



**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

NEW SOUTH WALES

**SUBMISSION
TO THE
PARLIAMENT OF WESTERN AUSTRALIA
JOINT STANDING COMMITTEE
ON THE
CORRUPTION AND CRIME COMMISSION**

INQUIRY INTO THE CCC BEING ABLE TO PROSECUTE ITS OWN CHARGES

SEPTEMBER 2016

Introduction

The NSW Independent Commission Against Corruption (“the ICAC”) makes this submission to the Parliament of Western Australia Joint Standing Committee on the Corruption and Crime Commission (“the Committee”) for the purpose of the Committee’s inquiry into the Corruption and Crime Commission being able to take prosecution action.

The terms of reference for this inquiry require the Committee to enquire into:

- a) the operation of the State's prosecution system in relation to Corruption and Crime Commission matters subsequent to the Court of Appeal decision in the case of A v Maughan [2016] WASCA;*
- b) arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions; and*
- c) any amendments required to the Corruption, Crime and Misconduct Act 2003 following the Court of Appeal decision in the case of A v Maughan [2016] WASCA.*

In a letter to the ICAC dated 18 August 2016 the chairman of the Committee, the Hon Nick Goiran MLC, invited the ICAC to make a submission addressing the second term of reference about the procedures in NSW. The chairman requested the ICAC to specifically address the following three matters:

- 1. Does ICAC’s legislation allow it to charge and prosecute, even for the enforcement of actions on its own legislation?*
- 2. If ICAC doesn’t have the power to charge and prosecute, does it think that it should have this power?*
- 3. If it doesn’t have the power to charge and prosecute, which agency undertakes this process and how effectively does it work?*

This submission is in response to that request.

As set out below, ICAC officers have power under the *Criminal Procedure Act 1986* to commence criminal proceedings but only in circumstances where the NSW Director of Public Prosecutions (DPP) has provided written advice to the ICAC that such proceedings may be commenced by an officer of the ICAC.

Once proceedings have been commenced by an ICAC officer, they are taken over by the DPP and thereafter conducted by the DPP.

This process has proven effective in ensuring there is an objective appraisal of evidence to determine whether there is sufficient admissible evidence to commence a prosecution and that suitably experienced prosecutors from the Office of the DPP (ODPP) conduct prosecutions arising from ICAC investigations.

The ICAC Act

It is useful to commence by first considering the relevant provisions of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).

Section 13 of the ICAC Act sets out the “*principal*” functions of the ICAC. Section 14 of the ICAC Act provides that the “*other*” functions of the ICAC are:

- (a) *to gather and assemble, during or after the discontinuance or completion of its investigations, evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish such evidence to the Director of Public Prosecutions,*
- (a1) *to gather and assemble, during or after the discontinuance or completion of an investigation into conduct under section 13A, evidence that may be admissible in the prosecution of a person for a criminal offence in connection with the conduct and to furnish such evidence to the Electoral Commission and (if considered appropriate) to the Director of Public Prosecutions,*
- (b) *to furnish, during or after the discontinuance or completion of its investigations, other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.*

Section 74 of the ICAC Act provides that the ICAC may prepare reports in relation to any matter that has been or is the subject of an investigation.

Section 74A provides that any such report must include, in respect of each “*affected*” person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to, inter alia, obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence.

An “*affected*” person is a person described as such in the reference made by both Houses of Parliament or against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.

Section 74B(1) of the ICAC Act provides that the ICAC is not authorised to include in a report under s 74 a statement as to:

- (a) *a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*
- (b) *a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*

Identifying matters for referral to the DPP

Most matters referred to the DPP relate to s 74A statements made in ICAC investigation reports. Some referrals also arise from investigations that are not the subject of an ICAC investigation report.

The ICAC's investigative processes are not necessarily concerned with the admissibility of evidence in judicial proceedings. The ICAC's primary function is to investigate and expose corrupt conduct. It is imperative to the work of the ICAC that lines of inquiry are pursued regardless of their potential to result in a successful prosecution. The gathering of admissible evidence for the prosecution of criminal offences is, therefore, a secondary function of the ICAC.

