ICAC's Operation 'Hale': A Low Point in the History of the Agency

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Abstract

In May 2014, a somewhat innocuous motor vehicle accident triggered an unpredictable series of events. The incident involved Deputy Senior Crown Prosecutor, Margaret Cunneen, and led initially to a proposed investigation by the Independent Commission Against Corruption ('ICAC') called Operation Hale. The New South Wales ('NSW') Court of Appeal and the High Court ruled that the alleged conduct was not corrupt conduct. In response, the NSW Government convened a Review Panel, resulting in the Inspector of the ICAC's Report on Operation Hale, alleging that the ICAC had engaged in unreasonable, unjust and oppressive maladministration. Premier Baird referred the Report to the Parliamentary Committee on the ICAC for review, which led to the tabling of the Inspector's Review of the ICAC. In its October 2016 Report, the Committee made 35 recommendations, including restructuring the ICAC. This restructure, along with other recommendations, has now been enacted. This article discusses this process and its outcomes.

Keywords: Independent Commission Against Corruption – Operation Hale – Margaret Cunneen – accountability – oversight

Introduction

In October 2014, it was reported that Margaret Cunneen SC, Deputy Senior Crown Prosecutor with the New South Wales Office of the Director of Public Prosecutions ('NSWODPP'), her son, Stephen Wyllie and Sophia Tilley, her son's then partner, were being investigated by the NSW Independent Commission Against Corruption ('ICAC') for allegedly perverting the course of justice (McClymont & Whitbourn 2014). The basis for the investigation, known as Operation Hale, was that Cunneen and her son had advised Tilley to fake chest pains at the scene of an accident in May 2014 so as to avoid a blood alcohol breath test. While subsequent blood tests revealed a 'zero' reading, the allegations and proposed public inquiry by the ICAC sent shock waves through the NSW legal community.

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Cunneen immediately launched proceedings against the ICAC in the NSW Supreme Court to halt any inquiry. Two declarations were sought: (1) a declaration that the ICAC was exceeding its jurisdiction; and (2) a declaration that the ICAC's decision to hold a public inquiry was invalid and a nullity.

Hoeben CJ ruled against the plaintiffs in relation to both declarations and consequent orders (*Cunneen v ICAC*). The plaintiffs immediately appealed and on 18 November 2014 the NSW Court of Appeal delivered its judgment (*Cunneen v ICAC*). By a 2:1 majority, the Court allowed the appeal on the basis that the alleged conduct was not corrupt conduct for the purposes of s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW) ('ICAC Act'). The Court, however, ruled against the appellants as to the other grounds of appeal, notably that the ICAC Commissioner's decision to hold a public inquiry was unreasonable.

Given the significance of this decision as it related to s 8(2) and its effect on ongoing ICAC investigations, the High Court granted the ICAC leave to appeal with an expedited hearing of the matter. On 15 April 2015, the High Court, by a 4:1 majority, dismissed the appeal, affirming the decision of the NSW Court of Appeal that the respondents' alleged conduct was not corrupt conduct within the meaning of s 8(2) of the Act.

In May 2015, the NSW Government responded to the High Court's decision by commissioning a Review Panel ('the Panel') headed by Murray Gleeson and Bruce McClintock (Gleeson & McClintock 2015). The Premier released the Panel's Report on 11 August 2015, stating that the Government would implement all recommendations (Whitbourn & Nicholls 2015). In terms of *Cunneen*, the Panel did not recommend amending s 8(2) of the ICAC Act so as to reverse or alter the High Court's decision (Gleeson & McClintock 2015, p. ix). Of direct relevance to *Cunneen* and future cases, however, was the recommendation 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' (Gleeson & McClintock 2015, p. xii).

Even though Cunneen's alleged conduct fell outside the jurisdiction of the ICAC, the Panel was of the opinion that it should never have been investigated by the ICAC, raising the question of whether ICAC decisions should be subject to some form of oversight. Significantly, however, the Panel strongly rejected any proposal to implement any additional oversight or review procedures. All proposed amendments were enacted under the *Independent Commission Against Corruption Amendment Act 2015* (NSW) ('ICAC Act'), which commenced on 28 September 2015.

For many, however, the initial decision to investigate Cunneen was of fundamental concern. In November 2015, Alex Dore, the president of the NSW Young Liberals, noted the 2014 statements of the ICAC Commissioner, Megan Latham, who controversially described the examination of witnesses appearing before the ICAC as being like 'pulling the wings off butterflies', and inquisitorial litigation as 'fantastic' because 'you are not confined by the rules of evidence' (Dore 2015). For Dore, the central issue was the extent to which those appearing before the ICAC were being afforded procedural fairness.

