



## 1.0 DEFINITION OF CORRUPT CONDUCT

### 1.1 Definition of corruption under the ICAC Act 1988

The definition of corrupt conduct in the *ICAC Act* identifies the investigative jurisdiction of the ICAC. Commissioner O'Keefe explained the importance of the inclusion of a definition of corrupt conduct in the Act:

*The ICAC is an anti-corruption body. Its functions relate to the investigation, exposure and prevention of corrupt conduct. It is specifically required to conduct its investigations with a view to determining whether any corrupt conduct has occurred, is occurring or is about to occur. It is therefore central to the jurisdiction and operations of the ICAC that the term "corrupt conduct" be defined (Submission 1: 48).*

For the purposes of the *ICAC Act*, corrupt conduct is any conduct that falls within s.8, and is not excluded by s.9.

8(1) *Corrupt conduct is:*

- (a) *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- (b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his benefit or for the benefit of any other person.*

8(2) *Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of*

*official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:*

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);*
- (b) bribery;*
- (c) blackmail;*
- (d) obtaining or offering secret commissions;*
- (e) fraud;*
- (f) theft;*
- (g) perverting the course of justice;*
- (h) embezzlement;*
- (i) election bribery;*
- (j) election funding offences;*
- (k) election fraud;*
- (l) treating;*
- (m) tax evasion;*
- (n) revenue evasion;*
- (o) currency violations;*
- (p) illegal drug dealings;*
- (q) illegal gambling;*
- (r) obtaining financial benefit by vice engaged in by others;*
- (s) bankruptcy and company violations;*
- (t) harbouring criminals;*
- (u) forgery;*
- (v) treason or other offences against the Sovereign;*
- (w) homicide or violence;*
- (x) matters of the same or similar nature to any listed above;*
- (y) any conspiracy or attempt in relation to any of the above.*

Section 9 provides for limitations on the nature of corrupt conduct. It states:

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:*
  - (a) a criminal offence, or*
  - (b) a disciplinary offence, or*
  - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*

- (d) *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.*

Under ss 9(4) and 9(5), conduct which meets the criteria of s.8 and “would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute”, and which breaches an identified law, can also be the subject of a finding of corrupt conduct.

### 1.1.1 Problems with the definition of corrupt conduct

The Committee’s 1992 Review of the ICAC surveyed opinions about the definition of corrupt conduct. Since then, amendments have been made to section 9 of the Act, adding the provisions relating to breaches of the Code of Conduct for Ministers and Members of Parliament. Some problems with the definition, however, remain.

- **Breadth of the definition**

The definition of corrupt conduct contained in sections 8 and 9 of the *ICAC Act* has been criticised as being broader than the commonly understood meaning of corruption. For example, section 8(2) includes such conduct as oppression, breach of trust, official misconduct, treason and homicide.

In the Court of Appeal’s *Greiner* decision, the definition of corrupt conduct under the Act was described as:

*... misleading and apt to cause injustice. ... The injustice arises because the Act applies ‘corrupt conduct’ to conduct which, in the ordinary meaning of the term, is not corrupt.*<sup>1</sup>

Priestly JA made a similar observation.

The Law Society of NSW submitted that:

*the definition of corruption under section 8 should be changed in such a way as to bring it closely into alignment with the Common Law definition of corruption and ordinary community interpretation of corruption. The existing artificial definition catches far too much conduct which right thinking members of the community do not regard as corrupt* (Submission 22: Attachment 1 page 2).

The Law Society went on to recommend that corrupt conduct should be defined in terms of its ordinary meaning, noting that “the criminal law sets out a

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<sup>1</sup> *Greiner vs ICAC* (1992) 28 NSWLR 125, Mahoney J, dissenting

comprehensive list of offences relating to corruption as commonly understood" (ibid). These are not detailed in the Society's submission, but presumably refer to Part 4A of the *Crimes Act 1900* and the common law offences of bribery, extortion and misconduct in office. The latter includes neglect of duty, oppression, fraud, breach of trust and refusal to serve in public office, but these are rarely resorted to. The Law Society suggested the following definition of corrupt conduct:

*Corrupt conduct is conduct by any person (whether or not a public official) that adversely affects the exercise of official functions by any public officer, any group or body of public officials or any public authority and involves a criminal offence (Submission 22: 2).*

The Law Society's proposed definition would result in the narrowing of the definition so that only criminal conduct would fall within the ambit of the Commission. Commissioner Temby's submission to the 1992 Review of the ICAC indicated his preference that non-criminal conduct remain within the Commission's investigative jurisdiction. He noted:

*The Commission ... believes that if it is to be effective in ensuring integrity of public administration and confidence in public institutions it must be able to examine conduct which may not be criminal. This objective was fundamental to the original legislation. The experience of the Commission reinforces this policy view. Many times the Commission has been called upon to examine conduct which although not criminal is of great concern (Committee on the ICAC: 1993: 20).*

Others have suggested that the label of "corrupt conduct" could be removed or altered to avoid the inappropriate classification of more minor forms of misconduct. One proposal is for an amendment to allow for several categories to be created for different degrees of misconduct. For example, the definition of corrupt conduct could incorporate more serious misconduct traditionally considered corruption, or be restricted to criminal conduct. Conduct of a less serious nature could be termed "misconduct", or "improper conduct". Alternatively, as the previous Committee noted, "the conduct ... could be called "relevant conduct" if it needs to be defined at all" (Committee on the ICAC: 1993: 25).

