



INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES

## **SUBMISSION**

TO THE

**PREMIER OF NSW**

ON THE

**ICAC INSPECTOR'S REPORT ON HIS  
REVIEW OF THE ICAC**

MAY 2016

# Summary

This submission by the NSW Independent Commission Against Corruption (“the Commission”) is made to the Premier of NSW, the Hon Mike Baird, in response to the *Report to the Premier: The Inspector’s Review of the ICAC* dated 12 May 2016 (“the Report”).

Although most of the matters and 16 recommendations canvassed in the Report directly concern the operation of the Commission, the Inspector did not undertake any consultation with the Commission. This is therefore the first opportunity the Commission has had to directly address these matters.

The Commission does not support recommendations 1 to 4, 6 to 13, 15 and 16. This is because some would seriously compromise the Commission’s effectiveness, some are unnecessary because the issues they seek to address are already addressed by the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) and internal Commission policies and procedures and, in some cases, no policy or practical justification is provided for their adoption.

The Inspector’s “principal recommendation” (Recommendation 1) is that the Commission should conduct all examinations in private. Adoption of this recommendation would seriously weaken the Commission’s proven effectiveness in exposing and preventing corruption. It is contrary to the considered conclusions reached by the 2004-5 Independent Review of the ICAC conducted by Mr Bruce McClintock SC and the more recent 2015 Independent Panel Review conducted by the Hon Murray Gleeson AC and Mr McClintock. The Commission notes that the Inspector has not directly addressed these reports and has provided no compelling reasons for repudiating the relevant conclusions. The Commission agrees with the Independent Panel’s assessment that public inquiries “...serve an important role in the disclosure of corrupt conduct [and] in disclosing the ICAC’s investigative processes”. The Commission’s accountability is, in fact, enhanced by having public inquiries.

Adoption of Recommendation 6 would seriously compromise the Commission’s effectiveness by removing its power to make any factual findings absent a finding of serious corrupt conduct.

Recommendation 15, which provides that consideration be given to the introduction of an “exoneration protocol”, ignores the basis upon which corrupt conduct findings are made under the ICAC Act and relevant case law.

Recommendations 2, 3, 4, 7, 8 and 16 are already addressed by the ICAC Act or in the Commission’s internal policies and procedures.

The report provides no apparent policy or practical justification for recommendations 9, 11, 12 and 13.

Recommendation 10 is unnecessary because the Inspector currently has access to the assessments information he is seeking under this recommendation.

# Recommendation 1

*The Examinations conducted by the ICAC should be in private.*

## Commission response to Recommendation 1

The Commission does not agree with this recommendation. Its adoption would seriously weaken the Commission's proven effectiveness in exposing and preventing corrupt conduct. The recommendation also overlooks that the Commission's accountability is enhanced by having public inquiries.

Despite the significance of this recommendation, the Report contains no evidence and virtually no analysis to support the recommendation. No consideration is given to how implementation of the recommendation will adversely affect the Commission's work.

Public inquiries are important to the Commission's effectiveness in exposing and preventing corrupt conduct because they:

- widely expose serious corrupt conduct and systemic corrupt conduct
- deter corrupt conduct – public officials and others are less likely to engage in corrupt conduct if they know they will be subject to public exposure
- disrupt corrupt conduct that is ongoing
- hold public officials and others engaged in corruption publicly accountable for their actions
- hold public authorities and public officials publicly accountable for ensuring relevant policies and procedures not only adequately address corruption risks but are enforced
- encourage others to come forward with information relevant to the investigation<sup>1</sup>
- encourage the reporting of other suspected corruption
- educate the public about corruption.

Public inquiries also:

- provide transparency to the Commission's fact-finding and investigative processes
- enhance public confidence in the Commission's operations
- enable the public to assess the evidence for themselves
- provide an opportunity for those against whom unfounded allegations have been made to publicly clear their reputations or to publicly dispel rumour and speculation about corruption.<sup>2</sup>

Recommendation 1 is contrary to the considered conclusions reached by Mr Bruce McClintock SC in his 2004-5 review and the more recent 2015 review conducted by the Hon

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<sup>1</sup> This is most recently demonstrated by the public inquiry into the conduct of employees of the City of Botany Bay Council (Operation Ricco). The public inquiry was announced on 16 February 2016 and evidence taken between 29 February and 17 March. In the three months since 16 February the Commission received 14 reports involving that council. Of these, five were assessed as being directly relevant to Operation Ricco and were referred to the Commission's Investigation Division.

<sup>2</sup> The Commission's February 2010 public inquiry into allegations of corruption made by or attributed to Michael McGurk demonstrated there was no cogent evidence supporting the rumour and speculation of corruption arising from audio recordings made by Mr McGurk.

Murray Gleeson AC and Mr McClintock. In both reviews the issue of public inquiries was examined and the power to hold a public inquiry was endorsed.

In his January 2005 *Independent review of the Independent Commission Against Corruption Act 1988 – Final Report* Mr Bruce McClintock SC considered the Commission's power to hold public hearings and concluded:

I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.<sup>3</sup>

The Independent Panel of the Hon Murray Gleeson AC and Mr McClintock also examined this issue in their July 2015 report *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*. The Independent Panel accepted that

...public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.<sup>4</sup>

The Independent Panel concluded that no further change to or further restrictions should be placed on the Commission's powers to hold a public inquiry.<sup>5</sup>

The Inspector has not directly addressed these reports and has provided no compelling reasons for repudiating the relevant conclusions.

The recommendation is fundamentally inconsistent with the established principle of open justice. It is a recognised principle of Australian law that proceedings involving the administration of justice and inquisitorial proceedings should be conducted in public. Criminal and civil courts and tribunals conduct their proceedings in public. While certain of these proceedings may attract publicity that could be highly damaging to a person's reputation, it is accepted that the public interest is best served by opening the proceedings to public scrutiny. Likewise, Royal Commissions conduct public hearings. The Royal Commission into Institutional Responses to Child Sexual Abuse is the most recent case in point. Its public hearings are very likely to damage reputations but it can hardly be argued that, on this basis alone, it is in the public interest for its proceedings to be conducted entirely in private.