> In a liberal democracy, conservatism demands that institutions that have served us well be protected: the rule of law, including procedural fairness, is amongst them.
>
> One of the great things about Australians is our healthy skepticism of any institution which gains too much power, and if we're honest with ourselves, isn't that exactly what ICAC has become? (Dore 2015)

Certainly, the Inspector of the ICAC thought so. In his Report on Operation Hale (Levine 2015), Inspector David Levine described the case as 'a low point in the history of the agency, and the watchdog had engaged in unreasonable, unjust, [and] oppressive maladministration' (Levine 2015, pp. 50, 56, 63). The ICAC rejected the Report almost in its entirety and both the Report and the Inspector were heavily criticised, adding yet another twist to the *Cunneen* case (ICAC 2015). But this was not the end of the matter, with Premier Mike Baird referring the Report to the Parliamentary Committee on the ICAC ('the Committee'). Public hearings were commenced with both the ICAC Commissioner, Megan Latham and Inspector Levine making submissions, this resulting in a somewhat unseemly and public falling out between the two.

On 1 June 2016, the Committee reconvened to further consider the matter and undertake a review of the Inspector's Report to the Premier: The Inspector's Review of the ICAC (ICAC Committee 2016b). This Report made several highly controversial recommendations, which are considered later. Public submissions on the Inspector's Report were sought and obtained with public hearings conducted on 8 and 9 September 2016 (ICAC Committee 2016c).

As noted, the 2015 amendments introduced some positive reforms, notably s 74BA (Report may only include findings etc. of serious corrupt conduct). What is clear from the numerous submissions received by the Committee, however, was that more was needed. As such, the 2015 Panel Review and resulting amendments were arguably a missed opportunity to go further. For many, *Cunneen* represented fundamental failings by the ICAC in its decision-making processes and, further, there was a significant need to introduce checks and balances to prevent such a case recurring. The unanswered question is what form these should take.

Sixteen recommendations were made by Levine in his Report to the Premier. During the latest Committee hearings, several submissions received made further recommendations. The Committee then made 35 recommendations that may be crystallised into three: the adoption of a three-Commissioner model; guidelines for the decision to hold public inquiries; and a combined Office of Inspectorates. These recommendations were passed by both Houses, with the *ICAC Amendment Act 2016* (NSW) receiving Royal Assent on 23 November 2016. Labor and the Greens had opposed these changes, claiming that the introduction of the three-Commissioner model was a means to terminate Commissioner Latham's current tenure and weaken the Commission, and potentially limit its ability to inquire into misconduct by Coalition Members of Parliament. There may even be a perception that the amendments are themselves corrupt (Nicholls 2016a). Commissioner Latham resigned with effect from 30 November 2016.

All of this, however, must be considered in a context which involves first grappling with the vexed question: What is the ICAC? To a large extent, it remains unanswered. This article argues that the ICAC is more than a mere investigative tribunal. It is likely more than a Standing Royal Commission, as it has been described (ICAC 2017). The ICAC has the power to investigate allegations of corruption. It can then hold a public inquiry to determine whether there was corruption. Where there are findings of corruption, there is often a referral to NSWODPP. In many cases, persons are subsequently found guilty of criminal offences. While the ICAC is not a law enforcement agency, it has been compared to bodies that are. It is also not a prosecutorial agency, in the same sense as the NSWODPP, but again there are similarities. In addition, however, it is similar to a court in its public inquiry form. In light of the most recent amendments to the ICAC Act, the ICAC will continue largely in its current role, albeit with a significantly different structure. Unfortunately, this has opened up another cause of concern, with some arguing that the new three-Commissioner structure is an attack on the Commission's independence. This is concerning because the ICAC must act

independently and be free from political pressure. It must not only act justly and without bias, but be *seen* to be so acting. The remaining question then becomes how best to achieve this.

These issues and concerns are by no means new. They were first raised when the idea of an ICAC was tabled. *Cunneen* not only resurrected many of these historical concerns, but highlighted for many the potential for an excessive exercise of executive power and the damaging consequences that can flow. To fully understand all of the above issues, the article adopts a timeline methodology. It begins with an analysis of developments from the creation of the ICAC in 1989 up to *Cunneen*. We then analyse the events from and including *Cunneen* to the present. The article concludes with a final reflection on where to go from here.

From inception/creation to *Cunneen:* What is the ICAC?

The ICAC came into existence in March 1989. For the then government, the creation of the ICAC was about restoring integrity. It was not, as stated by Premier Greiner in his Second Reading Speech, 'a political stunt' (Greiner 1988, p. 675). In terms of the actual role of the Commission, Greiner noted that '(t)he independent commission will not be a crime commission. Its charter is not to investigate crime generally (Greiner 1988, p. 674). While not a crime commission, he stated, that '[t]his commission will have very formidable powers. It will effectively have the coercive powers of a Royal Commission' (Greiner 1988, p. 675).

Sydney University seminars

In June 1989, and then approximately 18 months later, the University of Sydney's Institute of Criminology held two public seminars that considered issues concerning the role of the ICAC. Papers from these seminars were subsequently published in *Current Issues in Criminal Justice* (1990, 1991).

