of an individual in one context, the concept of corruption may be wide enough to embrace any act or omission that constitutes a serious transgression of a moral precept. However, in a legal context it usually has a narrower meaning. The law does not seek to enforce all the requirements of morality; and not all breaches of the law involve moral turpitude. In a legal context the word corruption is often used as a general or summary description, or rubric, applied to a category of criminal offences, such as bribery, abuse of office, extortion, and others, each of which has its own

established elements which include a requisite state of mind, such as knowledge or intention. It is sometimes a convenient classification of crimes which have their own individual definitions.”

18 In a case where a corrupt conduct finding is made on the basis of conduct that could constitute a disciplinary offence, the person against whom such a finding is made may, in addition to facing the prospect of losing a job or career, also bear the opprobrium of a public corruption finding.

19 The Independent Panel in its discussion of the power to conduct public inquiries stated that decisions to hold such inquiries can be difficult: at 3.5.3. The Panel noted at 3.5.1, that a decision to hold a public inquiry is a discretionary decision of the Commissioner, and to that extent could be the subject of judicial review.

20 The Independent Panel observed that not all reputational damage associated with a public inquiry is the result of a considered and reasoned conclusion expressed in a report,:

‘... When the case of *Cuneen* was before the New South Wales Court of Appeal, Basten JA referred to the potential for harm that can arise from publicity associated with the conduct of proceeding seven before any ultimate findings are made.” (at 3.2.20)

21 The Commission by s 12A of the ICAC Act is, as far as practicable, required in exercising its functions to direct its attention to serious corrupt conduct and systemic corrupt conduct. By s 74BA(1) of the Act, it is stated that the Commission is not authorised to include in a report under s 74, a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

22 Two questions arise in relation to the power to conduct a public inquiry:

(1) In light of the provisions of s 12A and s 74BA(1), should the power to conduct a public inquiry be similarly confined, that is to say, should the power to conduct a public hearing only be available in cases involving serious corrupt conduct or systemic corrupt conduct? It is to be noted,

of course, that decision-making under s 31(2)(b) requires that there be taken into account, inter alia, the seriousness of the allegation or complaint being investigated. There remains, however, a question as to whether the type of limitation expressed in s 74BA(1) should also be expressly stated in relation to the power under s 31(1) rather than the issue of “seriousness” being dealt with as but one factor to be considered under s 31(2).

- (2) Should the coercive powers conferred on the Commission, including the power to conduct a public hearing, be confined to cases involving corrupt conduct that involves suspected or alleged criminal conduct? In other words, should a coercive power like that under s 31(1) cease to be available for investigations involving disciplinary offences? If it is to remain available, then with what limitations?

23 The latter question brings forward for consideration legislative innovations that have emerged in recent years in other State jurisdictions. Although in both Victoria and South Australia the anti-corruption commissions established in those States have been designed and established along different lines to the ICAC in New South Wales, there are certain provisions governing their jurisdiction and powers that may commend themselves as useful and adaptable to other models.

24 The focus in each of those two States has been on the investigation of corrupt conduct that could involve or constitute a specified criminal offence. By recent amendment to the Victorian Act, the Independent Broad-based Anti-corruption Commission Act 2011, the list of specified offences in that Act now includes the common law offence of misconduct in public office. In the South Australian Act, the Independent Commissioner Against Corruption Act 2012 the specified offences include the offence of abuse of public office under the *Criminal Law Consolidation Act 1935* (SA). Accordingly, the jurisdiction of each Commission potentially applies to an extensive range of conduct within the specified offences.