Commissioner Temby considered this issue in the Second Report on Investigation into the Metherell Resignation and Appointment, and suggested:

*Perhaps what should be done is to examine the conduct the definition does cover and to ask whether it should be labelled "corrupt"? If not, should there be some lesser appellation such as "improper" applied to it?*

*If a distinction were to be made in the Act between “corrupt” and “improper”, perhaps the element of benefit or advantage ought to be the determining factor.*

*... any such change merits serious philosophical attention. Does the community benefit more by retaining old notions of corruption, or does it benefit by the expansion of these notions to explicitly cover partiality and dishonesty that nonetheless involves no benefit to the public official? In other words, what is achieved by labelling such conduct “corrupt” rather than “improper”? One argument in favour of such labelling is that “corrupt” implies a perversion of the system, something more than a mere personal lapse. It must be remembered that the partial, dishonest or wrongful exercise of public office can be equally dangerous and harmful to the community, irrespective of whether the public official concerned gets a kickback. The argument against seems to be that it is an extreme thing to label “corrupt” someone who does something wrong with no intent to benefit personally thereby (ICAC: 1992: 14).*

On this subject, the Law Society of NSW submitted:

*As the definition of corrupt conduct stands it may apply to both relatively trivial and extremely serious matters. ... The wide range of conduct which is less than criminal conduct should not, in our view, be stigmatised by application of a single pejorative phrase (Submission 22: Attachment 1, p 5).*

To remedy this, the Law Society proposed that the Act be redrafted:

*to include a definition of “unsatisfactory official conduct” covering this broad range of behaviour (ibid).*

- **Conditional wording**

The ICAC has in the past indicated concerns with the conditional nature of the wording of the definition of corrupt conduct. In its *Second Report on Investigation into the Metherell Resignation and Appointment*, Commissioner Temby noted:

*The real difficulty arises under s9(1), in particular its conditional nature – ‘**could** constitute or involve’ dismissal and so on. The Commission has from time to time made clear its difficulties with the definition, which arose in stark form in the Metherell matter ... Gleeson CJ at 4 said ... that the conclusion a person has engaged in “corrupt conduct” is unconditional in form, but is based upon a conditional premise as it can suffice that s.8 conduct “could” constitute or involve a criminal or disciplinary offence or reasonable grounds for dismissal (p 12).*

The Commission's submission to the 1992 Review elaborated on the problems of s.9:

*The Commission is troubled by s.9. Apart from the difficulties adverted to in Greiner vs ICAC (which arise when conduct is being classified) it is inappropriate to define jurisdiction in a way which requires a judgement to be made of the quality of the conduct when seeking to assess whether to accept the allegation. After all the formation of this judgement is an essential part of the investigation. A sound judgement will often be possible only when the investigation is at least partially completed.*

The Hon Athol Moffitt QC raised similar concerns in his submission to the 1992 Review, noting that the definition applied subjective and conditional criteria:

*S.7 accepts that conduct to be corrupt must fall within both s.8 and s.9. It accepts, as must be so, that merely to fall within s.8 does not make conduct corrupt. S.8 objectively refers to conduct. This is not so with s.9(1)(a),(b) or (c). It depends on what others external to ICAC 'could' do, but may not do. Thus, whether conduct is corrupt depends on s.9(1), which does not itself objectively describe the nature of the conduct or quantify its seriousness. As Gleeson CJ pointed out, it introduces a conditional element into the definition (Committee on the ICAC, 1993: 17).*

Criticisms of this nature have also been raised by the Law Society of NSW, which argued that section 9 is "drafted in terms of possibilities":

*The repeated use of the word "could" and the word "may" within sections 8 and 9 renders the definition unreasonably wide and uncertain. This is a serious matter when it is considered that the Act empowers the ICAC to make findings against individuals that their conduct has been corrupt when it merely "could" have adversely affected the impartial exercise of functions by a public office and "could" involve any irregularity that "may" constitute grounds for disciplinary action under law (Submission 22: Attachment 1 page 2).*

In relation to the current Review, the Commission submitted that the provisions of s.9 were applied in accordance with the approach of Priestly JA outlined in *Greiner* whereby the word "could" was construed as meaning "would, if proved". The Commission further noted that:

*in relation to 9(1) the approach would be to consider whether, in the case of a criminal charge which would be tried before a jury, the facts found by the ICAC as constituting corrupt conduct would, if the jury were to accept them as proved beyond reasonable doubt, constitute the offence charged. The approaches required in relation to s.9(1)(b) and s.9(1)(c) are similar (Submission 1: 5).*

- **Other identified problems**

The Commission has identified a further potential problem with the current definition of corrupt conduct. In relation to conduct of a Minister or Member of Parliament (ss.9(3) and (4)), there is some uncertainty as to whether the common law is applicable for the purposes of a finding of corrupt conduct. The problem stems from s.9(5) of the *ICAC Act*. It was first raised in the Commission's report on *Investigation into Circumstances surrounding the Payment of a Parliamentary Pension to Mr P M Smiles* (February 1995) and repeated in the Commission's submission to the Review. Section 9(5) states:

