Chapter 9

The NSW Independent Commission Against Corruption Time for a Re-think?

The Honourable Jerrold Cripps

Recent events connected with the NSW Independent Commission Against Corruption's inquiry into the affairs of Mr Eddie Obeid and others (Operation Jasper) have caused people to question the relevance and efficacy of the ICAC generally. Mr Eddie Obeid, a former minister of the Crown, and others, were found to have engaged in corrupt conduct involving millions of dollars.

The ICAC issued its report in July 2013 finding corrupt conduct and recommending that the Office of the Director of Public Prosecutions (ODPP) consider whether criminal proceedings should be commenced. Yet, to date, there has been no decision as to whether Mr Obeid and/or others will face criminal charges.

Another inquiry saw the Premier of NSW, Mr Barry O'Farrell, resign over receipt of a bottle of Grange wine, notwithstanding that no allegation of corrupt conduct had been made against him.

There has been a call for "less exposure – more prosecutions" coming out of what some people see is the inconsistency of outcomes. On the one hand, Mr Obeid has been found to have engaged in corrupt conduct yet no decision is made as to whether criminal proceedings will be taken. On the other hand, the Premier of NSW has resigned although there have been no allegations of corrupt conduct made against him.

Public unease about the matter has led the NSW Parliament to establish a Joint Committee to consider, amongst other things, whether the gathering and assembly of evidence for a criminal prosecution should become a principal function of the ICAC – whether in lieu of, or in addition to, its present function of exposing corrupt conduct has not been made clear. As far as I can see, it would be difficult to give the ICAC the principal function of exposing corrupt conduct and a principal function of prosecuting without turning it into a special branch of the police force.

In 1988, the NSW Parliament passed the *Independent Commission Against Corruption Act*. The principal object of the legislation was to promote the integrity and accountability of public administration by investigation and exposure of corrupt conduct involving public officials. Educating public officials and members of the community about corruption and its detrimental effect on the administration and on the community was also a principal function.

The ICAC was not established to be a criminal law enforcement agency. The legislation forbids the ICAC from making findings that a crime has been committed. It cannot recommend that a particular person be prosecuted for a particular crime. The most it can do is to recommend to the Office of the Director of Public Prosecutions (ODPP) that consideration be given for prosecution of a person for criminal conduct arising out of its investigations.

"Corrupt conduct" is defined very broadly. It includes conduct affecting the honest and impartial exercise of official functions by a public official, the conduct of a public official that

involves dishonest or partial exercise of functions, conduct of a public official that constitutes or involves a breach of public trust and any conduct of a public official that involves the misuse of information acquired in the course of his or her official function.

The Commission is not entitled to make a finding of corrupt conduct unless the identified conduct could involve a criminal offence, a disciplinary offence or reasonable grounds for dismissal of the public official. The legislation further provides that the ICAC has a secondary function, namely, to assemble evidence that might be admissible in the prosecution of a person for a criminal offence arising in connection with the investigation into corrupt conduct.

There has always been a problem identifying and dealing with public sector corruption. That is because it is, generally speaking, conduct engaged in by consenting adults behind closed doors and leaving no apparent victims to assist the police and other criminal law enforcement agencies. Consequently, prosecutions for public sector corruption were few and far between.

Prior to the ICAC legislation, it was generally accepted that public sector corruption would have to be pretty serious before members of the public were even aware that it was being engaged in. Matters, however, came to a head in the 1970s and early 1980s. A cabinet minister and the Chief Stipendiary Magistrate were gaoled for fraud and perverting the course of justice. The decade also saw serious allegations of corrupt conduct made against a member of Australia's highest court. There had been a number of serious allegations and inquiries directed to alleged misconduct by senior members of the NSW police force. As well, there had been a public inquiry in Queensland into the activities of members of the police force and senior cabinet ministers which exposed serious and endemic public sector corruption.

The NSW ICAC was named after the Hong Kong Independent Commission Against Corruption, but had little in common with that agency other than the name. The Hong Kong ICAC was established early in the 1970s as a specialised branch of the police force to investigate widespread corruption in the Hong Kong police force. Later, the Hong Kong ICAC's jurisdiction was extended to investigate corruption in other government departments and, later still, to corruption in the private sector.