Bodies in Victoria, Queensland and Western Australia with functions broadly analogous to those of the Commission also have power to conduct public hearings.<sup>6</sup>

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<sup>3</sup> *Independent review of the Independent Commission Against Corruption Act 1988 – Final Report*, January 2005, paragraph 6.5.25.

<sup>4</sup> Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption report, July 2015, paragraph 9.4.6.

<sup>5</sup> *Ibid*, paragraph 9.4.10.

The Inspector is concerned about “reputational damage” caused by a public inquiry. The risk of undue prejudice to a person’s reputation is one of the factors the Commission must take into account in determining whether to conduct a public inquiry. It is not the sole consideration and must be balanced with other public interest considerations.

Section 31 of the ICAC Act provides that the Commission must be satisfied it is in the public interest to conduct a public inquiry. Section 31(2) of the ICAC Act sets out the factors the Commission must take into account in determining whether or not it is in the public interest to conduct a public inquiry. These are:

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

The Commission’s Operations Manual procedure for the conduct of public inquiries and compulsory examinations sets out criteria to be applied by the Commission in determining whether to conduct a compulsory examination or public inquiry. In the case of a compulsory examination, the considerations the Commission takes into account must include:

- the need to protect the reputation of a person from untested or unverified evidence
- the need to test or prove the evidence of the witness
- the timing of the examination having regard to the stage of the investigation and the extent to which the evidence likely to be obtained by the examination will require further investigation
- whether a public examination may prejudice the investigation, for example by alerting the public to the Commission’s interest in the relevant subject matter, identifying a witness or making known the extent of the evidence obtained by the Commission
- the need to protect the identity of a witness to ensure their health or safety
- the requirements of s 18(2) of the ICAC Act which provide that where proceedings for an indictable offence are conducted by or on behalf of the Crown, the Commission must to the extent to which it is necessary to do so, ensure the accused’s right to a fair trial is not prejudiced by ensuring as far as is practicable, the investigation is conducted in private during the currency of the proceedings.

The Commission’s Operations Manual procedure provides that considerations to be taken into account by the Commission in applying the criteria in s 31 of the ICAC Act include:

- a) whether public exposure would be likely to:
  - educate the public about serious corruption or systemic failures and issues
  - encourage others to come forward with information relevant to the investigation

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<sup>6</sup> See s 117 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s 177 *Crime and Corruption Act 2001* (Qld) and s 140 *Corruption Crime and Misconduct Act 2003* (WA). Section 7(4)(a)(i) of the *Independent Commissioner Against Corruption Act 2012* (SA) provides that examinations relating to corruption in public administration must be conducted in private.

- encourage public agencies to engage in reform and/or establish public understanding of why change is necessary
- b) the seriousness and nature of the conduct alleged, for example:
- whether the conduct involves a criminal offence or offences
  - the seniority or standing of the public official/s involved
  - the level of sophistication, organisation and planning
  - the number of persons involved and whether the alleged conduct is systemic
- c) whether the allegations are already in the public domain and the public inquiry would:
- provide a transparent mechanism for public officials and others to be publically accountable for their actions
  - enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account
- d) the desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission’s conduct of investigations.

The requirements of the ICAC Act and the Commission’s Operations Manual ensure that potential damage to reputation is one of the matters considered by the Commission in determining whether to conduct a public inquiry as opposed to a compulsory examination. As the ICAC Act makes clear, however, potential reputational damage is only one consideration to be taken into account in determining to conduct a public inquiry. Although other considerations are set out in s 31 of the ICAC Act, these are not addressed by the Inspector.

The Commission also protects against unnecessary reputational damage by only commencing a public inquiry where an investigation has obtained probative evidence to suggest corrupt conduct has occurred or is occurring. In some cases the Commission may conduct a public inquiry where the evidence indicates there is no likelihood of corruption but the Commission considers it is in the public interest to “clear the air” of unfounded allegations of corrupt conduct.

The primary reason given by the Inspector in support of his recommendation is that conducting hearings behind closed doors will eliminate “reputational damage”. This is, at best, speculative. As is demonstrated by the NSW Ombudsman’s Operation Prospect inquiry, the holding of an inquiry in private is no guarantee that reputations of those involved will be protected from damage. It is notable that this inquiry has also attracted criticism, including from those involved in the matters under investigation, because it was conducted “behind closed doors”.

The Inspector has cited the examples of Murray Kear in Operation Dewar<sup>7</sup> and John Booth in Operation Cavill<sup>8</sup> to demonstrate that a public inquiry can have a significant negative impact on a person’s reputation.<sup>9</sup> The information in the report concerning the impact on their

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<sup>7</sup> *Investigation into the conduct of the Commissioner of the NSW State Emergency Service*, May 2014.

<sup>8</sup> *Investigation into the conduct of certain City of Ryde councillors and others*, June 2014.

<sup>9</sup> Paragraph 49 of the Report.

reputations relates not to the public inquiries in which they were involved but the findings subsequently made in the relevant investigation reports.

In the case of Mr Kear, the Inspector's concern is that Mr Kear suffered unwarranted reputational damage from the findings of corrupt conduct made against him because of his "exoneration" in court. For the reasons given below in response to Recommendation 15, the court findings did not exonerate Mr Kear from the Commission's findings that he engaged in corrupt conduct.

It appears that the Inspector's concern in relation to Mr Booth is that his reputation was damaged as a result of the Commission, in its report on the investigation, recommending that the Director of Public Prosecutions give consideration to his prosecution for giving false or misleading evidence to the Commission and that he was subsequently found not guilty of that offence. Absent a requirement that Commission reports on its investigations not be published, it is difficult to see how the reputational damage cited in Mr Booth's case would be avoided by having held the inquiry in private.

## **Recommendation 2**

*There should be a provision (even if based to some extent on the model of Victoria or South Australia) which requires that: only in exceptional circumstances should a person not be informed before the commencement of a Compulsory Examination or Private (Public) Inquiry as to the nature of the allegation or complaint being investigated. Amendments to ss. 30, 31 and 35 would be required (as well as other sections within Div. 3).*

### **Commission response to Recommendation 2**

This recommendation is unnecessary as the issue is addressed in the ICAC Act and in the Commission's procedures.