In the first seminar titled 'The Growth of Specialised Investigative Agencies: Police Powers in the Modern State', Kevin Zervos, then General Counsel of the ICAC, likened the functions of the ICAC to that of a parliamentary inquiry, a gatherer of information for a government to consider and act upon. He noted, however, a number of conditions that were relevant to the ICAC:

> Inquiries armed with coercive powers must be confined to matters of vital public importance because clearly the power to compel the answers to questions and to compel the production of documents is a responsibility that should not be given lightly. It is this power that makes an inquiry unique and special. Inquiries have powers normally only associated with the judicial branch of government. They do not make decisions or affect the legal status of people as do courts, but in the conduct of some inquiries they act in a manner similar to that of courts (Zervos 1990, p. 56).

At the same seminar, Michael Bersten appeared to place the ICAC in the same category of investigative bodies as the then National Crime Authority and NSW State Drug Crime Commission. In commenting on the ICAC's considerable discretion, Bersten noted:

> Putting aside the various forms of accountability for a moment, the *Act* does not give the ICAC a discretion to exercise in an unstructured, whimsical, discriminatory or peremptory fashion. …. The issue is therefore how to properly structure this discretion, not through external influence or regulation but through self-regulation within the ICAC itself. In other words, under what internal guidelines should the ICAC operate in the exercise of its various discretions under the *Act*? (Bersten 1990, p. 96)

The second seminar, held at the end of August 1990, focused specifically on the first 12 months of the ICAC. In his paper, Ian Temby, the then Commissioner, stated that 'in exercising its functions the Commission has, as it is required to do by s 12 of its governing legislation, regarded the protection of the public interest and the prevention of breaches of public trust as its paramount concerns' (Temby 1991, p. 11). And then later:

> How does the Commission seek to protect the public interest? I submit that the only safe and proper approach is to recognise that rights are enjoyed by**,** and the Commission owes duties to, all members of the population, including those who become involved in investigations it decides to take on. The investigations are therefore carefully chosen and defined (Temby 1991, p. 12).

In his paper, however, Peter McClellan quoted from the 1989 Fitzgerald Report on the Queensland Government:

> There is the risk that any autonomous body, particularly one infused by its own inevitable sense of importance and crusading zeal, may become increasingly insensitive to the delicate balance between conflicting public and private interests, which is traditionally and best struck by judges (McClellan 1991, p. 17).

Mark Findlay went further, implying that a body such as the ICAC had a vested interest in creating a 'corruption monster'. In commenting on the then ss 8(2) and 9, he stated that '[t]he use of such a grab-bag of offences, and the partial identification of corruption in a generic sense, will obviously allow the anti-corruption agencies considerable leeway in their efforts to criminalise the corrupt' (Findlay 1991, p. 38). For Findlay, '[i]t is essential for the monster making process that the social reality of corruption remain unspecified … This will mean that in future, when it comes to political answers, almost anything goes' (Findlay 1991, p. 38).

In commenting on the effect of the public inquiry on a party involved in one of the earliest high profile ICAC cases, McClellan noted that:

> [t]he damage to Mr Schaefer has been considerable. His reputation has been tarnished. … All this could have been avoided if the inquiry had proceeded in private, examined the documents with expedition and reached the inevitable conclusion that the allegation was baseless (McClellan 1991, p. 27).

McClellan suggested a number of reforms, based on the assumption that the ICAC would continue as a permanent institution. These included that 'allegations which could never amount to corrupt conduct are not ventilated. If the Commission comes across matters falling outside its jurisdiction but which warrant investigation, it has ample powers to report such matters to the appropriate authorities for investigation and action' (McClellan 1991, p. 28). For McClellan, preliminary investigations should all be in private until there is a determination that there is sufficient proof of the allegation so as to justify 'the damage which will accompany its public ventilation. Unless individuals have this basic protection, the Commission processes will always be perceived as unfair' (McClellan 1991, pp 28–9).

By contrast, Brian Toohey noted that:

> ICAC is not the only place in which you can be bad mouthed and that, when it comes to a question of protecting reputations, courts are not the angelic places some would have us believe. All sorts of damaging accusations are bandied about by the prosecution in initial addresses, or in bail applications, which never get tested in the course of the trial. Similar considerations can apply to unsworn statements from the dock (Toohey 1991, p. 32).

Balog v ICAC [1990] HCA 28

The first major test of the Commission's power arose in *Balog*. The issue before the Court centred upon the capacity of the Commission to make findings of criminality or corrupt conduct in relation to an individual and publish them in a report to the Parliament. The trial judge and the Court of Appeal both said the Commission could make findings of corrupt conduct. The High Court reached a different conclusion: 'the broad function of the Commission … is to communicate the results of its investigations concerning corrupt conduct to appropriate authorities, it is apparent that its primary role is not that of expressing … any conclusions which it might reach concerning criminal liability' (*Balog* at [16]). According to the High Court:

> Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which might follow (*Balog* at [23]).

The Act was subsequently amended by the *ICAC (Amendment) Act 1990* (NSW), however, to state that the ICAC may make 'findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct', and that it may (and in some cases must) make 'findings of fact' and express 'opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons'.

In October 1990, the Committee held two public hearings to consider the role of the ICAC and the use of public hearings. The Committee concluded that the principle of public hearings should be adhered to (ICAC Committee 1990). While the Committee concluded that the ICAC should continue to conduct most of its hearings in public, there should be safeguards. Three potential dangers were identified in holding unrestricted public hearings: danger to informers; prejudice to fair trials; and unnecessary or unfair damage to reputations.

