

# **Parliamentary Oversight from Parliament's Perspective: the NSW Parliamentary Committee on ICAC**

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This paper deals with the oversight matters that concern me as a member of the New South Wales (NSW) Independent Commission Against Corruption (ICAC) Parliamentary Committee.

The most recent annual report of the NSW ICAC shows a period of highly active and productive work in complex fields. The Commission reported an unprecedented need for its services including a strong demand for corruption prevention and educative services. These demands tested ICAC to the full.

This scenario brings home the point made in the Griffith overview paper that the volume and complexity of an agency's activities will form a continuing challenge to the expertise of parliamentary oversight committees. I believe, from my own experience, that the New South Wales Legislature has been responsive to Committee needs both in regard to financial support and the provision of the necessary Secretariat expertise.

In regard to our Committee Mr Griffith comments that broadly its work has involved holding 'general meetings' in the form of public hearings with the Commissioner. I might say we have in recent years moved away from that benign approach to a review more focussed on our specific statutory responsibilities. This has disclosed certain oversight issues that I believe you will find of interest.

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### ***Meeting with Commissioner ICAC of Republic of Mauritius***

In November 2003 the Speaker, the Clerk of the Legislative Assembly and the Chairman of our Committee, the Hon Kim Yeadon MP met with Mr Navin Beekary who is the Commissioner of the ICAC of the Republic of Mauritius. Not all of you will be aware that the ICAC Act of Mauritius is modelled on the ICAC Act of NSW. However, one difference is that at the conclusion of an investigation the Commission submits its report and recommendations to the Director of Public Prosecutions. The ICAC of Mauritius, unlike that of NSW, does not make findings of corrupt conduct. That approach has recently been endorsed by our committee.

### ***Effort to restrict Commission to findings of fact***

This year the NSW ICAC Act was the subject of a major independent review by Mr McClintock, SC. In the course of the McClintock Review our committee put a submission that the Commission's powers should be restricted to making findings of fact and recommendations rather than findings of corrupt conduct and recommendations. This approach has the advantage of leaving reputations intact if court or disciplinary proceedings do not eventuate. It also removes the risk of prejudice in any criminal proceedings that might follow.

In the course of an earlier review of the Act by the committee in 1992 the Hon Adrian Roden QC said in his submission that the idea that the Commission should make findings of corrupt conduct reflected confusion between the respective functions of the Commission and the courts. The Hon Athol Moffitt QC, CMG took a similar view. In his submission of October 1992 he said that a finding by ICAC that the conduct of a named person is corrupt is akin to the ancient practice of sentencing a person found to have done a public wrong to the public pillory. He said the function of ICAC is to act in aid of outside bodies and where necessary spur them into action.

In the face of powerful views of this type I was disappointed with the approach adopted by Mr McClintock who, in his report, in his curious phraseology, said 'he was not persuaded' that ICAC should be prevented from making findings of corrupt conduct.

The NSW Act states that findings of corrupt conduct are not to be interpreted as a finding that a person has committed a criminal or disciplinary offence. The Commission's findings are therefore regarded as not affecting legal rights and obligations. This is small comfort to someone found to be corrupt but who is not subsequently charged with any offence by the DPP. That person never gets his day in court. Do these findings have a discriminatory impact on the future employment of a person even though no criminal or disciplinary proceedings are taken? The answer to this question would justify some research I think. Mr McClintock's words at page 30 of his report certainly have an ominous ring. He says: 'ICAC's findings,

although not affecting legal rights and obligations, invariably have a significant impact on employment and reputation.’ In 1990 when the legislature amended the ICAC Act to say that a finding of corrupt conduct did not equate to guilt what exactly was the finding intended to convey?

### ***Greiner v ICAC 1992***

Chief Justice Gleeson in his judgment in *Greiner v ICAC* (Court of Appeal 1992) spoke of the many persons whose position in office would be untenable following a public and official finding of corruption yet there was no right of appeal or procedure for review of the merits of the Commission’s findings. He said that a finding of corrupt conduct might be based on the commission of an alleged crime, and might be followed by a trial and an acquittal. Yet the finding of corrupt conduct by this administrative body would stand.