When comparing the two ICACs it is, therefore, important to remember that the purpose of the NSW ICAC is to expose corrupt conduct in the public sector. It is not a criminal law enforcement agency and was never intended to be one. It is hoped, of course, that corrupt officials will ultimately be answerable in the criminal court but, unlike the Hong Kong ICAC, that is not its principal function.

To date, no-one has criticised the ICAC's performance in exposing corrupt conduct in the public sector. The ICAC has been criticised for the manner in which it conducts public inquiries and it is held responsible, in part at least, for the inordinate delays before a decision is made as to whether or not to prosecute after it has published its report.

There are some who think the ICAC has gone too far. Others think it has not gone far enough. Those who think it has gone too far assert that undeserved reputational damage is caused to people called before it and who are not themselves corrupt. Two premiers have resigned after being involved in investigations – one after an adverse, but legally incorrect, finding by the ICAC; and the other in the course of an ICAC investigation and against whom no allegation of corrupt conduct was made.

When the legislation was introduced into the NSW Parliament it was bitterly opposed by the Opposition which claimed that it was brought into existence for the purpose of punishing previous Labor members. Civil libertarians were also opposed to what amounted to a standing royal commission, reflecting the general hostility to standing royal commissions in Westminster systems of government since the days of the Star Chamber and Court of High Commission.

When the legislation was introduced, the Premier, Nick Greiner, expressed the view that within 10 to15 years the work of the ICAC would be confined to education because, by that time, its exposure function would have rooted out all public sector corruption. Whether that reflected the Premier's genuine belief at the time, or whether it was simply an attempt to make the creation of an unpopular institution more palatable, is a matter of some debate. In all events, although the ICAC has unearthed a considerable amount of public sector corruption in the last 25 years, public sector corruption remains a problem.

It is not known how much corruption there was in the public sector prior to the ICAC commencing, although the general belief was that it was pretty extensive. No-one can tell how much corruption there would have been but for the activities and investigations of the ICAC. It is clear, however, that there are a number of public sector practices which have ceased, or been modified directly, as a result of the legislation. For example, practices with respect to the receipt of gifts and benefits have been significantly changed.

NSW was the first integrity commission. Since it commenced, other States and the Federal Government have introduced integrity commissions. But none emphasises the importance the NSW ICAC attributes to the holding of public inquiries. Of the other States, some make provision for public inquiries and some do not. No other State matches NSW's enthusiasm for public inquiries. Public hearings can be held in Queensland and Western Australia but, in fact, are not held as frequently as in NSW. There is provision for public hearings in Victoria, but on a more limited basis than in NSW. In South Australia, Tasmania and federally, there are no provisions for public hearings.

I should nail my colours to the mast and declare that I am in favour of public inquiries in appropriate circumstances. I can think of none in the last ten years where the holding of a public inquiry was inappropriate. After all, the principal function of the NSW ICAC is to expose public sector corruption. I do not see how you can "expose" public sector corruption if your investigations remain behind closed doors. Public inquiries make it clear to the general public what the ICAC is doing and how it reaches its conclusions. The publicity generated by public inquiries also encourages people to report matters to the ICAC which might not otherwise be the case.

I do not deny that when public inquiries are conducted involving members of parliament and local government councillors, the media are not as restrained as some people would like to think they should be and that the inquiries run the risk of affecting subsequent criminal trials adversely.

When the ICAC came into existence it was assumed that all investigations would involve a public inquiry. In the result, many people had their reputations damaged who had not done any wrong. Being called as a witness was apt to create a suspicion in the minds of some members of the public that they were involved in corrupt conduct, even though that was not the case as the ICAC made clear in its public reports. The legislation was later amended, however, to give the Commissioner the function to determine whether, and to what extent, investigations should be

held in public. The legislation also provided that suppression orders could be made of matters emerging in a public inquiry if it is in the public interest to do so.