Greiner v ICAC (1992) 28 NSWLR 125

'The theme of protection of reputation is at its strongest in *Greiner*' (Allars 1996, p. 249). In *Greiner*, the NSW Court of Appeal, by a 4:1 majority, ruled that the ICAC had acted in excess of its jurisdiction. The ICAC had alleged that Premier Greiner and another NSW Government Minister had acted corruptly in their appointment of Dr Metherell to the Environment Protection Authority following his resignation from Parliament. Referring to s 9 of the Act (which has been subsequently amended), Gleeson CJ held:

> On the true construction of s9, the test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner … it should not be construed so as to make that outcome turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits. Furthermore, the legislative history of the statute shows that it was Parliament's intention that the test be objective and that determinations should be made by reference to standards established and recognised by law (*Greiner* at 144).

The ICAC could have appealed the decision, but cited costs and harm to public confidence as reasons for not pursuing the matter. From the perspective of judicial review this is significant, with Allars arguing that the legal position taken by the Court of Appeal in *Greiner* is likely wrong (Allars 1996, p. 249). For Allars, the question in *Greiner* was non-jurisdictional in that the ICAC had received a legitimate reference from the government. If the ICAC had jurisdiction, its decision could be challenged 'only if an error appeared on the face of the record'.

For some, Greiner was somewhat inconsequential in imposing limits on ICAC's powers. Roser, for example, described the ICAC as the New Star Chamber (Roser 1992). Three years later McClellan noted: 'It is appropriate to recognise that if the ICAC is to be viewed as a special form of administrative body with extraordinary powers of investigation and determination, it may be legitimate to require it to observe different rules of procedural fairness' (McClellan 1995, p. 30).

In 2002, the conduct of ICAC hearings was again examined by the Committee (ICAC Committee 2002). In its Report, the Committee noted the relative decline in the use of public hearings following the 1991 amendments to the Act. In its submission, the ICAC 'argued that it no longer regards public hearings as the primary or "most effective" investigative tool available to it', as the Commission previously stated in the 1990 Annual Report. Rather, the ICAC indicated that it now regards public hearings 'as only one of the investigative tools available in the investigative repertoire of the Commission' (ICAC Committee 2002, p. 18).

Despite the ICAC's view that the controversy about its hearing functions had subsided over time, it was a matter raised in several submissions. In response, the Committee stated that 'all initial investigations by the commission should be in private so that avenues of inquiry that proved baseless but which could damage reputations would be examined and discarded without unjustly damaging the reputation of individuals' (ICAC Committee 2002).

The 2005 Review — Bruce McClintock (McClintock 2005)

In 2005, the Committee appointed Bruce McClintock to undertake a review of the Act and to specifically consider:

- Whether the functions of the ICAC remain appropriate;
- The definition of corrupt conduct, and the capacity of the ICAC to make findings of corrupt conduct;
- The jurisdiction of the ICAC;
- Whether the ICAC's powers are appropriate mechanisms for the ICAC; and
- Any other matters (McClintock 2005, p. viii).

McClintock made a number of recommendations, including an amendment to s 31 of the Act and public hearings. Recommendation R6.8 stated:

> That the Act be amended to rename ICAC's power to conduct public hearings as a power to hold public inquiries. Public inquiries would be held for the purpose of an investigation, where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements (McClintock 2005, p. 112).

This recommendation was accepted and the Act amended accordingly. This change was considered important for the following reasons:

> The change in nomenclature emphasises the inquisitorial nature of the investigation. It may, over time, encourage those involved in such inquiries, such as counsel assisting and other legal practitioners, to discard inappropriate adversarial tactics and techniques.
>
> The hearing is the culmination of the investigation. The presiding Commissioner is the chief investigator. The point being to determine whether corrupt conduct has occurred and, if so, what needs to be done about it, not whether ICAC can prove beyond reasonable doubt that a person is guilty of a corruption offence (McClintock 2005, 6.5.27–6.5.28).

> [T]he important point is to move away from the term 'hearing' which carries the erroneous connotation that ICAC investigation is akin to the hearing process undertaken by a Court of law (McClintock 2005, 6.5.38).

Following this review, debate as to the purpose and powers of the ICAC largely subsided. For what might be considered almost *deja vu*, in terms of the beginnings of the ICAC, the next series of corruption scandals arose with the demise of the Labor Government in 2011. By 2014, nine public inquiries had been held looking into the conduct of former Labor ministers as well as 10 Liberal ministers and Members of Parliament. By June 2014, 35 people had been found guilty of charges arising from ICAC investigations, with another 22 pending (Mitchell 2015). This somewhat stellar run was to come to an abrupt halt with *Cunneen*.

Cunneen and beyond

While Cunneen succeeded on the grounds of jurisdiction, she failed at both first instance and before the Court of Appeal as to procedural fairness.