Sections 30 and 31 of the ICAC Act provide that a person required to attend a compulsory examination or public inquiry is entitled to be informed of the nature of the allegations or complaint being investigated before or at the commencement of the compulsory examination or public inquiry and, in the case of a public inquiry, the scope and purpose of the public inquiry. The Commission's procedures ensure that it complies with these requirements.

The Inspector has not pointed to any instance where there has been a failure to comply with s 30 or s 31.

Section 30 of the ICAC Act deals with compulsory examinations. Subsections (3) and (4) are relevant:

- (3) A person required to attend a compulsory examination is entitled to be informed, before or at the commencement of the compulsory examination, of the nature of the allegation or complaint being investigated.

- (4) A failure to comply with subsection (3) does not invalidate or otherwise affect the compulsory examination.

Section 31 deals with public inquiries. Subsections (5), (6) and (7) are relevant:

- (5) At a public inquiry, the person presiding must announce the general scope and purpose of the inquiry.
- (6) A person required to attend a public inquiry is entitled to be informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated before or at the time the person is required to appear at the inquiry.
- (7) A failure to comply with subsection (6) does not invalidate or otherwise affect the public inquiry.

It is general Commission practice to set out the nature of the allegations under investigation in all summonses issued under s 35 of the ICAC Act and to also set out the general scope and purpose of the public inquiry in summonses for a public inquiry.

The Commission's Operations Manual procedure for the conduct of compulsory examinations provides that where it is proposed to issue a s 35 summons without containing information on the nature of the allegations under investigation, the issuing Commissioner is to be informed and advised when the witness will be advised of this information. A decision not to include this information in the summons is based upon whether divulging the information at that stage may prejudice the investigation. This consideration may apply in relation to some compulsory examinations where there is legitimate concern that the person receiving the summons may communicate information contained in the summons to others involved in the conduct under investigation and that such a communication may adversely affect the conduct of the investigation. Even if the information is not included on the face of the summons, the witness must and therefore will be advised of the nature of the allegations or complaint under investigation at the commencement of the compulsory examination and before being required to give evidence.

In 2014 the NSW Court of Appeal considered a case where the Commission issued a s 35 summons for production of documents at a compulsory examination without specifying in the summons the nature of the allegations under investigation.<sup>10</sup> The Court considered that the Commission was not required by s 30 to set out the nature of the allegations under investigation in the summons and that the Commission would comply with the requirements of that section by informing the person appearing of the nature of the allegations under investigation at the commencement of the compulsory examination.

All summonses for public inquiries contain information about the nature of the allegation or complaint being investigated.

Commission procedures provide that at the commencement of any compulsory examination the presiding Commissioner informs the witness of the nature of the allegations or complaint under investigation. Commission procedure also provides that at the commencement of a public inquiry the presiding Commissioner will announce the nature of the allegations or complaint under investigation and the general scope and purpose of the public inquiry. The

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<sup>10</sup> *A v Independent Commission Against Corruption* [2014] NSWCA 414.

nature of the matters under investigation in a public inquiry is also dealt with in the opening address of counsel assisting the Commission.

It appears from paragraph 89 of the Report that the Inspector is also recommending that the ICAC Act be amended to repeal s 30(4) and s 31(7).

The Commission considers that s 30(4) and s 31(7) should not be repealed as they serve an important purpose. The purpose of these sections is to ensure that the Commission's proceedings are not invalidated where there has been a failure to strictly comply with s 30(3) or s 31(6). A person involved in a compulsory examination or public inquiry, aware that there has been some failure to strictly comply with these requirements, should not be able to remain silent during the course of the compulsory examination or public inquiry and then, later, raise objection as to the validity of the proceedings.

### **Recommendation 3**

*There should also be a provision which requires that in a summons to a person to appear before the ICAC for a Compulsory Examination or Private (Public) hearing, the nature of the complaint or allegations being investigated shall be set out unless to disclose such information would be likely to prejudice the conduct of the investigation or would be contrary to the public interest. Further the Commission where it has determined not to disclose the nature of the allegations or complaint being investigated must notify the Inspector in writing within three days of the issue of the Summons with details of the Summons, the witness, and the reasons upon which the ICAC relies for its conclusion as to prejudice to the conduct of investigations or it being contrary to the public interest.*

#### **Commission response to Recommendation 3**

The part of the recommendation relating to the contents of a summons is unnecessary because the issue is already addressed in the ICAC Act and the Commission's procedures. There is no justification for the balance of the recommendation.

The Commission's response to Recommendation 2 applies with respect to the first part of Recommendation 3.

As explained in that response, the instances where the Commission may decide not to set out in a compulsory examination summons information on the nature of the allegations being investigated is where to do so may prejudice an investigation. This decision is an operational decision which the Commissioner or Assistant Commissioner issuing the summons is best placed to make. The Commission notes that the Inspector has not identified any instances where a decision to not include information in a compulsory examination summons has involved any abuse of power, impropriety, misconduct or maladministration.

The Inspector has provided no reason for the recommendation that the Inspector be provided with written notification where the Commission has not disclosed the nature of the allegations under investigation on the face of the summons. The Inspector has noted that in Victoria the Law Institute of Victoria has argued, in relation to the Victorian Independent

Broad-based Anti-corruption Commission (IBAC), that in the event IBAC issues a summons that does not contain information about the nature of matters on which the witness will be questioned, then IBAC should provide reasons to the Victorian Inspectorate for not including such information in order to “provide accountability for IBAC’s decision and ensure that the power is being exercised fairly and appropriately”. The Victorian Government has not amended the IBAC legislation to accommodate this recommendation.

The Commission notes that there is no similar requirement in any other Australian jurisdiction.

## **Recommendation 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.*

### **Commission response to Recommendation 4**

This recommendation is unnecessary because the issues of public interest and whether a matter should be referred to another agency are currently addressed in the ICAC Act and Commission procedures.