- 25 However, neither the Victorian nor the South Australian legislation has extended the concept of “corrupt conduct” or “corruption in public administration” to include non-criminal conduct, such as conduct that could constitute a disciplinary offence. However, as discussed below, the South Australian model nonetheless by other provisions and processes is designed to safeguard public integrity in respect of conduct falling within distinct classes or categories.
- 26 The Independent Commissioner under the South Australian Act has an overriding jurisdiction in respect of specified conduct that is inimical to the integrity of public administration and does so pursuant to a jurisdiction that operates on the basis of three distinct categories of conduct, namely, corruption in public administration, misconduct in public administration and maladministration in public administration, each of which is defined in detailed terms in ss 5(1), 5(3) and 5(4) of the Independent Commissioner Against Corruption Act 2012.
- 27 The South Australian Act also establishes a separate statutory Office under Part 3 entitled, “Office for Public Integrity”, which takes a central role in the receipt of complaints and reports and the making of assessments that facilitate the determination as to whether a matter raises a potential issue of corruption in public office, misconduct or maladministration in public administration. The Act provides for a process whereby matters within the second and third of those three categories are subject to referral processes or alternatively whether they are to be the subject of the exercise of the power of investigation vested in the Commissioner himself: s 24.
- 28 Attached to this submission is an appendix which sets out the provisions of s 5 of the Independent Commissioner Against Corruption Act 2012 and commentary on other matters.
- 29 In the Victorian legislation, the Independent Broad-based Anti-corruption Commission Act 2011 (IBAC) corrupt conduct is defined in s 4 by reference to

specified conduct being conduct "... that would constitute a relevant offence":
s 4(1).

30 A relevant offence is defined in s 3(1) of the IBAC Act or common law offences committed in Victoria being:

- (1) Attempt to pervert the course of justice;
- (2) Bribery of a public official;
- (3) Perverting the course of justice;
- (4) Misconduct in public office.

31 The IBAC is empowered to hold examinations: s 115(1).

32 Section 117 addresses the subject of private/public examinations. It proceeds upon the basis of a general position that examinations are to be conducted in private. The terms of s 117 are as follows:

"117 Examinations generally to be held in private

- (1) Subject to subsection (2), an examination is not open to the public unless the IBAC considers on reasonable grounds—
 - (a) *there are exceptional circumstances*; and
 - (b) it is in the public interest to hold a public examination; and
 - (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.
- (2) The IBAC must not hold an examination in public if the examination may disclose particulars likely to lead to the identification of a person who has made an assessable disclosure.
- (3) However, the IBAC may hold an examination in public if the information that may be disclosed is information to which section 53(2)(a), (c) or (d) of the Protected Disclosure Act 2012 applies.
- (4) For the purposes of subsection (1)(b), the factors the IBAC may take into account in determining whether or not it is in the public interest to hold a public examination include, but are not limited to—

- (a) *whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;*
 - (b) *the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;*
 - (c) *in the case of police personnel conduct investigations, the seriousness of the matter being investigated.*
- (5) Not less than 7 days before a public examination is held, the IBAC must—
- (a) inform the Victorian Inspectorate that the IBAC intends to hold the public examination; and
 - (b) provide a written report to the Victorian Inspectorate giving the reasons the IBAC decided to hold a public examination in accordance with subsection (1).
- (6) A judicial officer is not required to attend a public examination but may consent to doing so.” (emphasis added)

33 In relation to the power to conduct a public examination under s 117 the test imposed by the IBAC Act differs and may be considered to be a more demanding one than that provided for in the comparable provisions in s 31 of the ICAC Act (NSW).

34 The provisions of s 117(1)(a) (“exceptional circumstances”) was recently the subject of consideration by the Supreme Court of Victoria, Court of Appeal in *R & M v IBAC* [2015] VSCA 271.

35 Ground 2 of the appeal in that case concerned the provisions of s 117(1)(a). Whilst the High Court subsequently heard and determined an appeal from the decision of the Court of Appeal ([2016] HCA 8) ground 2 was not the subject of the High Court appeal.

36 In the Court of Appeal it was argued for the applicants that in order that the circumstances be “exceptional” for the purposes of s 117(1)(a), they must be extremely unusual or fall outside the range of misconduct that might be reasonably anticipated that the respondent would encounter.

37 The Court (Priest, Beach and Kaye JJA) observed:

“67 The phrase ‘exceptional circumstances’, in s 117(1)(a), should be construed in light of such considerations. As a matter of ordinary usage, in order to be ‘exceptional’, circumstances must be highly unusual, and quite rare, for the type of circumstances which would normally be the subject of examination by IBAC under Part 6 of the IBAC Act. The requirement of ‘exceptional’ circumstances thus involves both a qualitative distinction between the circumstances which might ordinarily be inquired of by the respondent and, in addition, an assessment that those circumstances might be reasonably rare.”