Many people are under the belief that the *Greiner* case involved an appeal against the facts found by the Commissioner. That is incorrect. They were not in the nature of an appeal against the facts found by the Commissioner. The Court of Appeal had no jurisdiction either to endorse or to reject those findings of fact. The plaintiff’s had invoked the narrower inherent jurisdiction of the Supreme Court to supervise the functioning of administrative tribunals to ensure they carry out their functions according to law.

The situation is that the ICAC Act makes no provision for an appeal against a determination that a person has engaged in corrupt conduct even though those findings can have devastating affects on individuals.

If you have an opportunity to do so you should read the transcript of proceedings of the NSW Court of Appeal in *Greiner and Moore vs ICAC* of June/July 1992. In that transcript the then Chief Justice Gleeson asks Roger Gyles QC what happens to a finding of corrupt conduct in the event of an acquittal of the person labelled corrupt by ICAC.

Gleeson, CJ: What happens if Bloggs is tried with a criminal offence and is acquitted. What happens to the finding of corrupt conduct?

Gyles: It stays.

Later in the hearing the Chief Justice returned to this issue. You can sense his unease in the further questions he puts to Mr Gyles.

Gleeson CJ: I am just interested to know. Can the Commissioner change his mind? Suppose the alleged form of corrupt conduct happens also to be a criminal offence. The Commissioner looks at it and reports corrupt conduct, and then the person in question goes to trial. Let us suppose that he gets acquitted because the jury believes him, the Commissioner having disbelieved him. What happens then?

Gyles: Nothing your honor. He is *functus officio*.

Gleeson CJ: So that person is ruled corrupt?

Gyles: Yes.

The Chief Justice then goes on to say:

Gleeson CJ: I just cannot at the moment see what has to stop the Commissioner changing his mind. If the Commissioner reported 5 years ago that somebody was engaging in corrupt conduct, and tomorrow some fresh evidence was produced that satisfied the commissioner that that finding was wrong, can he not change his mind?

Gyles: He can but he cannot recall his report.

Mr Justice Mahoney then drew the Court's attention to section 74 of the Act, which permits the Commission to prepare reports in relation to any matter that has been the subject of investigation.

### ***ICAC never reviews its previous findings***

This situation shows that the Commission clearly has the authority to review its findings in regard to a previous matter. The Parliamentary Committee when it met with the Commission in 2004 took the opportunity to try to clarify the matter. Commissioner Moss was asked whether a finding by the Commission of corrupt conduct against a person is reviewed under section 74(1) of the ICAC Act in the event of that person's subsequent acquittal in court proceedings.

One such acquittal was listed in the annual report for 2002–2003. Commissioner Moss said it had never been done to her knowledge. It seems there has never been an instance in the 17 year life of the Commission where it has felt any need to question the reliability of a finding it has made of corrupt conduct relating to a possible criminal offence even where the person has subsequently been acquitted by the courts.

When I mull over this fact I can hardly credit that an institution could be brought to this state of perfection.

In the course of the McClintock review the Commission argued that there was no connection between its functions and any prosecution action based on the same conduct. This seems a preposterous argument when you consider that the prosecution by the DPP has been commenced as a direct result of the recommendation of the Commission.

The Committee does not have details of the number of instances where an acquittal has followed a finding of corrupt conduct by the Commission. However the strength of the views expressed by the Chief Justice on the lack of any merits appeal point to the need, perhaps belatedly, for the Commission to give more searching attention to the question of whether an earlier finding warrants review.

### ***A finding of corrupt conduct lasts forever***

We need to recognise, therefore, that in NSW a finding of corrupt conduct has a life of its own that persist regardless of the fate of any related prosecution by the DPP or disciplinary action by a government authority in regard to an employee. Many prosecutions fall by the wayside. Go through any ICAC Annual report and you will see examples. In ICAC's Annual Report for 2003–2004 I counted at least 20 cases which were either not proceeding because of insufficient evidence or were described as 'awaiting outcome', left in suspended animation until someone at the DPP got around to consider them. You may have the impression that I am talking of matters recently referred to the DPP. Regrettably that is not the case. A number of the originating inquiries go back several years. In one case, which the Commission labelled as 'serious corruption' 6 years had elapsed since the Committee had made its recommendations to the DPP.