The ICAC Act requires the Commission to have regard to the public interest in deciding whether to conduct a compulsory examination or a public inquiry. The ICAC Act provides that the Commission may, for the purposes of an investigation, conduct a compulsory examination (s 30) or a public inquiry (s 31) if it is satisfied that it is in the public interest to do so. In relation to a decision to hold a public inquiry, s 31(2) of the ICAC Act sets out certain factors to be taken into account in determining whether it is in the public interest to conduct a public inquiry. This section is set out in the response to Recommendation 1, together with the considerations set out in the Commission’s Operations Manual procedures for the conduct of public inquiries.

Public interest criteria are addressed in each Hearing Plan accompanying the summons or summonses for compulsory examinations and public inquiries so that the Commissioner or Assistant Commissioner signing the summonses has regard to the public interest in relation to the issuing of each summons.

In 2010, 2012 and 2013 Inspector Cooper undertook audits of the Commission’s exercise of its powers under s 35 of the ICAC Act. These audits included reviewing hearing plans addressing public interest criteria. Inspector Cooper found that each summons was issued appropriately. The following is an excerpt from the April 2013 audit report:

*Accordingly in conducting this audit I have looked at each exercise of the powers to determine whether it has been taken for the purposes of an investigation into suspected corruption on the part of a public official or authority and, whether it was*

*reasonable in all the circumstances balancing on the one hand the rights of the individual and, on the other hand, the need to protect society from the damage which results from corruption on the part of public officials or authorities.*

*The Commission has instituted and maintained a detailed and impressive system of controls designed to achieve this balance in its procedures. It achieves this goal by requiring the participation of a number of its officers in the approval process and the need for the facts and reasons supporting the request for the exercise of the power to be clearly documented.*

*Examination of the documentation indicates that each exercise of the powers has been appropriate and well founded.<sup>11</sup>*

The ICAC Act presently requires the Commission, when exercising its functions, to take into account the responsibility and the role other public authorities and public officials have in the prevention of corrupt conduct.<sup>12</sup> Referral of a matter to the Director of Public Prosecutions (DPP) is only generally practicable at the conclusion of an investigation when the Commission has obtained all relevant evidence. This is because the DPP is not an investigative agency and is not able to directly gather evidence.

The Commission concentrates its efforts on matters involving serious corrupt conduct and systemic corrupt conduct that are not readily amenable to effective investigation by other agencies, where there are corruption risks requiring the expertise of the Commission or where other agencies are unable or unwilling to conduct an investigation or implement corruption prevention strategies.

In determining what matters to investigate, the Commission takes into account the role and capacity of other agencies and, where appropriate, disseminates material to them or refers matters for investigation or other action. The Commission has a long history of working cooperatively with other agencies to ensure that matters that come to its attention are dealt with by the most appropriate agency.

Various sections of the ICAC Act facilitate dissemination of material and referral of relevant matters to other agencies.<sup>13</sup>

## **Recommendation 5**

*Section 112 of the Act be amended to reflect the provisions of both Victorian and Queensland legislation to enable persons to complain to the Inspector without fear of breaching s.112 or any other cognate suppression order.*

### **Commission response to Recommendation 5**

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<sup>11</sup> *Report of an Audit into the Exercise by the Independent Commission Against Corruption of its Powers under Sections 21, 22, 23 & 35 of the Independent Commission Against Corruption Act 1988*, April 2013, page 36.

<sup>12</sup> Section 12A, *Independent Commission Against Corruption Act 1988*.

<sup>13</sup> Sections 14, 16 & 53, ICAC Act.

The Commission has no issue with this recommendation. On every occasion that a person has sought a variation to a s 112 direction to allow transmission of information to the Inspector, the direction has been varied to permit such a transmission.

## Recommendation 6

*Section 74BA(2) should be repealed.*

### Commission response to Recommendation 6

The Commission does not agree with this recommendation. Its adoption would seriously compromise the Commission's effectiveness.

Section 74BA of the ICAC Act provides:

- (1) The Commission is not authorised to include in a report under section 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.
- (2) The Commission is not precluded by this section from including in any such report a finding or opinion about any conduct of a specified person that may be corrupt conduct within the meaning of this Act if the statement as to the finding or opinion does not describe the conduct as corrupt conduct.

The Inspector suggests that s 74BA(2) “negates the intended effect of the original recommendation” of the Independent Panel and that it should be repealed so that the Commission is “**precluded from making other findings or opinions about any conduct of a specified person unless it falls within the definition of ‘serious corrupt conduct’**”.<sup>14</sup> (emphasis added)

The Inspector has misinterpreted the Independent Panel recommendation and has ignored other relevant provisions of the ICAC Act.

The Independent Panel recommended that the ICAC Act be amended “...so that the Commission's power to make **findings of corrupt conduct** may be exercised only in the case of serious corrupt conduct” (emphasis added).<sup>15</sup> It is worthwhile to set out relevant sections of the Independent Panel's report:

- 9.6.4 The question which now arises is whether any aspect of the ICAC's power should be limited so that it can only be exercised in circumstances where, objectively, there has been serious or systemic corrupt conduct.
- 9.6.5 The Panel does not believe it is appropriate to limit the ICAC's general powers to investigate, or the particular power to hold public inquiries, in this manner – the

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<sup>14</sup> Paragraph 23 of the Report.

<sup>15</sup> Recommendation 4, Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption, 30 July 2015.

purpose of an investigation, and the public inquiry which is part of the investigation, is to determine what happened and it would be wrong to impose any form of *a priori* restraint on the power to investigate.

- 9.6.6 On the other hand, the Panel considers that the ICAC's power to make findings of corrupt conduct should be so limited. The Panel recommends that the Act be amended so that the Commission's power to make findings of corrupt conduct may be exercised only in the case of serious corrupt conduct. This could be achieved by the insertion of a new section 74B(1A) to that effect. (A number of other corresponding amendments would need to be made to section 74B to conform to the proposed new subsection.)

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- 9.6.13 ...[T]he Panel repeats that the ICAC is capable of undertaking very valuable and important work, even when it does not make findings of corrupt conduct. The power to investigate, and **the power to describe and reveal the results of that investigation by making findings of fact and recommendations for taking action as a result of such findings under section 13(3) of the Act is a powerful and beneficial one**, not necessarily or in every case enhanced by an additional declaration that a particular person has engaged in corrupt conduct. (emphasis added).