38 A little later the Court also observed:

“71 Thus, in order that IBAC has power to conduct an examination publicly, it must first determine (inter alia), on reasonable grounds, that the circumstances are exceptional in that sense, namely, that they are clearly unusual and distinctly out of the ordinary. The question on review for the primary judge, and for this Court on this application, is whether the conclusion by the respondent, that the circumstance were of such a character, was one that could reasonably be considered to be based on reasonable grounds.”

39 The Inspector, at [83] of his report, stated:

“I express my view that s 31(1) and (2) of the Act in relation to public inquiries and the concept of ‘public interest’ do not facilitate the resolution of the debate just as in my view they do not with abundant clarity identify the components of the public interest to which consideration must be given.”

40 The provisions of s 117(1) and (4) under the Victorian Act identify the specific elements of the public interest that would be satisfied before a public examination may be conducted. In particular, (a) the requirement that an examination be not open to the public unless the IBAC considers on reasonable grounds, inter alia, that there are “exceptional circumstances” and (b) s 117(4)(a) (whether the corrupt conduct being investigated relates to an individual, an isolated incident or that is systemic in nature) are amongst the important public interest elements that are to be considered.

41 Finally, I note that nothing said above is intended as suggesting that the ICAC’s jurisdiction should be reduced. The Commission’s important role in protecting and promoting the integrity and accountability of public administration, in particular by the investigation and exposure of corruption, is well-established and recognised. Any future proposal for a reformulation or

restructure of the Commission's jurisdiction and processes based on concepts of corruption, misconduct and maladministration, along the lines discussed above, may be expected to proceed upon the Commission retaining its full charter to deal with the range and types of conduct within its present jurisdiction.

Peter M Hall

26 July 2016

APPENDIX

South Australia

- 1 The *Independent Commissioner Against Corruption Act 1912* (SA) separates or distinguishes conduct within the Commissioner's jurisdiction into three categories:
 - (1) Corruption in public administration;
 - (2) Misconduct in public administration; and
 - (3) Maladministration in public administration.
- 2 Each of these expressions are defined in specific and detailed terms in ss 5(1) and (2), 5(3) and 5(4) and (5).
- 3 The definition of *corruption in public administration* is defined in a way that restricts it to conduct capable of constituting specified criminal offences.
- 4 The result of categorising conduct defined in s 5 is that different processes of investigation or inquiry all ultimately falling within the Commission's jurisdiction may be employed in relation to cases falling within one or other of those categories (or possibly falling within more than one category).
- 5 Section 5 of the *Independent Commissioner Against Corruption Act 2012* (SA) the expression "corruption in public administration" is defined in the following terms:
 - (1) Corruption in public administration means conduct that constitutes—
 - (a) an offence against Part 7 Division 4 (Offences relating to public officers) of the *Criminal Law Consolidation Act 1935*, which includes the following offences:
 - (i) bribery or corruption of public officers;
 - (ii) threats or reprisals against public officers;
 - (iii) abuse of public office;
 - (iv) demanding or requiring benefit on basis of public office;
 - (v) offences relating to appointment to public office; or

- (b) an offence against the Public Sector (Honesty and Accountability) Act 1995 or the Public Corporations Act 1993, or an attempt to commit such an offence; or
- (c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the Criminal Law Consolidation Act 1935) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or
- (d) any of the following in relation to an offence referred to in a preceding paragraph:
 - (i) aiding, abetting, counselling or procuring the commission of the offence;
 - (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
 - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
 - (iv) conspiring with others to effect the commission of the offence.

(2) If the Commissioner suspects that an offence that is not corruption in public administration (an incidental offence) may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.

6 The Independent Commissioner Against Corruption may conduct investigations in conjunction with South Australian Police (SAPOL). The ICAC (SA) conducts its investigations and assembling of material in private and does so as not to jeopardise or impede a particular investigation undertaken. Further, the Commissioner does not make or publish findings.

7 The Independent Commissioner Against Corruption Act 2012 (SA) provides power for an examiner to conduct an examination for the purposes of an investigation into corruption in public administration: Schedule 2, clause 2. However, clause 3(3) of Schedule 2 states that examinations are required to be held in private.