Before determining whether to provide a brief of evidence to the DPP, the ICAC carefully considers the extent of admissible evidence it has obtained and the likelihood of being able to obtain further admissible evidence. The ICAC does not seek the advice of the DPP unless it is first satisfied that there is likely to be sufficient admissible evidence to warrant the commencement of a prosecution.

While ample evidence, including evidence by way of admissions, may be obtained to make factual and corrupt conduct findings in an investigation report, there are a number of factors which affect whether or not the ICAC is able to obtain sufficient evidence in admissible form to warrant prosecution action. For example, a witness, when giving evidence at an ICAC public inquiry or compulsory examination, may make admissions under objection. These admissions can be used by the ICAC to make factual findings and to make findings of corrupt conduct. The effect of giving evidence under objection, however, is that the evidence cannot be used against the witness in any subsequent criminal proceedings, other than for proceedings for an offence under the ICAC Act.¹ Other witnesses may give evidence about a person but not agree to provide a statement in admissible form for the purpose of a criminal prosecution of that person.

In some cases the ICAC will also take into account mitigating circumstances in deciding whether to seek the advice of the DPP. For example, where a witness has fully cooperated with the ICAC or actively assisted the ICAC, the ICAC may state these as reasons for not seeking the opinion of the DPP with respect to prosecution action. In these cases the ICAC takes the view that it is in the public interest to encourage witnesses to fully cooperate with the ICAC in identifying and exposing corrupt conduct and the system weaknesses that allowed that conduct to occur.

Arrangements with the ODPP

The ICAC has a Memorandum of Understanding (MOU) with the ODPP to enable charges arising out of ICAC investigations to be laid and prosecuted promptly, and to set out in general terms the responsibilities of the ICAC and the ODPP.

¹ Section 37, ICAC Act.

Under the MOU, the ICAC is responsible for furnishing the ODPP with briefs of admissible evidence.

After reviewing a brief of evidence and any additional evidence provided by the ICAC in response to requisitions raised by the ODPP, the ODPP provides advice to the ICAC on whether or not criminal proceedings should be commenced. If the ODPP considers there is sufficient admissible evidence to commence proceedings it will also advise the ICAC of the appropriate wording for the Court Attendance Notice(s) (CANs) by which criminal proceedings are commenced and provide a statement of facts. If the ICAC accepts the ODPP advice an officer of the ICAC commences proceedings by issuing a CAN.

Commencing prosecutions

An officer of the ICAC, acting in their official capacity, is a “public officer” for the purpose of the NSW *Criminal Procedure Act 1986* and *Criminal Procedure Regulation 2010*. As a consequence, an ICAC officer has power to commence criminal proceedings by issuing a CAN.

Until recently, while it was clear under the *Criminal Procedure Act 1986* that ICAC officers had power to commence criminal proceedings for statutory offences, the position with respect to common law offences was less clear. This uncertainty was removed in 2015 when the *Criminal Procedure Act 1986* was amended to make it clear that ICAC officers could commence proceedings for common law offences.² A new s 14A was inserted which relevantly provides:

- (1) *An officer of ICAC does not have the power to commence proceedings for an offence unless the Director of Public Prosecutions has advised the Independent Commission Against Corruption in writing that the proceedings may be commenced by an officer of ICAC.*
- (2) *For that purpose, the Director of Public Prosecutions may liaise with the Independent Commission Against Corruption, but is to act independently in deciding to advise that proceedings for the offence may be commenced.*

The term “offence” was amended to specifically include “a common law offence”.

Under the MOU between the ICAC and the ODPP, once a CAN has been served, the ICAC files the affidavit of service and court copy of the CAN with the relevant court registry. A copy of the affidavit of service and CAN is provided to the ODPP. On the first return date of the CAN, the DPP appears and takes over the prosecution at that time under s 9 of the *Director of Public Prosecutions Act 1986*. That section provides that the DPP may take over any prosecution or proceeding in respect of an offence that has been instituted by a person other than the DPP and carry on that prosecution or proceeding.