*Without otherwise limiting the matters that it can under s74A(1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct could also constitute a breach of a law (apart from this Act) and the Commission identifies that law in the report.*

In relation to this subsection, the Commission's submission notes:

*the reference to "a law", its explication by the Parenthetical Clause "(apart from this Act)" and the requirement for the ICAC to identify "that law" are strong indicators that the law referred to is either a statute law, or a law made pursuant to the provisions of a statute. It does not appear to include the unwritten law, whether it be the common law or the law of equity as developed by the courts (Submission 1: 48)*

The Commission has requested that the Committee:

*... recommend to Parliament that [the provision] be broadened to include non-statutory and regulatory law, be it the common law or the law of equity (O'Keefe, Evidence, 31 October 1997).*

## **1.2 Definitions in other jurisdictions**

Several jurisdictions avoid attempting to define corruption, and instead use a term such as misconduct to establish the investigative agencies' jurisdiction. Criticisms that the stigma of corruption are being attached to individuals whose actions are relatively minor therefore do not arise.

### **1.2.1 Police Integrity Commission (PIC), New South Wales**

The *Police Integrity Commission Act 1996* identifies the PIC's principal functions as including preventing, detecting and investigating **serious police misconduct**



and **other police misconduct**. The following definition of police misconduct is provided:

*5 Police misconduct*

(2) *Examples*

*Police misconduct can involve (but is not limited to) any of the following:*

- (a) *police corruption,*
- (b) *the commission of a criminal offence by a police officer,*
- (b1) *misconduct in respect of which the Commissioner of police may take action under Part 9 of the Police Service Act 1990,*
- (c) *corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a police officer,*
- (d) *any other matters about which a complaint can be made under the Police Service Act 1990.*

....

(4) *Serious and other misconduct*

*References in provisions of this Act to ``serious'' police misconduct and ``other'' police misconduct are intended for general guidance and are not intended to indicate a precise distinction between the two concepts.*

- Comment on definition of serious misconduct

The definition of misconduct under the *Police Integrity Commission Act 1996* is somewhat broader than the definition of corrupt conduct in the ICAC Act. In fact, the police misconduct definition incorporates the ICAC Act's corruption definition, and adds further provisions. The Committee may wish to obtain evidence as to any problems that may have been identified relating to this definition.

### **1.2.2 Criminal Justice Commission, Queensland**

The CJC's investigative role involves identifying and reporting on "official misconduct" in the public service, and investigating allegations of "misconduct" by members of the Queensland Police Service.

The definition of “official misconduct” is defined under the Act as:

32. (1) *Official misconduct is –*
- (a) *conduct of a person, whether or not the person holds an appointment in a unit of public administration, that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of powers or authority of a unit of public administration or of any person holding an appointment in a unit of public administration; or*
  - (b) *conduct of a person while the person holds or held an appointment in a unit of public administration –*
    - (i) *that constitutes or involves the discharge of the person’s functions or exercise of his or her powers or authority, as the holder of the appointment, in a manner that is not honest or is not impartial; or*
    - (ii) *that constitutes or involves a breach of the trust placed in the person by reason of his or her holding the appointment in a unit of public administration; or*
  - (c) *conduct that involves the misuse by any person of information or material that the person has acquired in or in connection with the discharge of his or her functions or exercise of his or her powers or authority as the holder of an appointment in a unit of public administration, whether the misuse is for the benefit of the person or another person;*

*and in any such case, constitutes or could constitute –*

- (d) *in the case of conduct of a person who is the holder of an appointment in the unit of public administration – a criminal offence, or a disciplinary breach that provides reasonable grounds for termination of the person’s services in the unit of public administration; or*
  - (e) *in the case of any other person – a criminal offence.*
- (2) *It is irrelevant that proceedings or action in respect of an offence to which the conduct is relevant can no longer be brought or continued or that action for termination of services on account of the conduct can no longer be taken.*
- (3) *A conspiracy or an attempt to engage in conduct, such as is referred to in subsection (1) is not excluded by that subsection from being official misconduct if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in subsection (1).*

- **Comment on Criminal Justice Act definition**

The definition of official misconduct applying to the CJC is very similar in content to the definition of corruption in sections 8 and 9 of the *ICAC Act*. Sections 31(1)(a) – (c) of the *CJ Act* mirror s.8 of the *ICAC Act*, while ss 32(1)(d) and (e) reflect s.9 of the *ICAC Act*.

In using the term “official misconduct”, the concerns that arise over the breadth of the definition of “corrupt conduct” do not arise. However, the Queensland definition does share the difficulties connected with the use of conditional criteria such as “could adversely affect ... ” that were identified in with New South Wales.

The *Criminal Justice Act* definition could be seen to be inequitable in its application to various categories of public officials. This stems from the requirement that official misconduct be either a criminal offence, or a disciplinary offence providing reasonable grounds for termination of services. As a result, public officials with harsher disciplinary instruments have higher standards applied to them than those who would only be dismissed in exceptional circumstances. Section 9 of the *ICAC Act* previously contained similar provisions, but it was amended to add the provisions relating to breaches of codes of conduct for Members of Parliament.