Cunneen v ICAC [2014] NSWSC 1571

In ruling against Cunneen at first instance, Hoeben CJ concluded that:

> 114. There is no presumption that just because the defendant has not provided reasons for its decision to conduct a public hearing, pursuant to s 31, that it has failed to take into account the public interest as there defined.
>
> …
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> 117. It is trite to observe that most persons to be investigated by the defendant would consider that the investigation would cause 'disproportionate embarrassment and damage' to their reputation. But the discretion lies with the defendant. I am not satisfied that the plaintiffs' submissions meet the high threshold of legal irrationality necessary to make out their complaint in respect of s 31 of the Act.

His other significant finding was that the plaintiffs' conduct was potentially corrupt conduct for the purposes of s 8(2) of the Act. On appeal, and by majority, the NSW Court of Appeal reversed this decision as to s 8(2) (*Cunneen v ICAC*). The appellants had, however, raised 16 grounds of appeal. Outside of the applications made regarding s 8(2), the appellants also challenged: (1) 'the refusal of the primary judge to order, pursuant to UCPR r 59.9(4), that the Commission provide reasons for its decisions to investigate the applicants in connection with the allegation and to hold a public inquiry' (*Cunneen* at [38]); and (2) 'the decision to hold a public inquiry' (*Cunneen* at [41]). The majority, however, ruled against the appellants on these other grounds. For Basten J: 'While the applicants' complaints about the reasoning of the trial judge were not unfounded, it was by no means clear that, on the limited evidence before him, he was wrong to reject the challenge to the decision to hold an inquiry' (*Cunneen* at [116]–[117]). On the same point, Ward JA stated:

> Nevertheless, without knowing what, if anything, transpired at the compulsory examination on 14 August 2014 and what other steps may have been taken to investigate the allegations, I am not satisfied that the applicants have established that the decision to hold a public inquiry could not reasonably have been justified had each of the mandatory factors been properly considered by the Commissioner and hence I am not satisfied that the decision must be taken to have been unreasonable or made without proper consideration of the mandatory factors. Hence, I would not have found that his Honour erred in rejecting the challenge to the decision to hold a public inquiry (*Cunneen* at [293]).

Considering the above, any determination of the public interest under s 31 would appear to be completely at the discretion of the ICAC and judicial review would only succeed where 'the plaintiffs' submissions meet the high threshold of legal irrationality necessary to make out their complaint' (*Cunneen* at [117]).

ICAC v Cunneen [2015] HCA 14

The ICAC then sought special leave to apply to the High Court on 9 December 2014. The High Court held, by majority, that the ICAC had no power to conduct an inquiry into allegations that were made against the respondents because the alleged conduct was not 'corrupt conduct' as defined in s 8(2) of the ICAC Act. Further, the High Court unanimously granted special leave but, by majority, dismissed the appeal. The majority held that the expression 'adversely affect' in s 8(2) refers to conduct that adversely affects or could adversely affect the probity of the exercise of an official function by a public official. The definition of 'corrupt conduct' does not extend to conduct that adversely affects or could adversely affect merely the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision. The High Court made no reference to s 31 provisions referring to public interest.

Interestingly, the effect of s 12A was not considered in *Cunneen* and there is no indication in the Act or elsewhere as to how this would be determined. Section 12A requires the ICAC 'as far as practicable to direct its attention to serious corrupt conduct and systemic corrupt conduct', and there appears to be ample evidence to conclude that the circumstances of *Cunneen* did not meet these requirements. For some, *Cunneen* was a 'piddling little case' (Dick 2015).

Cunneen's counsel, Arthur Moses SC claimed that the ICAC needed to explain its decision to hold a public inquiry:

> It might sell a few newspapers but that doesn't give it the justification, Mr Moses said.
>
> There has to be something more than that. Seriously, what is the purpose? Is it to be a public flogging? Is it a show trial? What is it? (Whitbourn 2014).

McClintock was also critical of the ICAC's decision to investigate Cunneen. For him, the ICAC's decision to launch an inquiry was a 'very concerning trend when it's ICAC and not the criminal law that is being invoked in circumstances such as this (Berkovic 2014).

Gleeson/McClintock Review and the *Independent Commission Against Corruption Amendment Act 2015* (NSW)

As noted, the NSW Government responded to the High Court's decision in *Cunneen* by commissioning a Review Panel headed by Murray Gleeson and Bruce McClintock (Gleeson & McClintock 2015). The Panel did not recommend amending s 8(2) so as to reverse or alter the High Court's decision and this was accepted by the Government.

In light of *Cunneen*, the Panel received a number of submissions regarding mechanisms for the external review and oversight of the ICAC's findings of corrupt conduct and decisions to hold public inquiries. This was strongly opposed by the ICAC and the Panel recommended against such changes 'which would involve an inappropriate confusion of administrative and judicial powers' (Gleeson & McClintock 2005, p. x). In addition, the Panel reconfirmed the

position taken in 2005 regarding the decision to hold public inquiries and, as such, recommended there be no change to the current s 31. Further, the Panel noted that there had been little criticism of the ICAC's decisions to hold public inquiries. The one exception was *Cunneen*. The Panel stated that this case alone was 'an insufficient basis to recommend a change' (Gleeson & McClintock 2015, p. 61).