The legislation set out the circumstances to be considered before determining whether an inquiry should be held in public. They were:

(a) the benefit of exposing to the public and making it aware of the corrupt conduct;
(b) the seriousness of the allegations of complaint being investigated;
(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry);
(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the person concerned.

A declaration of corrupt conduct has, of itself, no legal consequences. It does, however, have significant reputational consequences. For some time it was believed that the reputational damage would be sufficient to rein in public sector corruption. But the general view these days appears to be that merely placing the mark of Cain on the forehead of a corrupt public official is not enough. Many people believe that, unless criminal prosecutions follow, there is little point in spending millions of dollars exposing corrupt conduct. They point to the fact that a finding that a person has engaged in corrupt conduct involves a finding that they have engaged in conduct that could amount to a criminal offence.

It would seem to me that the decision of the ODPP as to whether criminal proceedings should follow should be made as soon as possible after the ICAC has published its report if a relevant recommendation has been made. If it is thought that there may be some undue prejudice to an accused arising out of media reporting of the public inquiry, consideration should be given to trials by judges alone. Moreover, it must be remembered that claims of unfairness in the manner of conducting public inquiries can be made to the Inspector of the ICAC. The Inspector has a wide-ranging remit in the supervision of the ICAC – much wider than the Parliamentary Joint Committee.

Operation Jasper highlights the issue. So far from naming and shaming being sufficient of itself, Mr Obeid has boasted to the media that, notwithstanding the ICAC's findings, he will never be prosecuted.

The decision of the ODPP as to whether prosecutions will be launched has always been characterised by the most extraordinary delays. Sometimes they amount to years. Shortly after the ICAC report into the activities of Mr Obeid, the Government gave the ODPP $2 million to expedite the decision concerning whether criminal charges would follow the report. Since then, the silence has been deafening.

People frequently ask why it takes so long time for a decision to be made as to whether people should be prosecuted. When asked to comment on the delays, the ODPP usually gives two reasons why it takes a long time to make a decision. The first is that a finding made by the ICAC is a finding based on the balance of probabilities whereas a prosecution requires proof beyond reasonable doubt . The second reason given is that the evidence put before an ICAC inquiry is not admissible in a criminal trial.

As to the first explanation based on the onus of proof, I know of no occasion when the ICAC has recommended that consideration be given for criminal prosecution where the ICAC

is of the opinion that the case has been made out on the civil as opposed to the criminal standard of proof. In other words, findings and recommendations about corrupt conduct are not made unless the ICAC is convinced they should be.

As to the second explanation, it is not correct to say that all evidence given in the public inquiry is not admissible in criminal proceedings. Section 37 of the legislation obliges all people summoned to a public inquiry to answer questions asked of them of relevance to the inquiry. They may not decline to answer on the basis of well-recognised common law privileges and rights. For example, they are not entitled to refuse to answer questions on the basis that the answers might incriminate them, that they have legal professional privilege or even public interest privilege.

If an objection is made, however, the questions and answers cannot be used in subsequent criminal or civil proceedings. Previously they were not to be used in disciplinary proceedings, but this has since been amended to remove disciplinary proceedings from the ambit of protection. The Parliament still refuses to exclude civil proceedings, although I have never understood why.

Although rare, there have been cases where the evidence given before the ICAC is simply a convincing admission by the public official of corrupt conduct. In that event, of course, more evidence would be needed than the evidence given before the ICAC. But, in most cases, the corrupt conduct is based on evidence that is admissible in a criminal trial – for example, authorised phone taps and the use of surveillance devices together with properly conducted controlled operations. Furthermore, although the admission cannot be introduced into evidence in a criminal trial, the prosecuting authority is not left in the dark as to what has happened. All that remains is for the ODPP to prove by admissible evidence that which it knows to be true.