### 1.2.3 Anti-Corruption Commission, Western Australia

The Anti-Corruption Commission is required to undertake investigative or other action in relation to allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers (s.12(1) of the *Anti-Corruption Commission Act 1988*). These terms are to a large extent linked back to the West Australian Criminal Code.

The Act provides the following definitions:

*“corrupt conduct” means conduct referred to in section 13 (1) (a) (i) or (ii);*

*“criminal conduct” means conduct referred to in section 13 (1) (a) (iii), (iv), (v) or (vi);*

*“criminal involvement” means involvement referred to in section 13 (1) (b);*

*“serious improper conduct” means conduct referred to in section 13 (1) (c);*

13. (1) Subject to subsection (3), the Commission shall --

(a) receive information furnished to it by any person who alleges that a public officer has --

- (i) corruptly acted or corruptly failed to act in the performance of the functions of his or her office or employment; or*
- (ii) corruptly taken advantage of his or her office or employment as a public officer to obtain any benefit for himself or herself or for another person; or*
- (iii) committed a scheduled offence whilst acting or purporting to act in his or her official capacity; or*
- (iv) committed an offence under section 552 of The Criminal Code by attempting, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence; or*
- (v) committed an offence under section 553 of The Criminal Code by inciting, whilst acting or purporting to act in his or her official capacity, the commission of a scheduled offence; or*
- (vi) committed an offence under section 558 of The Criminal Code by conspiring, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence;*

*(b) receive information furnished to it by any person who alleges that another person has been involved in criminal conduct engaged in by a public officer in such a manner that the other person could be regarded, under Chapter II of The Criminal Code, as having taken part in committing an offence, or as having committed an offence or as being an accessory after the fact to an offence;*

*(c) receive information furnished to it by any person who alleges that a public officer has engaged in conduct (other than corrupt conduct or criminal conduct) that --*

- (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public body or public officer; or*
- (ii) constitutes or involves the performance of the public officer's functions in a manner that is not honest or is not impartial; or*
- (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
- (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or another person, and constitutes or could constitute --*
- (v) an offence against the Statutory Corporations (Liability of Directors) Act 1996 \_4 or any other written law; or*
- (vi) a disciplinary breach providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct);*

- Comment on the West Australian definition

The Western Australian definition seeks to categorise conduct according to the nature of the misconduct involved. Four categories are created: “corrupt conduct”, “criminal conduct”, “criminal involvement” and “serious improper conduct”. The “serious improper conduct” category incorporates conduct which is not criminal or corrupt, but which would usually lead to dismissal.

#### 1.2.4 Independent Commission Against Corruption, Hong Kong

Under the Independent Commission Against Corruption Ordinance (Hong Kong: Cap. 204), the Hong Kong ICAC’s investigations are focused on breaches of the *Prevention of Bribery Ordinance* (Hong Kong: Cap. 201) and the *Corrupt and Illegal Practices Ordinance* (Hong Kong: Cap. 288). Crown employees suspected of blackmail may also be investigated.

The *Prevention of Bribery Ordinance*, as its title suggests, targets bribery and attempted bribery of public officials. The *Corrupt and Illegal Practices Ordinance* details offences relating to election fraud, and includes practices such as personation, treating, bribery and intimidation in respect of elections. The jurisdiction of the Hong Kong ICAC is clearly more specific and restricted than agencies in Australia.

### 1.3 Issues for consideration

- Is the definition of corrupt conduct in the *ICAC Act* too broad?
- Should corrupt conduct be restricted to conduct that is criminal?
- Would it be more appropriate for the Act to refer to “official misconduct”, “relevant conduct” or some other term?
- Should more than one category be created to acknowledge the different degrees of misconduct? What should those categories be and how should they be determined?
- Is the conditional wording a problem, and if so, can it be clarified?
- Should non-statutory and regulatory law be included under s.9(5)?

## 2.0 FINDINGS AND RECOMMENDATIONS

### 2.1 The current scope of findings and recommendations

The Commission's powers relating to findings and recommendations are founded on its principal functions. Section 13(3) stipulates that:

*The principal functions of the Commission also include:*

- (a) *the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and*
- (b) *the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.*

Further details are provided in ss 13(4) and (5):

*13(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).*

*13(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:*

- (a) *findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,*
- (b) *opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons,*
- (c) *findings of fact.*

Sections 74A and 74B of the *ICAC Act* relate to the content of the Commission's reports to Parliament, including the reporting of Commission findings.