The Committee's concern is that such inordinate delays are not fair to the parties involved. This situation has led the Committee to recommend that the Commission hold discussions with the DPP to examine practical steps to remedy the situation. We will be asking the new Inspector of ICAC to interest himself in these discussions. This type of approach is a good example of the proper oversight role of a committee in asking what Gareth Griffith in his paper describes as hard questions of investigatory authorities with the objective of improving their performance.

### ***Assessing the admissible evidence***

As I mentioned, one of the main reasons the DPP monotonously puts up for not proceeding with prosecutions arising out of ICAC investigations is the lack of admissible evidence. Another, blunter way of putting this would be to say there is no realistic prospects of success because we haven't got enough evidence to establish our case.

One of ICAC's functions under Section 14 of the Act is to assemble evidence that may be admissible in the prosecution of a person for a criminal offence and to furnish that evidence to the DPP. When you go through the evidence to determine what is admissible wouldn't this give you a realistic idea of whether or not you should recommend to the DPP the consideration of prosecution action? The committee thought that it would.

The fact that the DPP has on so many occasions had to come back and report that there is insufficient admissible evidence suggested that the Commission is not adequately appraising the evidence before making its recommendations.

The Commission responded by telling us that it is their practice, before making any recommendation, to assess the available admissible evidence. The Commission said that in such cases, although the Commission can make representations, it must

ultimately accept the advice of the DPP. This situation again shows a core area where some improvement is not just necessary but imperative. ICAC is now exploring the possibility of bringing the DPP into the picture at an earlier stage in the proceedings so as to achieve unanimity of view.

Even in the course of our discussion today the mere fact of putting these issues into the public arena shows another powerful and advantageous role that our oversight committees perform.

### ***Inspector of ICAC***

In the coming months our committee will be closely observing and reporting on the most major structural change in the oversight of ICAC which is the introduction of an Inspector of ICAC. The Inspector will deal with complaints of abuse of power and other forms of misconduct or maladministration on the part of ICAC employees and report on the operational effectiveness of ICAC. The Inspector's functions will be monitored and reviewed by our committee.

The Inspector is needed to address a gap in the accountability of ICAC. Although the parliamentary joint committee is responsible for monitoring and reviewing the exercise of ICAC's functions, it is prohibited from examining particular decisions made by ICAC. The creation of an Inspector was the main change arising from the McClintock Review and stemmed from an earlier recommendation of our committee. Mr Graham Kelly was appointed as Inspector of the ICAC on 1 July 2005 for a period of 5 years.

### ***Comment on performance***

I was interested in Gareth Griffith's positive remarks about the achievements of NSW oversight committees. These included the initiation of reforms in their respective spheres designed to improve the processes and structures of the integrity watchdogs. He left open the issue of whether the oversight committees should or could have done more.

I have a few points or impressions to put forward on this subject. I would first note that reports of Parliamentary Committees are usually set down for debate, at least in the Legislative Assembly, at 1pm on a Thursday when members are going to lunch. There is barely a handful of members present and little spirited debate. The speech notes are invariably prepared by officers of the particular Secretariat.

Second, Government response to these reports in my experience has not been very forthcoming. Our Committee has in the past made various recommendations relating to ICAC which have brought forth no reaction whatever from the Government. It is a mistake to believe that recommendations that have been

cogently justified will guarantee their adoption. It needs to be recognised that the tabling in Parliament of a report may be the very beginning of the process needed to have some justified change implemented.

It is difficult for oversight committees to judge their own value and effectiveness. I think that a periodic audit, undertaken at say 5 yearly intervals by an external body, of the costs and benefits of the reports and work of oversight committees would be a valuable initiative. I don't think this has ever been done in the past and may be quite revealing. Of course that exercise could without doubt be extended to the full range of parliamentary committees and would serve to either confirm or qualify the need for them. ▲