² *Courts and Other Justice Portfolio Legislation Amendment Act 2015*.

Effectiveness

The arrangements between the ICAC and the ODPP are currently effective in ensuring timely prosecution action.

The “*extent to which ICAC investigations give rise to prosecution and conviction*” and “*whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC’s powers*” were part of the terms of reference of an Independent Panel appointed by the NSW Government in May 2015 to review the jurisdiction of the ICAC. The panel comprised the Hon. Murray Gleeson AC as chair and Mr Bruce McClintock SC.

The Panel reported on 31 July 2015.³ Chapter 12 of the report deals with prosecutions arising from ICAC investigations.

At paragraph 12.3.3 of the report it was noted that an earlier review conducted by Mr McClintock in 2005 had recommended that consideration be given to permitting the ICAC to commence criminal proceedings without seeking the advice of the DPP. That recommendation was not adopted by the NSW Parliament at the time and the Panel’s position was that it would not now support such a recommendation. The Panel then went on to consider whether the ICAC should be given express power to commence criminal proceedings. In this context, the Panel considered a submission from the NSW DPP, Mr Lloyd Babb SC, who, after setting out the processes by which the ICAC sought advice from the DPP on prosecution action and commenced proceedings by issuing CANs on the basis of advice from the ODPP, recommended that “...it be expressly stated within the ICAC Act 1988 that the ICAC may, after considering advice of the ODPP, institute criminal proceedings arising from its investigations.” The Panel considered there was “force” in this recommendation and was of the view that “[i]f Parliament thought it appropriate to make such a change, it might also consider it appropriate to include common law offences within the criminal proceedings in respect of which the ICAC can institute proceedings...”⁴ The amendments to the *Criminal Procedure Act 1986*, set out above, gave effect to this recommendation.

The Panel noted that there is a disparity between the number of corrupt conduct findings made by the ICAC and the number of successful prosecutions but concluded this was “unavoidable”.⁵ The Panel considered there were two reasons for this conclusion, one general and one particular to the ICAC as an investigative body. The general reason “...is inherent in the criminal justice system and is simply that some people who stand trial on criminal charges are acquitted.”⁶ The particular reason was that the ICAC’s primary statutory focus of investigating and exposing corrupt conduct is not necessarily concerned with or compatible with the collection of evidence admissible in judicial proceedings. The Panel considered that “[t]he discrepancy between convictions and findings of corrupt conduct, in fact, provides an eloquent demonstration of the fundamental distinction between an ICAC investigation and its function and the criminal justice system and its purpose and that of a criminal trial.”⁷

³ Independent Panel – Review of the jurisdiction of the Independent Commission Against Corruption report, 30 July 2015.

⁴ Ibid, page 79.

⁵ Ibid, page 74.

⁶ Ibid, page 74.

⁷ Ibid, page 77.

The Panel also noted that there had been historic concern over the delay between the ICAC concluding an investigation and the initiation of criminal proceedings. The delay was caused by the time taken by the ICAC to prepare and dispatch a brief of evidence to the DPP and the time taken by the DPP to provide advice as to whether or not criminal proceedings should be commenced. The Panel noted that the delays have been reduced and made no recommendations as to legislative change.⁸

Delays in preparing briefs of evidence have been reduced through the ICAC working towards obtaining admissible evidence as far as possible during the course of its investigations.

The ICAC actively monitors progress in preparing briefs of evidence and the progress of prosecutions through monthly reports to its Investigations Management Group (IMG). The IMG comprises the Commissioner, Deputy Commissioner and executive directors of the ICAC's Investigation, Corruption Prevention and Legal divisions.

As a matter of transparency, the Commission publishes on its website (www.icac.nsw.gov.au) and in its annual reports information concerning what briefs have been provided to the DPP, what prosecutions have been commenced and the results of those prosecutions.

This publicly available information demonstrates the effectiveness of the current arrangements in place between the ICAC and the ODPP.

⁸ Ibid, pages 78-79.