**74A Content of reports to Parliament**

- (1) *The Commission is authorised to include in a report under section 74:*
  - (a) *statements as to any of its findings, opinions and recommendations, and*
  - (b) *statements as to the Commission's reasons for any of its findings, opinions and recommendations*
  
- (2) *The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*
  - (a) *the prosecution of the person for a specified criminal offence,*
  - (b) *the taking of action against the person for a specified disciplinary offence,*
  - (c) *the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.*

**74B Report not to include findings etc of guilt or recommending prosecution**

- (1) *The Commission is not authorised to include in a report under section 74 a statement as to:*
  - (a) *a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*
  - (b) *a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*
  
- (2) *A finding or opinion that a person has engaged, is engaging or is about to engage:*
  - (a) *in corrupt conduct (whether or not specified corrupt conduct)*
  - (b) *in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),*

*is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.*

Sections 74A and 74B were incorporated in the *ICAC Act* in response to the High Court's *Balog*<sup>2</sup> decision, which found that the ICAC's reporting powers did not include the power to make findings of guilt or of corrupt conduct. Rather, the Court found that the only finding the Commission could make under s.74 (in addition to reporting the results of its investigation) was a finding whether there is any evidence warranting consideration of prosecution of a person for a specified offence. The amendments altered the situation to ensure that such findings could be made.

The High Court's decision canvassed a number of dangers associated with a power to make findings of corrupt conduct. In particular, the Court noted the potential damage to reputations and possible prejudice to any subsequent trial.

The value of a finding of corrupt conduct has been questioned in the past. The doubts arise because a label of corrupt conduct has no legal effect on an individual. The practical effects may be seen to vary according to the public prominence of the person so labelled. That is, a finding against an individual in a public position will obtain more publicity, and thus have a greater impact, than a finding against a relatively anonymous public official.

However, Commissioner O'Keefe submitted that "it is necessary both to define and use the term corrupt conduct" (Submission 1: 48). He noted:

*... If the ICAC is to conduct its investigations with a view to determining whether any corrupt conduct has occurred, is occurring or is about to occur, it would indeed be strange if the ICAC could not, at the end of its investigation, state whether or not corrupt conduct had actually occurred.*

*The ability to make findings of corrupt conduct also have a useful deterrent and educative role in the work undertaken by the ICAC (Submission 1: 48).*

In a hearing with the previous Committee, Mr O'Keefe gave evidence that he considered a label of corrupt conduct to be a useful tool:

*The shock of the finding and its characterisation as corrupt conduct are often the necessary things to cause the relevant agency to want to change ... Without you being able to point to specific things, there are many agencies that say, "We don't have a problem and if we don't have a problem we don't need to change anything." The ability to find and*

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<sup>2</sup> *Balog vs ICAC* (1990) 169 CLR 625.



*characterise facts as involving corrupt conduct concentrates the attention of agencies on that (Evidence: 31 October 1997)*

The Law Society of NSW has philosophical concerns with the ICAC's power to make findings of corrupt conduct against individuals. It argued:

*... the role of investigator should not be confused with the role of judge. The separation of the function of investigation and prosecution from the role of decision making ensures that the zeal of the investigating body is checked by an independent mind. The process of a court hearing ensures that misleading and unreliable evidence is placed under appropriate scrutiny and the civil rights of the persons potentially affected by an adverse finding to know what is alleged against them and to answer those allegations before an independent party are observed. Section 74A and 74B constitute ICAC as a quasi judicial body exercising some of the functions of a court with no appropriate safeguards (Submission 22: Attachment 1: 6).*

The Law Society also notes unfairness could arise because "adverse findings about identifiable persons are too easily confused with criminal convictions" (Submission 22: Attachment 2 page 4). Damage to reputations could ensue.

The Law Society favours the removal of the ICAC's power to draw conclusions, express opinions and make findings about individuals. It submitted:

*Section 74B should be retained in its current form. Section 74A should be amended to provide that the Commission is authorised to include in its report under section 74:*

- (a) a description of the matters which it has investigated in the preceding year; and*
- (b) an outline of the events which the investigation revealed as having occurred; and*
- (c) whether or not evidence obtained as a result of any inquiry has been referred to the Director of Public Prosecutions for consideration (Submission 22: Attachment 1: 6).*

If such amendments are not made to the *ICAC Act*, the Law Society favours the introduction of a formal process of review.

Others have commented on the power to make findings of corrupt conduct. The Hon Adrian Roden QC, previously an Assistant Commissioner at the ICAC, made the following comments in the *ICAC's Report on Investigation into North Coast Land Development*, July 1990 (p xiv – xviii):

*'Corrupt conduct' is a term used and defined in the ICAC Act. It has a technical meaning given to it by the Act. From the outset, I was of the*

*opinion that no useful purpose would be served by determining whether any conduct of any person, disclosed in the course of the investigation, amounted to corrupt conduct as defined in the Act. ... Whether alleged conduct does or does not amount technically to corrupt conduct, is relevant for purposes of jurisdiction only. It determines whether the Commission can properly embark upon an investigation (cited in Committee on the ICAC: 1993: 30).*

Commissioner Temby addressed the issue of findings of corrupt conduct in the Commission's submission to the 1992 Review of the ICAC, and identified some of the benefits and disadvantages of the 'labelling' power:

*As to a power to make findings as to corrupt conduct, it is obvious that there is significant justification for it. It is strongest in the case of a person who has been wrongly accused of corruption. A power in the Commission to dispel the allegation in terms may be important.*