It is clear from these excerpts that the Independent Panel confined its recommendation to the making of corrupt conduct findings and was not seeking to limit the Commission's powers to make factual findings and recommendations to only those cases where the Commission had found serious corrupt conduct.

The Commission's principal functions under the ICAC Act include the power to make factual findings (see in general s 13(3), s 13(5), s 74A and s 74BA(2) of the ICAC Act).

The purpose of subsection 74BA(2) is to make it clear that the Commission is not precluded from making factual findings. This is so even where those factual findings may bring the conduct within the definition of corrupt conduct in the ICAC Act, provided the Commission does not then go to the next step of describing the conduct as corrupt conduct absent a finding that the conduct is serious corrupt conduct. This subsection therefore serves a vital purpose of confirming the Commission's power to make factual findings in circumstances where it has not made a finding of serious corrupt conduct. This is clearly what was contemplated by the Independent Panel.

Accepting the Inspector's Recommendation 6 would mean that, absent a finding of serious corrupt conduct, the Commission would not be able to make other findings. That is an absurd position. It would mean, for example, that the Commission could not make a factual finding exonerating a person from alleged conduct. It would mean that if the evidence established that a person had engaged in wrongdoing the Commission would be precluded from making a factual finding to that effect. It would also preclude factual findings in relation to persons whose conduct does not amount to serious corrupt conduct but whose conduct is integral to an appreciation of the context of a serious corrupt conduct finding against another person.

## Recommendation 7

*Section 22 be amended whereby the form of any notice that requires production of documents or other things to exclude a requirement for production "forthwith". Amendments should be made where appropriate to ensure that a Notice to Produce allows a reasonable time for the production according to the terms of the Notice which must specify a time and place otherwise than "forthwith" and before which no production need occur. Further amendments to s.22 suggested are:-*

- 1) *That a notice under s.22 of the ICAC Act should only be granted by [sic]:*
  - a) *by a Commissioner or Assistant Commissioner in circumstances where a particular investigation is nominated; for example: "Operation Smithsonian";*
  - b) *in circumstances where the nominated document or thing might reasonably be regarded as to leading to a chain of inquiry that might advance the nominated inquiry;*
  - c) *the party upon whom the s.22 Notice to Attend and Produce is served be provided with a reasonable time to respond to the requirements as set out in the Notice [sic].*
  
- 2) *That a reasonable time also includes a sufficient time for the party upon whom the Notice to Attend and Produce is served to obtain relevant legal advice and initiate setting aside procedures.*

### Commission response to Recommendation 7

The Commission does not agree that there is any need to amend the ICAC Act as recommended.

In support of this recommendation the Inspector refers to a legal opinion he obtained “for the purposes of the preparation of the Hale Report”.<sup>16</sup> The Commission understands this to be the October 2015 joint opinion provided to the Inspector by Messrs Blackburn SC and Kulevski (“the Joint Opinion”).

The Inspector’s previously stated position that a notice issued under s 22 of the ICAC Act requiring production “forthwith” is unlawful is contrary to law and is not supported by the Joint Opinion.

The Federal Court decision in *Egglisshaw v Australian Crime Commission* [2010] FCAFC 82 makes it clear that there is no inherent illegality in a notice to produce requiring production “forthwith”.

The Joint Opinion does not support the Inspector’s previous finding in his Operation Hale review that the issuing of notices requiring production “forthwith” rendered them unlawful. The Joint Opinion was that “...on the state of the authorities, a notice pursuant to sec 22 of the ICAC Act may require production ‘forthwith’ if production is compelled in otherwise lawful circumstances”.

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<sup>16</sup> Paragraph 99 of the Report.

The Joint Opinion was that the notices were unlawfully *executed* on the basis that the notices did not authorise entry onto premises and seizure of property without the owner's consent. That advice, however, was expressly qualified by counsel who noted that they lacked information about what actually occurred in relation to the execution of the notice. The Commission agrees that a notice issued under s 22 of the ICAC Act does not authorise entry onto premises without consent or the seizing of property without consent. The evidence establishes that in Operation Hale, Commission officers did not enter premises without consent and did not seize property without consent. This evidence, which was available to the Inspector, does not appear to have been provided by the Inspector to his counsel for consideration in preparing the Joint Opinion.

Although used only occasionally, a notice under s 22 of the ICAC Act requiring production "forthwith" is a valuable investigative tool. It is a tool used by other agencies such as, for example, the Police Integrity Commission, the Australian Crime Commission and the Australian Securities and Investments Commission.

Notices requiring production "forthwith" are used typically in cases where the Commission is concerned that, if given time, the recipient of the notice will take steps to destroy or hide the documents or things required to be produced. In each case the Commission considers whether, in all the circumstances, it is reasonable to require production "forthwith". A single document or item, such as a mobile telephone, which is likely to be carried on or about the person, will be capable of immediate production. If it is likely that some time may be needed for the recipient of the notice to collect together the relevant material the Commission will not issue a notice to produce "forthwith" but, if it is concerned that the material may be destroyed once the Commission has identified its interest in the material and the material is at known premises, the Commission may obtain a search warrant in order to seize the material.

A notice to produce "forthwith" may also be used in cases where a person has agreed to provide items as soon as the person receives a notice and the person has advised the Commission that the items are ready to be produced. In some cases, a person may want a s 22 notice so that the person can object to production under s 26 of the ICAC Act and thereby protect themselves from the item produced being used in proceedings against them.

In relation to paragraph 1(a) of Recommendation 7, the Commission notes that the power to issue a s 22 notice is limited by the ICAC Act to the Commissioner (or an Assistant Commissioner who has a relevant delegation). Commission procedure requires that all applications to the Commissioner (or an Assistant Commissioner) for the issuing of a s 22 notice are supported by a minute setting out reasons for the issuing of the notice. The supporting minute identifies the investigation to which the matter relates.

The Commission does not consider it necessary to nominate a particular investigation on the notice. Only full investigations are given an investigation name. Preliminary investigations have a file number but no name. The file number will not have any evident meaning to the recipient of a s 22 notice. Even where an investigation has progressed to an operation with an operation name, the inclusion of that name on the notice is unlikely to be of any relevance to the recipient who (unless the matter has proceeded to a public inquiry) will not be aware of the nature of the allegations under investigation.