8 In the Annual Report 2014-2015, the Commissioner, the Hon. Bruce Lander QC, noted that there had been debate as to what was said to be the secretive nature by which the Commissioner performs his functions under the Act. He noted in that respect that comparisons were often made with anti-corruption agencies whose model of operation extends to public hearings (Report, p 4).

9 In relation to the requirement for him to conduct investigations in private the Commissioner observed:

“When I investigate corruption in this State, because of the definition of corruption in the *ICAC Act*, I am necessarily investigating criminal conduct. Corruption in this State is confined to criminal conduct. Investigations into criminal conduct are almost always conducted in private, so as not to jeopardise or impede the investigation. Indeed, many of the investigations I conduct would be undermined if those subject to investigation were prematurely made aware of the investigation.

The *ICAC Act* provides a range of powers to investigate corruption. One is the power to summons a person to appear for examination into corruption SAPOL does not have such a power. When I hold an examination, I am obliged by the *ICAC Act* to conduct it in private. The powers of examination given to me are almost identical to the powers of examination given to the Australian Crime Commission, an agency that also conducts all of its investigations, and its examinations, in private.” (2014-2015 Annual Report, p 4)

10 The Commissioner observed that since ICAC operations commenced in September 2013, ten persons had been summoned for examination, only one of which was suspected of engaging in corruption. The other nine persons were witnesses.

11 In the 2014-2015 Annual Report of ICAC OPI it was stated that in the reporting period for that year, five examinations were conducted for the purposes of an investigation into corruption in public administration: p 30.

12 As examination under the ICAC (SA) is conducted for the purposes of gathering information and evidence. As has been noted:

“South Australia’s Independent Commissioner Against Corruption is a law-enforcement agency and the role of the Commissioner is that of an

investigator. [The Commissioner's] role is focussed on gathering evidence on corrupt conduct, which, under the *ICAC Act*, is conduct that is a criminal offence and referring those matters for prosecution."

- 13 The ICAC (SA) has now been operating for a little under three years (commenced operations on 2 September 2013). In the year ended 30 June 2015, twelve prosecutions had been commenced and disciplinary action was commenced against nineteen public officers as a result of the ICAC (SA) investigations: Annual Report 2014-2015, ICAC OPI at p 29.

Victoria

- 14 The Independent Broad-based Anti-corruption Commission Act 2011 (Vic) classifies the objects of the Act as relating to categories of conduct: namely, corrupt conduct and police personnel misconduct.

- 15 Section 8 is in the following terms:

8 Objects of Act

The objects of this Act are to—

- (a) provide for the identification, investigation and exposure of—
 - (i) serious corrupt conduct; and
 - (ii) police personnel misconduct;
- (b) assist in the prevention of—
 - (i) corrupt conduct; and
 - (ii) police personnel misconduct;
- (c) facilitate the education of the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct on public administration and the community and the ways in which corrupt conduct and police personnel misconduct can be prevented;
- (d) assist in improving the capacity of the public sector to prevent corrupt conduct and police personnel misconduct;
- (e) provide for the IBAC to assess police personnel conduct.

- 16 Section 4(1) of the IBAC Act defines corrupt conduct in the following terms:

“(1) For the purposes of this Act, corrupt conduct means conduct—

- (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
- (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
- (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
- (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
- (da) of a person (the first person) intended to adversely affect the effective performance or exercise by a public officer or public body of the functions or powers of the public officer or public body and result in the first person or an associate of the first person obtaining—
 - (i) a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
 - (ii) an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
 - (iii) a financial benefit or real or personal property; or
 - (iv) any other direct or indirect monetary or proprietary gain—

that they would not have otherwise obtained; or

- (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c), (d) or (da)—

being conduct that would constitute a relevant offence.
 ...” (emphasis added)

17 The expression “relevant offence” is defined in s 3(1) of the IBAC Act in the following terms:

Relevant offence means -

- (a) An indictable offence against an Act; or
- (b) Any of the following, law offences committed in Victoria -
 - (i) attempt to pervert the course of justice;
 - (ii) bribery of a public official;
 - (iii) perverting the course of justice;
 - (iv) misconduct in public office.”