The Panel did recommend, however, 'that the power to make findings of corrupt conduct should exist only in cases of serious corrupt conduct' (Gleeson & McClintock 2015, p. x). This recommendation resulted in the enactment of s 74BA. This must now be read in conjunction with the existing s 74B of the Act but, significantly, the Panel recommended against any definition of serious corrupt conduct. While Cunneen's alleged corrupt conduct was not, and will not in the future, be corrupt conduct for the purposes of the Act, it is arguable that it would now not be seen as serious even if it were covered under the Act. A determination of seriousness, however, would appear to be at the ICAC's discretion.

Of importance, the Panel noted that there was a popular misconception as to the role of the ICAC. It noted that many people believed the ICAC to be a quasi-court with one of its functions the successful prosecution of corrupt individuals (Gleeson & McClintock 2015, p. 24). The response of the Panel was that such misconceptions were not problematic. While it recognised the exceptional coercive powers of the ICAC, it saw the role of the ICAC compared to those of the criminal justice system as 'an eloquent demonstration of the fundamental distinction between an ICAC investigation and its function and the criminal justice system and its purpose and that of the criminal trial' (Gleeson & McClintock 2015, p. 77).

The subsequent Committee Reviews and recommendations would certainly question this somewhat out-of-hand dismissal of these so-called misconceptions. Given that the Panel's recommendations were all adopted as part of the *Independent Commission Against Corruption Amendment Act 2015* (NSW), we argue that this was a missed opportunity for much more to be done.

Levine Report December 2015

The fallout from *Cunneen* received renewed impetus with the release on 4 December 2015 of the much-anticipated Report by the Inspector of the ICAC, David Levine (Levine 2015). In what was described as a 'blistering report' (Whitbourn 2015), Levine found that the 'ICAC needed to display a "sensible consciousness of proportion" in deciding which matters to investigate'. He said the allegations raised in the *Cunneen* inquiry were 'neither serious nor systemic and at best could be described as trivial' (Levine 2015).

While the ICAC disputed many of the Report's findings, Premier Baird referred the Report to the Parliamentary Committee on the ICAC for review in early 2016. The ICAC also responded to the Report by claiming that the Inspector had 'failed in his obligation to provide procedural fairness to the Commission' by not seeking any response to the findings of the Report before its release (ICAC Committee 2016a). This position seems somewhat incongruous given Cunneen's failed claims of procedural impropriety by the ICAC.

In March 2016, Levine responded by calling for stronger oversight of the ICAC. In a direct attack on Commissioner Latham, Levine stated that 'the watchdog risks the perception it has a "craving to sacrifice" the rights, liberties and reputations of those it pursues on the altar of its self-perceived authority' (Nicholls 2016a).

On 12 May 2016, Levine published his Inspector's Review of the ICAC, and the Report was referred to the Parliamentary Committee on 1 June. The Committee was required to have particular regard to:

1. the extent, nature and exercise of the ICAC's current powers and procedures including the rationale for and conduct of investigations and public hearings, and possible options for reform;
2. the current structure and governance of the ICAC, best practice models adopted by other integrity institutions, and possible options for reform;
3. the current oversight arrangements for the ICAC, including the role, powers and resourcing of the ICAC Inspector, and possible options for reform;
4. whether the outcome of legal action taken in response to the ICAC's corrupt conduct findings is adequately reflected on the public record; and possible options for reform.

Public submissions were sought, with 8 and 9 September allocated for public hearings.

Committee Report 2/56 — October 2016 and the Independent Commission Against Corruption Amendment Bill 2016 (NSW)

In its Report, the Committee made 35 recommendations (ICAC Committee 2016a). While a number of these related to the rejection of the recommendations made in the Levine Report, those of substance can be crystallised into three recommendations as set out in the Report's Executive Summary. The first was the restructuring of the ICAC so as to accommodate three Commissioners, a model adopted by the newly proposed Law Enforcement Conduct Commission ('LECC'), and a Bill to establish the LECC received Assent on 14 November 2016.

The second recommendation was for the formulation of guidelines for the holding of public inquiries to ensure procedural fairness. Finally, in response to Levine's recommendations as to the role of the ICAC Inspectorate, and submissions on this, it was recommended that the Inspector's Office be amalgamated with that of the LECC Inspectorate so as to form a single office of Inspectorates.

Further to the three-Commissioner model, the Committee recommended that any decision to hold public hearings during a corruption inquiry should require unanimous agreement of the Commissioners. It was also recommended that the decision to hold compulsory examinations of witnesses in an inquiry — also known as 'private hearings' — should be made by majority agreement of the Commissioners.

The amendments, however, do not go this far. Section 6(2) states that '[a] decision of the Commission to conduct a public inquiry under section 31 must be authorised by the Chief Commissioner and at least one other Commissioner'. As such, there is no requirement for a decision to hold a private hearing and any single Commissioner may determine this.