In relation to paragraph 1(b) of Recommendation 7, the ICAC Act provides that the Commission can only issue a s 22 notice for the purposes of an investigation.<sup>17</sup> Issuing a notice other than for the purpose of an investigation is beyond the Commission's statutory power. Commission procedure requires that the minute supporting the application identifies the relevance to the investigation of the material being sought. The Commission is not aware of any suggestion that a s 22 notice has ever been issued where the production of the document or thing was not relevant to the investigation.

In relation to paragraphs 1(c) and 2 of Recommendation 7, the Commission only issues a s 22 notice if it is satisfied that, in all the circumstances, the time required for production is reasonable. This applies to notices to produce "forthwith" as well as other notices. If it is satisfied that it is appropriate to do so the Commission may grant an extension of time in which to produce. These requirements are part of the common law: see *Egglishaw*.

The Commission notes that Inspector Cooper undertook audits of the Commission's exercise of its power under s 22 of the ICAC Act in 2010, 2012 and 2013 and found, in each case, that the Commission's exercise of that power was "appropriate and well founded". An earlier audit was undertaken by Inspector Kelly in 2007 who found that the Commission's exercise of its power under s 22 of the ICAC Act complied with the relevant legal requirements.

## Recommendation 8

*I further recommend that a new s.22A be introduced into the ICAC Act providing that if a document or thing has been produced to the Commission pursuant to a s.22 Notice to Attend and Produce:*

- 1) *Where documents or other things are produced to ICAC the person nominated to produce the documents or other things should be given a receipt identifying each of the documents or things produced.*
- 2) *The Commission may retain the document or other thing if and for so long as its retention by the Commission is reasonably necessary for the purposes of the investigation nominated in the Notice to Produce.*
- 3) *If retention of the document or other thing by the Commission is not or ceases to be reasonably necessary for such purposes, the Commission shall cause it to be delivered to:*
  - a) *The person who appears to the Commission to be entitled to possession of the document or other thing, or*
  - b) *The Attorney General or Director of Public Prosecutions with a recommendation as to what action should be taken in relation to the document or other thing; provided that any such delivery must be notified to the person who appears to the Commission to have been otherwise*

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<sup>17</sup> Section 22 ICAC Act.

*entitled to possession of the document or thing before or at the time of any such delivery.*

### **Commission response to Recommendation 8**

The Commission does not consider any amendment to the ICAC Act is required. The Commission has procedures dealing with the receipt and return of documents and other things obtained during the course of an investigation. The substance of this recommendation invariably finds expression in the procedures of every investigative agency which issues notices under similar provisions to s 22 of the ICAC Act. The Inspector has not identified any reason why these procedures require statutory force.

### **Recommendation 9**

*Section 57B should be amended to provide a new function to the Inspector namely an expanded role to assess the appropriateness of the Commission's determination not to investigate a complaint or a matter referred to it by another public authority or the DPP.*

### **Commission response to Recommendation 9**

The Commission does not support this recommendation.

The Commission notes that at paragraph 91 of the Report this recommendation is expanded to include that the role of Inspector be expanded "...to allow the Inspector to issue guidelines which must be followed by ICAC, in consultation with ICAC. Those guidelines would then be tabled in Parliament". It is not clear from the Report what the "guidelines" would cover and whether they are intended to be limited to determining what matters not to investigate or whether they are intended to have wider application.

The Inspector's functions under s 57B include dealing with complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or Commission officers and dealing with conduct amounting to maladministration. The Inspector also has a function of assessing the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities. The Inspector has exercised his functions under s 57B to consider decisions of the Commission to not investigate particular matters. The Inspector has not identified any instance of an unjustified refusal by the Commission to investigate. It is not clear what purpose the Inspector seeks to serve by having a general role to "...assess the appropriateness of the Commission's determination not to investigate a complaint or a matter referred to it by another public authority or the DPP".

The Inspector provides no policy or practical justification for these recommendations. In the absence of any compelling justification these recommendations should not be considered further.

## **Recommendation 10**

*Either by amendment to the Memorandum of Understanding or otherwise by agreement the Inspector should be informed of all assessments made by the ICAC, outcomes thereof and the reasons therefor.*

### **Commission response to Recommendation 10**

This recommendation is unnecessary because the Inspector already has access to this information through his access to the Commission's case management system. The Commission has, in addition, offered to provide the Inspector with comprehensive investigation reports on a monthly basis.

## **Recommendation 11**

*The Independent Commission Against Corruption (Commissioner) Act 1994 should be repealed and all matters relevant to the appointment of the Commissioner should be within the ICAC Act 1988.*

### **Commission response to Recommendation 11**

The Commission does not agree with this recommendation.

The only apparent justification provided in the Report for this recommendation is an entirely unsupported assertion that "...it is demeaning to Judicial Office for a holder of that Office to be able to abandon the high honour of the grant of a judicial commission to embark upon five years as Commissioner of the ICAC at an extraordinarily increased salary and then be free to be reappointed to the Supreme Court".<sup>18</sup> While the Inspector speculates that the nature and function of the Commissioner could "...affect the standing and reputation of the Commissioner or assistant Commissioner to the point where the person's (re)appointment as a member of the judiciary would cause concern in the community..."<sup>19</sup> he concludes that it has not done so.

The purpose of the *Independent Commission Against Corruption (Commissioner) Act 1994* is to expand the pool of potential candidates for appointment to the position of Commissioner.

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<sup>18</sup> Paragraph 14 of the Report.

<sup>19</sup> Paragraph 16 of the Report.

It provides the Government with flexibility in the selection of a suitably qualified and experienced person for the position of Commissioner.

There are state and Commonwealth examples of the appointment of serving Supreme Court and other judges to Royal Commissions. These include the appointment of Justice James Wood as Commissioner of the Royal Commission into the NSW Police Service and the appointment of justices Peter McClellan and Jennifer Coate as commissioners of the Royal Commission into Institutional Responses to Child Sexual Abuse. There has been no suggestion of community concern in relation to the return of those persons to their courts.