In my opinion, it is unfortunate that the ICAC is criticised for the massive delays, but one must acknowledge that it is, in effect, a self-inflicted wound. Ordinarily, a criminal prosecution would be investigated by the police and the material sent to the ODPP for prosecution. I do not know what the arrangements are between the police and the ODPP with respect to general criminal offences or, indeed, how effective the arrangements are. The police, however, claim that they should not undertake investigations following an ICAC inquiry because, I was told, they consider them to be too complicated. Moreover, the ODPP absolutely refuses to undertake investigations of any kind and it will not undertake the necessary work such as the preparation of criminal briefs, serving subpoenas, etc. Years ago, material was sent to the police from the ICAC with respect to the "re-birthing" of stolen motor cars. But no further action was taken by the police. If the police force are directed, as it should be, to investigate, it must be answerable and accountable.

Therefore, the ICAC has taken the view that because the police and the ODPP both refuse to undertake investigations, if the ICAC does not undertake this work there will be no prosecution at all.

In my opinion, the legality of the ICAC investigating after it has published its reports and investigating for the sole purpose of people being prosecuted in the criminal courts is of questionable legality. The ICAC is not a criminal law enforcement agency. Nobody, I think, would suggest that the ICAC itself should launch and maintain criminal prosecutions. This is because of its jurisdiction and power with respect to the information it is entitled to receive. Why, then, does it assist with investigations after its essential role has been completed?

If, however, the Parliament will not insist on the police undertaking the necessary investigation work and/or will not make it clear to the ODPP that there are some aspects of the investigation that it can do, for example, preparing briefs, serving subpoenas and the like, the only solution I can think is that the Parliament should establish a special body to investigate and prosecute matters arising from ICAC inquiries. This should ensure prosecutions would follow within a few months of the report of the ICAC and not many years later as is presently the case.

I have already referred to the Parliamentary Joint Committee inquiring into additional functions for the ICAC, namely, the gathering and assembly of evidence for criminal proceedings. I do not see how this could work unless the ICAC was turned into an institution like the Hong Kong ICAC. I doubt whether people in NSW would accept the methods and practices of that body. People, for instance, can be held in custody while an investigation is proceeding. It must be remembered that the Hong Kong ICAC was brought into existence to deal with a corruption problem far in excess of any corruption problem in Australia. It has been remarkably successful but I doubt whether its methods and practices would be acceptable in this country.

The Parliamentary Committee is also to inquire into whether there should be more criminal offences to accommodate findings of corrupt conduct. There is a tendency in NSW to rush to legislation whenever a problem, real or imagined, is said to arise in the criminal justice system. In the past the legislation has, in my opinion, had the effect of complicating criminal law without any evident improvement in the effectiveness of prosecutions. It seems to me that the offence of misconduct in public office is quintessentially the offence which should follow consequent upon the findings of the ICAC whose function is to promote honesty and ethical conduct in the public sector.

In two decisions in the Hong Kong Supreme Court, Justice Anthony Mason, formerly the Chief Justice of the High Court of Australia, referred to the width and meaning of the offence of misconduct in public office. It is a common law offence in NSW and it is a common law offence in Hong Kong. Justice Mason defined the offence of misconduct in public office as follows:

1. a public official
2. in the course of or connected with his/her public office
3. engages in wilful misconduct by act or omission. For example, by wilfully neglecting or failing to perform a duty
4. without reasonable cause or excuse
5. where the misconduct is serious and meriting criminal punishment having regard to the responsibility of the office and the office holder, the importance of the political objects which they serve and the nature and extent of the departure from those objects.

The "wilful misconduct" does not necessarily have to be a criminal offence in itself. People who occupy high public office in NSW such as ministers of the crown have public trust obligations (reflected in the ICAC legislation), breach of which can found a charge of misconduct in public office. The definition of corrupt conduct, for example, includes breach of public trust.

Although the offence is commonly prosecuted in Victoria, in NSW the authorities seem reluctant to prosecute the offence, although there have been rare prosecutions. However,

recently a minister of the crown in NSW was found by the ICAC to have improperly signed an agreement for the purchase of land of substantial value after an election had been called but before the new election was held. He knew his actions were in violation of the well-recognised conventions because he backdated the letter to give the appearance that it was written before the election was called. A recommendation by the ICAC that consideration be given to his prosecution for the offence of misconduct in public office was not adopted by the ODPP although I do not know the reason why.