Significantly, the three-Commissioner model is based on the submission to the Committee by the Department of Premier and Cabinet. Apart from allowing for different types of expertise, the submission noted that '[m]ultiple Commissioners also provide a peer group and a check against "agency capture" — they are an internal and confidential resource for each other to discuss ideas and issues, and a check against idiosyncratic decision-making' (ICAC Committee 2016c, p. 16).

Others also expressed support during the public hearings on 8 and 9 September, with McClintock stating that a 'model of three commissioners heading the organisation was an attractive one' (Whitbourn 2016a). This is somewhat surprising given his previous opposition in the Panel Review to any form of increased oversight of ICAC decision making.

Unsurprisingly, the proposal to introduce three Commissioners was rejected by Commissioner Latham, who noted that all other similar Australian agencies had only one Commissioner (ICAC 2016). Ex-Commissioner David Ipp was much stronger in his opposition to the proposal condemning it as a 'bureaucratic monstrosity' that would hamper the work of the ICAC (Whitbourn 2016c).

The Committee also recommended that there be legislative change 'to ensure that, where the ICAC refers a matter to the DPP to consider whether a person should be prosecuted for a criminal offence, it provides the DPP with all disclosable evidence' (ICAC Committee 2016a, p. ix). In making this recommendation the Committee noted its concern over *Kear* (Operation Dewar 2014) where 'the ICAC had not provided the DPP with certain records of interview taken by the ICAC that contained relevant exculpatory material' (ICAC Committee 2016a, p. 27).

The Committee made no mention of the Levine recommendation that the conduct of the ICAC be embodied in a Code or set of Rules, but did call for the formulation of guidelines. Before considering this recommendation more specifically, it is worth noting the ICAC's response to the original Levine recommendation. The ICAC rejected this recommendation, noting the publication in 2014 of standard directions for the conduct of public inquiries and s 17(2) of the Act.

It is somewhat misleading, however, for the ICAC to say that the standard directions are published. They are set out in the ICAC's Operations Manual. Significantly, this is not a public document. It was tabled as part of the Commission's earlier submission to the current Parliamentary Committee hearing. It was labelled 'Sensitive' and was provided in response to the Committee's question to ICAC: 'Is there a document or a manual of practice and procedure governing the manner in which private and public hearings are conducted by the ICAC?' (Parliament of NSW 2016a). One interpretation of this request is that Committee was not aware of the existence of an Operations Manual or, if Committee members were, they did not have a copy.

Regarding guidelines, the Committee recommended that:

- the three-member Commission be required to issue guidelines to Commission staff and Counsel Assisting for the conduct of public inquiries. These guidelines should be tabled in Parliament and published on the ICAC's website;
- the guidelines include requirements that ICAC staff and Counsel Assisting must follow in relation to procedural fairness;
- the guidelines cover the investigation of exculpatory evidence and the disclosure of relevant evidence to an affected person;
- the guidelines cover the opportunity to cross-examine regarding credit;
- the guidelines cover access to documents and time to prepare for a public inquiry (ICAC Committee 2016a, p. xii).

It is unclear, however, whether such guidelines would be separate from or part of the existing Operations Manual. It has already been noted that this Manual is not a published public document. What it contains, among its many provisions, are listed criteria that should

be considered for determining whether or not to hold a public inquiry. The current Manual, however, is different from that which existed at the time of ICAC's initial investigations of the *Cunneen* and was amended soon thereafter (Parliament of NSW 2016b, TAB 1[1]). As part of an earlier submission to the Committee, the ICAC provided copies of both Manuals. In the earlier version of the Manual, under 14.4 Procedural fairness, for example, it was stated that '[r]eputation is an interest attracting the protection of the rules of natural justice' (Parliament of NSW 2016b, TAB 2[2]). This has been deleted from the new Manual.

Both the previous and current versions of the Manual state, although differently, that a consideration in favour of holding a public inquiry is that it will provide those 'subject to false accusations or innuendo an opportunity to clear their names' or 'enable persons the subject of allegations, including false accusations or innuendo, an opportunity to provide an account'.

On the face of it, the Guidelines go much further than what is stated in the Operations Manual. This is significant because the above recommendations have all been enacted and are now set out, almost verbatim, in s 31B of the Act. The recommendations as to the Inspector have also been enacted, but we make no comment on this here.

Conclusions

We believe the mandating of guidelines is a positive reform. But this is by no means new, as guidelines were proposed by Bersten in 1989 at the first Sydney University seminar. At the same seminar, Kevin Zervos, the then General Counsel for the ICAC, concluded that '[a] specialist body like the ICAC brings together a range of skills and special powers necessary to fight official corruption. However, with such a body comes great responsibility and above all accountability' (Zervos 1990). Bersten also noted that '[t]he impact of the ICAC upon civil liberties is also important although I think that is better treated as an accountability problem' (Bersten 1990). For him:

> The civil liberty arguments are weakened if ICAC uses the impugned powers effectively …
>
> In such circumstances the more practical way to protect civil liberties is:
>
> - first, through reinforcing the view that abuse of these special powers is intolerable and
> - second, that proper systems of accountability are required so as to ensure that these special powers are held in check and only used when genuinely appropriate (Bersten 1990, p. 96).