## **Recommendation 12**

*If there is to be a Deputy Commissioner that should be a statutory appointment under the ICAC Act 1988 of limited duration (5 years).*

### **Commission response to Recommendation 12**

The Commission does not consider this recommendation is necessary or desirable.

The Inspector has not provided any justification why the term of appointment should be limited to five years when the ICAC Act effectively limits the period of appointment to no more than nine years.

The person holding the position of Deputy Commissioner is (and always has been) required to also be able to exercise the powers of an Assistant Commissioner. This is an essential requirement of the Deputy Commissioner position. This means that to be appointed as Deputy Commissioner the person must also be appointed as an Assistant Commissioner. An Assistant Commissioner is appointed by the Governor, with the concurrence of the Commissioner.<sup>20</sup> Schedule 1 to the ICAC Act sets out the eligibility requirements for a person to be appointed Assistant Commissioner.<sup>21</sup> Clause 4(1A) of Schedule 1 provides that an Assistant Commissioner is to hold office for such term not exceeding nine years as may be specified in the instrument of appointment. No person may hold office as Assistant Commissioner for terms totalling more than nine years.

The term of appointment of a person as Deputy Commissioner is limited to the period for which the person is appointed an Assistant Commissioner. In any event, no person holding the position of Deputy Commissioner can remain in that position for longer than nine years, being the maximum period for which a person may hold the position of Assistant Commissioner.

The restriction of the Deputy Commissioner to a five-year term would have a deleterious effect on the operational activities of the Commission. The Deputy Commissioner exercises functions analogous to a deputy chief executive officer. An incoming Commissioner's

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<sup>20</sup> Section 6, ICAC Act.

<sup>21</sup> The person must be qualified to be appointed as a judge of the Supreme Court of NSW or of another state or territory, a judge of the Federal Court of Australia or a Justice of the High Court of Australia or be a former judge or Justice of any such court.

reliance upon the “corporate knowledge” of the Deputy Commissioner would be jeopardised in the event that both positions were filled contemporaneously or nearly contemporaneously.

## **Recommendation 13**

*Contingent upon whatever advice the Crown Solicitor has given to the Parliament, s.64 of the Act should be considered for the purposes of amendment to ensure that subject to safeguards as to purely operational matters both the ICAC and its Inspector are answerable on all matters to the Parliament of New South Wales.*

### **Commission response to Recommendation 13**

The Commission does not agree that s 64 of the ICAC Act requires amendment.

The recommendation that the Commission should be answerable to the Parliamentary Committee “on all matters” is extraordinarily broad and overlooks both the sensible limitations imposed by s 64(2) of the ICAC Act and the Inspector’s own role.

Section 64 of the ICAC Act sets out the functions of the Parliamentary Committee. It provides that:

- (1) The functions of the Joint Committee are as follows:
  - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission’s and Inspector’s functions,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
  - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Joint Committee:
  - (a) to investigate a matter relating to particular conduct, or
  - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
  - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

The Commission has not been provided with a copy of the Crown Solicitor's advice to Parliament on the operation of s 64 of the ICAC Act. The Commission, however, considers that s 64 provides an appropriate level of Parliamentary oversight while ensuring that the Committee does not become involved in operational matters.

The importance of the Committee not involving itself in reviewing operational matters or other matters outside the scope of s 64 was recognised by the Parliamentary Committee in its *Report on the ICAC - Accounting for Extraordinary Powers*:

The Committee does not have the ability to review the Commission's decisions and findings, to investigate conduct, or to examine the legality and propriety of the Commission's actions with respect to particular complaints. **It is the Committee's opinion that these statutory restrictions imposed upon the Committee under section 64(2) are appropriate.** (original emphasis)<sup>22</sup>

The office of Inspector was created so that the Inspector could examine complaints concerning abuse of power, impropriety or other forms of misconduct and conduct audits. It is not appropriate that these functions also be exercised by the Parliamentary Committee.

## Recommendation 14

*The Office of the Inspector should be a full time position and Assistant Inspector(s) part time. The Inspector should have power to employ staff similar to the powers provided to ICAC by s. 104. The present position of principal legal advisor should be upgraded to Solicitor to the Inspector.*

### Commission response to Recommendation 14

The Commission has no response to this recommendation. It is a matter of policy for the Government to determine.

## Recommendation 15

*Exoneration Protocol: Consideration should be given to the introduction into the legislation of something with such a title. It should provide that in circumstances where there is an absence of a criminal conviction arising from any prosecution based upon the same or similar or cognate facts as warranted the making by the ICAC of a finding of corrupt conduct, the person against whom the finding was made may make an application to the Supreme Court for an expunging of the records of the ICAC or to have the findings set aside. The ICAC would of necessity be a party to such proceedings.*

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<sup>22</sup> *Report on the ICAC - Accounting for Extraordinary Powers*, May 2000, pages 18-19.

## Commission response to Recommendation 15

The Commission does not agree with this recommendation.

The recommendation ignores the fact that Commission investigations are separate from criminal proceedings and demonstrates an apparent misunderstanding on the part of the Inspector of the basis upon which corrupt conduct findings are made under the ICAC Act. It also fails to take into account relevant case law.

Criminal courts do not operate as a mechanism for review of Commission findings. The fact that a person found to have engaged in corrupt conduct is not prosecuted for a criminal offence or, if prosecuted, not convicted does not “exonerate” that person from a corrupt conduct finding. In any event, criminal proceedings do not “exonerate” a person from a criminal offence. In a criminal court persons are “acquitted” or found “not guilty”. They are not found “innocent” or “exonerated”.

Commission investigations, including hearings, are inquisitorial, not adversarial or criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is, in effect, a standing Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission.

The standard of proof in Royal Commissions is the civil standard; that is, on the balance of probabilities. This requires reasonable satisfaction in making findings as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters.

Findings of corrupt conduct made on the basis that, for the purposes of s 9(1)(a) of the ICAC Act, the conduct could constitute or involve a criminal offence are not dependent on a person being prosecuted or convicted of that offence.