*But there are significant factors weighing against such a power. For many, a finding of corrupt conduct is akin to a finding that a criminal offence has been committed. Its consequences may be for many just as devastating: loss of reputation and loss of employment. It also forces the Commission in any report to seek to classify conduct by reference to complicated and difficult legal concepts (cited in Committee on the ICAC: 1993: 41).*

Mr Temby commented in a similar vein in the *Second Report on Investigation into the Metherell Resignation and Appointment*:

*The witnesses who are "affected" persons ... should expect that clear statements will be made about them. As such people typically see it, the finger has been pointed at them in evidence, and they are entitled to a statement as to the Commission's concluded views one way or the other.*

*The best option may be to enable the Commission to make such findings and recommendations, but not require it to do so. There would then be a clear discretion in marginal cases (ICAC: 1992:16).*

Mr Roden proposed that the ICAC be limited in its findings to making findings of fact, without including labels of corrupt conduct. The example of a finding of fact he provided was:

*Y released the Prospect County Council information which he corruptly sold to X without authority and in breach of his duty as a public official (Committee on the ICAC: 1993: 43).*

Also on this issue, the Hon Athol Moffitt QC, CMG, submitted to the previous Review that the Commission's power to make findings and label individuals had the potential to cause serious injustice. He argued that the Commission:

*... should not have a power to report any opinions or findings of corrupt conduct (however defined) or any judgemental opinion concerning a named or identifiable person (ibid: 43).*

Mr Moffitt considered that only findings of primary facts should be made by the Commission "where findings or opinions would be adverse to a named or identifiable person" (ibid: 43, 49). The term primary facts was defined by Mr Moffitt in the following way:

*Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person (ibid: 51).*

The ICAC's response to Mr Moffitt's proposal was that:

*... many matters could not be brought to finality if ICAC findings were limited to primary facts. The ICAC drew on a number of its investigations and suggested that in these cases a limitation of ICAC findings to primary facts would have meant that the Commission could add little value to the raw transcript of evidence (Committee on the ICAC: 1993: 50).*

Others have raised concerns that the label of corrupt conduct could be unjust in some cases because, as previously discussed, the definition of corrupt conduct under the Act is much broader than most people's understanding of the term.

The Committee's 1993 Review Report made a number of findings and conclusions in relation to findings of corrupt conduct. The Committee recommended that the requirement for the Commission to label individuals should be removed. The Committee recommended the referral to the Law Reform Commission the question as to whether findings should be limited to primary facts, and what effect this would have. According to the Committee's records, the Committee requested the Government to forward the reference to the Law Reform Commission, but the Law Reform Commission did not receive such a reference.

## 2.1 Other jurisdictions

### 2.2.1 Police Integrity Commission, New South Wales

Unlike the ICAC, the principal functions of the Police Integrity Commission do not include making findings and recommendations. There are provisions for the Commission to make assessments and recommendations, and to form opinions. These provisions are found in s.16 of the Police Integrity Commission Act:

- (1) *The Commission may:*
- (a) *make assessments and form opinions on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct:*
    - *has or may have occurred, or*
    - *is or may be occurring, or*
    - *is or may be about to occur, or*
    - *is likely to occur, and*
  - (b) *make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of other disciplinary action against particular persons, and*
  - (c) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.*

Like the ICAC, the PIC is prohibited from making findings or forming opinions of guilt of a criminal or disciplinary offence, and may not recommend that a person be prosecuted for a criminal or disciplinary offence. However, the PIC must include in its reports a statement as to whether **consideration** should be given to the prosecution or taking of disciplinary action against each “affected” person. This also reflects the provisions of the ICAC Act.

Pursuant to s.97, the PIC may include any of its assessments, opinions and recommendations in its reports to Parliament. The PIC’s assessments and opinions are not reported in terms of “findings”. Instead, the PIC usually expresses its assessments and opinions in the following terms:

*The Commission heard evidence that:*

- *[listing of details of facts and assessment of information]*

*The Commission considers that:*

- *[listing of opinions as to the facts and information]*
- *An example from page 62 of the PIC Report on Operation Warsaw is “Despite the concerns raised by persons involved with this matter, there is no evidence that [X] or any other*

*person engaged in the subornment of witnesses, improper approaches, or the victimisation or harassment of witnesses in that investigation”.*

*On the basis of the information presented in this Report, the Commission recommends that:*

- *[Recommendations listed]*

### **2.2.2 Criminal Justice Commission, Queensland**

Section 93 of the *Criminal Justice Act* relates to the reporting powers of the Criminal Justice Commission. It states:

- (1) *The Commission must include in each of its reports –*
  - (a) *its recommendations; and*
  - (b) *an objective summary of all matters of which it is aware that support, oppose or are otherwise relevant to its recommendations.*
- (2) *The commission may also include in a report any comments it may have on the matters mentioned in subsection 1(b).*

The Criminal Justice Commission is not required to make findings about an individual's conduct. At the conclusion of an investigation, the relevant information is forwarded to the appropriate prosecuting or disciplinary authority.