As noted, in 1995 McClellan said that 'if the ICAC is to be viewed as a special form of administrative body with extraordinary powers of investigation and determination, it may be legitimate to require it to observe different rules of procedural fairness' (McClellan 1995, p. 30).

The need for guidelines was also reflected in the recommendations made in the Levine Report on Operation Hale, the first being most relevant to the decision to hold a public inquiry and procedural fairness. To this extent Levine recommended:

> That the ICAC and its decision makers bring to bear, at the earliest time when it considers itself sufficiently apprised of appropriate information, a sensible consciousness of proportion when determining whether or not it should embark upon a preliminary investigation of material that has come to its attention by whatever means. By 'sense of proportion', I am referring to a rational

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1 Note operative between 7 September 2009 and 1 July 2015.
2 Note operative from 1 July 2015.

> and balanced observation and decision making process with respect to the matter by itself, and in the context of the ambit of the statutory criteria, and the history of their application in relation to the investigation of conduct asserted to be 'corrupt'. The failure to do so would be (as it was here) unreasonable, unjust and oppressive in a serious way (Levine 2015).[3]

Levine, in his Report to the Premier on the ICAC, went on to recommend that the conduct of the ICAC be embodied in a Code or set of Rules. Unlike the Committee's recommendations as to guidelines, however, Levine provided no detail as to such a Code or set of Rules.

Section 31B of the Act specifies what the guidelines should cover. In terms of existing guidelines for other agencies, perhaps the most relevant are those set out in the Prosecution Guidelines of the NSWODPP (NSWODPP Guidelines, p. 4). Guideline 3, for example, sets out the requirements of Fairness. Here it states that:

> (a) prosecutor must act impartially and fairly according to law. This will involve the prosecutor informing the defence and the court of directions, warnings or authorities which may be appropriate in the circumstances of the case, even where unfavourable to the prosecution. It will also involve identifying portions of evidence which may be objectionable and declining to open on such evidence.
>
> …
>
> As a general rule the prosecution must offer all its proofs during the presentation of its case (NSWODPP Guidelines, p. 7).

Of relevance to the ICAC's decision to investigate and hold a public inquiry, the NSWODPP decision to prosecute must be guided by whether or not:

1. the admissible evidence available is capable of establishing each element of the offence;
2. it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and
3. discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

What then follows is a lengthy list of factors, a number of which could be relevant to the ICAC.[4]

In his Second Reading Speech to the 2016 Bill (Parliament of NSW, Legislative Assembly 2016), Premier Baird stated that the enactment of provisions requiring guidelines was 'intended to make existing procedural fairness obligations clearer and more accessible for ICAC staff and counsel assisting the ICAC'. It is a positive step, although we wonder why it has taken so long for this to be implemented. For too long, many proposed reforms have been dismissed by the ICAC and others as misconceptions as to what the ICAC is. What is evident from the events resulting from *Cunneen* is that the community's concerns over the powers of the ICAC and their potential misuse are far from being misconceived.

While the requirements for guidelines are likely to be uncontroversial, this is not the same for the introduction of the three commissioner structure. Again, referring to the Premier's Second Reading Speech, he noted that the panel of Commissioners will bring a more diverse set of skills and experiences to bear on the ICAC's deliberations and will strengthen its

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3 It is acknowledged that the extent to which there was a 'failure to do so' in *Cunneen* is disputed. From a general perspective, however, we argue that the recommendation is sound.

4 These include guidelines 3.1, 3.3, 3.5, 3.6, 3.8, 3.12 and 3.14.

decision-making. A panel of Commissioners may also assist in alleviating or avoiding tensions that can arise between a single Commissioner and the Inspector of the ICAC.

A completely contrary view, however, has been taken by two previous Commissioners, David Ipp and Anthony Whealy, who have described these amendments as 'scandalous', 'shameful' and a severely damaging blow to the fight against corruption. For them, this is a direct attack on the current Commissioner and the independence of the ICAC (Kennedy 2016). As stated by one commentator: 'In a year marked by some bad decisions by Baird, this was easily among the worst' (Nicholls 2016b).

If the restructuring of the ICAC was specifically designed to remove Megan Latham as Commissioner, as was claimed, then this was achieved when she announced her resignation on 23 November (Merritt 2016). For Fred Nile, however, Latham was a disaster. Nile said Latham's time as ICAC Commissioner — including her quashed pursuit of Crown Prosecutor Cunneen — had diminished public faith in the corruption watchdog, which he hoped the restructure would restore (Clennell 2016).

Whether or not the restructuring of the Commission will ultimately solve the perceived accountability problems will have to be considered in time. For McClintock, who has been appointed as the next ICAC Inspector:

> The recent reforms passed by the NSW Parliament, based on the recommendations of a parliamentary committee and which I supported in evidence before the committee, will improve the operation of the ICAC and deserve widespread support. They focus on structure and governance, decision-making and oversight, helping to bring the ICAC into line with other modern integrity bodies in NSW and around the country (McClintock 2016).

Potentially, however, future scrutiny of the ICAC may involve not so much a questioning of a decision to investigate and hold a public inquiry, but rather a decision *not to*.

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