The Commission’s task under the ICAC Act is to make findings in respect of allegations of corrupt conduct on the balance of probabilities. The Commission is not required to and cannot make a finding of criminal guilt.<sup>23</sup> What is required is for the Commission to consider whether, if the facts it has found on the balance of probabilities were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. If the Commission is satisfied this would be the case then it has the necessary satisfaction that the relevant conduct could constitute or involve a criminal offence. This approach is consistent with the decision of the NSW Court of Appeal in *Greiner v ICAC* (1992) 28 NSWLR 125.<sup>24</sup>

One reason a person may not be prosecuted is that the offence is out of time. Section 9(2) of the ICAC Act makes it clear that it does not matter that proceedings can no longer be brought or continued.

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<sup>23</sup> Section 74B(1) ICAC Act.

<sup>24</sup> Gleeson CJ at 136

Another reason a person may not be prosecuted is that there may be insufficient admissible evidence. There may be many reasons for this. One possibility is that although a person has admitted to wrongdoing in a public inquiry or compulsory examination, the evidence was subject to a declaration under s 38 of the ICAC Act which means the evidence cannot be used against the person in any civil, criminal or disciplinary proceedings. The person cannot be compelled to give evidence incriminating himself or herself in a criminal trial. Witnesses who gave evidence to the Commission may not be available to give evidence in criminal proceedings or may not be willing to do so.

The Commission's investigative processes are not primarily concerned with the admissibility of evidence in criminal proceedings (deliberately so). It is imperative to the work of the Commission that lines of enquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis, which required the Commission to focus on obtaining only evidence which would be admissible in a criminal trial in order to support any corrupt conduct findings, would seriously compromise the capacity of the Commission to expose corruption.

Evidence before a court in any criminal prosecution will invariably be different from the evidence before the Commission. The Commission makes its factual findings on the balance of probabilities while a court determines whether the prosecution has proven its case beyond reasonable doubt. Given these differences, it is wrong to confuse the absence of a criminal prosecution with the validity of a corrupt conduct finding.

This issue has been considered in cases such as *Greiner* and *Kazal v ICAC* [2013] NSWSC 53. In *Greiner* Gleeson CJ noted:

*Indeed, a determination of corrupt conduct might be based upon the commission of an alleged crime, and might be followed by a trial of the individual involved, and an acquittal. That could happen for any one of a number of reasons. It could simply be because a jury believed a witness whom the Commission disbelieved, or vice-versa. Even so, the finding of corruption would stand.*<sup>25</sup>

In *Kazal* the plaintiff sought a declaration that the Commission's December 2011 report *Investigation into the undisclosed conflict of interest of a senior executive of the Sydney Harbour Foreshore Authority* was a nullity. The report contained a finding of corrupt conduct against Mr Kazal on the basis that his conduct could, for the purposes of s 9(1)(a) of the ICAC Act, constitute or involve a criminal offence under s 249B(2)(b) of the *Crimes Act 1900*. The Commission did not recommend that consideration be given to the prosecution of Mr Kazal for this offence because the Commission did not consider there was sufficient evidence admissible in a criminal court to justify such a recommendation. The essence of Mr Kazal's case was that the Commission erred in applying the civil standard of proof upon evidence that would not be admissible in a criminal trial and that in so doing the Commission made a finding of corrupt conduct when the evidence could not support a prima facie case in any criminal prosecution. In dismissing Mr Kazal's summons Harrison J held that:

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<sup>25</sup> Gleeson CJ at 130-1.

*As a matter of construction, the words “unless it could constitute or involve... a criminal offence” [in s 9(1)(a) of the ICAC Act] are wholly different from words such as “unless a criminal offence has thereby been successfully prosecuted”, or some equivalent formulation. Mr Kazal’s argument depends upon some such construction being accepted. In my view, such a construction is not available.”<sup>26</sup>*

The following excerpt from the judgment of Basten JA in the Court of Appeal case of *D’Amore v ICAC* [2013] NSWCA 187 is also relevant:

*It would clearly be inconsistent with both the function of the Commission and the structure of the Act generally to hold that the Commission must be satisfied beyond reasonable doubt that an offence has been committed. The Commission is not a criminal court and is not required to reach conclusions on the basis of material which would constitute admissible evidence in a criminal proceeding: cf s 17(1). So understood, s 13(3A) requires that the Commission be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence. The combined purpose of ss 13(4) and 74B, is to emphasise that the Commission is not delivering a verdict on a criminal charge.<sup>27</sup>*

Current Commission procedure does address situations where persons are not prosecuted or acquitted following a Commission recommendation that consideration be given to their prosecution. The Commission publishes on its website and in its annual reports the outcomes of all such recommendations. This means that if the DPP decides not to prosecute a person, or a person is found not guilty of a criminal offence, then this information is published on the Commission’s website and in the next annual report.

Recommendation 15 also ignores the possibility that there may be no criminal proceedings because the corrupt conduct found by the Commission does not involve a criminal offence. Not all findings of corrupt conduct concern the commission of a criminal offence. Conduct may be corrupt if it comes within the definition in s 8 of the ICAC Act and, for the purposes of s 9 of the ICAC Act, could also constitute or involve:

- a disciplinary offence, or
- reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

## **Recommendation 16**

*By legislation or other means such as the creation of relevant Regulations, the conduct of proceedings by ICAC, whether in public or in private, be embodied in a Code or set of Rules.*

### **Commission response to Recommendation 16**

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<sup>26</sup> Harrison J at [33].

<sup>27</sup> Basten JA at [221].

The Commission does not agree with this recommendation.

The Inspector has provided no policy or practical justification for this recommendation. The Commission is therefore unable to understand the basis upon which this recommendation has been made.

The Commission has published standard directions for the conduct of public inquiries. The latest version was issued in October 2014 and is Appendix A to this submission. The Commission considers that it should have the flexibility to amend these from time to time to take into account changing circumstances without having to seek changes to legislation.

Section 17(2) of the ICAC Act provides that the Commission shall exercise its functions with as little formality and technicality as is possible. Introduction of a code or Rules governing the conduct of compulsory examinations and public inquiries will introduce unnecessary formality and technicality into Commission proceedings.