At the time of the previous Review of the ICAC, the Committee heard evidence from Mr Mark Le Grand, who was then Director of the CJC's Official Misconduct Division. Mr Le Grand informed the Committee that the CJC largely did not seek to label individuals:

*The CJC, as least as far as the Official Misconduct Division is concerned, has largely been able to avoid the debate about labelling which has bedevilled the ICAC in recent times. The end product of its consideration of matters has been whether there is sufficient evidence to enliven the jurisdiction of the courts, the misconduct tribunals or the disciplinary processes of the public sector. ... Thus it can be seen that the CJC, in other than its research capacity, has not made ultimate findings adverse to the interests of concerned persons. Its ultimate findings, where they have been made, have been findings that a complaint has not been substantiated, or occasionally positive findings that alleged misconduct did not occur where this is available on the state of the evidence... (Committee on the ICAC: 1993: 48).*

### 2.2.3 Anti-Corruption Commission, Western Australia

Like the Criminal Justice Commission, the Anti-Corruption Commission is not required to make findings about individuals. The ACC's powers in relation to findings were clarified in 1999, when the Supreme Court of Western Australia upheld the ACC's power to express opinions, make findings or draw conclusions. The applicants had sought to quash the ACC's report on the grounds that the Commission had exceeded its powers when it went beyond a purely investigative function. A previous case (*Parker vs Miller*)<sup>3</sup> had established that the ACC is not authorised to make findings of guilt.

### 2.2.4 Independent Commission Against Corruption, Hong Kong

The Hong Kong ICAC does not make findings. Its recommendations are restricted to recommendations for prosecution for particular offences. In this respect, the ICAC in Hong Kong is more like a police force than an investigatory agency familiar in Australia.

## 2.3 Issues for consideration

- What is the effect of a finding of corrupt conduct?
- What are the advantages and disadvantages of the ICAC having the power to make findings of corrupt conduct?
- Would it be preferable for the Commission to form opinions rather than making findings?
- Should the **requirement** for the Commission to make statements about affected persons be removed, and replaced with a discretion?
- Have other investigative agencies found difficulties arising from not making such findings about individuals?

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<sup>3</sup> *Parker and Others vs Miller and Others* (unreported decision of the Full Court, Supreme Court of Western Australia, 8 May 1998).

### 3.0 THE EXTENT OF THE ICAC'S JURISDICTION

The ICAC's jurisdiction is focused on public officials and public authorities. These are defined in the following terms in s.3 of the Act:

**public authority** includes the following:

- (a) a Government Department, Administrative Office or Teaching Service,
- (b) a statutory body representing the Crown,
- (c) a declared authority under the Public Service Act 1979,
- (d) a person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:
  - (i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or
  - (ii) is required by or under any Act to be audited by the Auditor-General, or
  - (iii) is an account with respect to which the Auditor-General has powers under any law, or
  - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) a local government authority,
- (f) the Police Force,
- (g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.

**Public official** means an individual having public official functions or acting in a public official capacity, and includes any of the following:

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,
- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly,
- (f) a judge, a magistrate, or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
- (g) an officer or temporary employee of the Public Service or a Teaching Service,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,

- (j) *an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of public authority is kept, of attending meetings or carrying out the business of any body constituted by an Act*
- (k) *a member of the Police Force*
- (k1) *an accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,*
- (l) *the holder of an office declared by the regulations to be an officer within this definition,*
- (m) *an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.*

Mr Greiner's Second Reading speech on the *ICAC Bill* noted that the Government aimed to have as broad a jurisdiction for the Commission as possible:

*The Commission's jurisdiction will cover all public officials. The term public official has been very widely defined to include members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of departments and authorities. Local government members and employees are also included. In short, the definition in the legislation has been framed to include everyone who is conceivable in a position of public trust. There are no exceptions and there are no exemptions (Legislative Assembly Hansard: 26 May 1988: 676)*

### 3.1 Matters arising from the ICAC's jurisdiction

#### 3.1.1 Exclusions from the Commission's jurisdiction

- **Officials not subject to a disciplinary instrument**

In its submission to the current Review, the Commission raised a concern relating to officials and authorities who fall outside the ICAC's jurisdiction because they are not subject to a disciplinary instrument. For example, boards appointed by the Governor are not subject to a disciplinary instrument, and are therefore excluded from the Commission's jurisdiction under s.9(b) (Submission 1: 47). Commissioner O'Keefe elaborated in evidence to the Committee:

*... at this time persons who are appointed by His Excellency the Governor to various boards do not fall within the ambit of our jurisdiction because they fall outside the ambit of the definition of "public official". There are a number of such boards, some of which deal with nature reserves, forest areas and the like. Substantial budgetary provisions are made in respect of those agencies (Evidence – 31 October 1997).*



Similarly, local government councillors no longer operate under a disciplinary instrument since the passage of the *Local Government Act 1993*. Councillors of local councils that have not adopted a code of conduct as their disciplinary instrument therefore are only within the ICAC's jurisdiction if their conduct involves a criminal offence. Mr O'Keefe told the Committee:

*In cases where no disciplinary instrument has been adopted, it is necessary for the ICAC when examining conduct to bring it within section 9(1) – that is, criminal conduct – there being no disciplinary matter that can be conjured up. That is something we would invite the Committee's attention to. This is something that should be mandatory for councils and perhaps there should be a time limit within which they should be required to adopt such an instrument. Many councils have done so, but a number have not (Evidence – 31 October 1997).*

- **Outsourced Government Services**

The current trend for contracting and tendering out government services, and for privatising or corporatising government enterprises raises general questions about the continuing accountability for those services. In respect of the ICAC, the issue that arises is: do privatised or contracted out services remain within the Commission's jurisdiction, and should they be?

The ICAC's jurisdiction (in terms of investigations and findings) in relation to contracted and privatised services is unclear. It is possible to argue that an individual performing those services would be captured in the definition of "public official" in s.3 of the *ICAC Act*. Subsection (m) identifies as a public official:

*an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.*

The ICAC Report on *Private contractors' perceptions of working for the NSW Public Sector* (January 1999) made the following observation about the Commission's jurisdiction:

*Section 3 of the [ICAC Act] ... defines a public official as an individual having public official functions or acting in an official capacity. This includes a person engaged by a public authority. In other words, private contractors and consultants can be defined as public officials when they contract for public money and hence may come under the jurisdiction of the ICAC" (ICAC: January 99: 43).*

A broad range of service providers may conceivably be included in this definition as a person 'acting on behalf of, or in place of' a public authority, including 'pink

slip' inspectors, community or disabled service providers, private auditors, security officers and waste collectors.

Consideration should also be given to whether it would be appropriate to include in the Commission's purview privatised or corporatised enterprises, such as the TAB, the State Bank, Sydney Water and the Electricity Commission.

The contrary view is that aspects of the definition of 'public official' in the Act suggest that there is no automatic inclusion in the ICAC's jurisdiction of contracted-out services. In particular, (k1) includes within the definition "an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*". This amendment was made to the *ICAC Act* as a consequence of the *Environmental Planning and Assessment Amendment Act 1997*, which allowed for accredited certifiers to undertake building inspections. It might be argued that the amendment to the definition to **specifically include one** out-sourced service implies that out-sourced services **generally** are not included in the definition. That is, other contracted out or privatised services must also be specifically included if they are to fall within the ICAC's jurisdiction. In further support of this argument is the provision at (l) for regulations to declare an office holder to be an public official.

In the case of Junee Correctional Centre, which is privately managed pursuant to Part 6A of the *Correctional Centres Act 1952*, the prison and its officers remain within the ICAC's jurisdiction as a result of section 31G. Section 31G has provided that the *ICAC Act* continues to apply to correctional centres privately managed under contract, and its officers and employees are considered 'public officials' within the meaning of the *ICAC Act*. This provides a precedent for the continued oversight of Government services that are being performed under contract by the private sector, and is a further example of the Parliament explicitly providing for the continued authority of the ICAC over an outsourced service.

It is important to note that in many instances, any person (whether a public official or not) can be investigated by the Commission if their conduct adversely affects the exercise of official functions of a public official or public authority, providing that conduct falls within the definition of corrupt conduct in ss 8 and 9. The ICAC recently reported that 56% of its public investigation reports from 1988 – 1998 "dealt with non-officials in conjunction with public and elected officials" (ICAC: January 1999: 1).

The appropriateness of continued oversight of, and accountability for, contracted out and privatised or corporatised services also requires consideration. Should the ICAC retain jurisdiction over services that have been out-sourced to the private or non-government sector?

A number of sources have discussed accountability-related issues in recent times. The fact that public funds are being used for the services is a key consideration in determining the appropriate level of oversight of a service.

In 1996 the Industry Commission completed an inquiry into *Competitive Tendering and Contracting by Public Sector Agencies*. A key finding of the inquiry was that agencies cannot transfer their responsibility for accountability in the provision of services:

*... irrespective of whether an agency delivers the service itself or contracts out all or parts of the service, it remains accountable for ensuring that the required service is actually delivered. Public money is being spent for the provision of the service and the contracting agency is responsible for ensuring that this money is spent effectively and with propriety (Industry Commission: 1996: 86).*

In a similar vein, the former NSW Ombudsman quoted Freiberg:

*The fact that expenditure is directed towards the **private** sector does not alter the **public** nature of the source of the funds. It is the source of the funds, not their destination, which is of paramount concern in the question of accountability (Freiberg: 1997: 141).*

## 3.2 Issues for consideration

- Should the ICAC Act be amended so that section 9 does not exclude the conduct of a Councillor if that conduct is in breach of the Code of Conduct of his/her Council?
- Should persons appointed to a Board by the Governor be included within the definition of 'public official' and thus be included in the ICAC's jurisdiction?
- Are contracted-out government services still within the ICAC's jurisdiction? Should they be?
- Are corporatised government enterprises still within the ICAC's jurisdiction? Should they be?

## References:

Committee on the ICAC, *Review of the ICAC*, May 1993.

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Independent Commission Against Corruption, *Investigation into Circumstances surrounding the Payment of a Parliamentary Pension to Mr P M Smiles*, February 1995.

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NSW Ombudsman, *Does contracting out and privatisation reduce the scope for scrutiny of the public service?* Paper given to IRR Conference 16/17 February 1998.

Wanna, J et al. (eds), *Entrepreneurial Management in the Public Sector*, Centre for Australian Public Sector Management, Brisbane, 1996.

## 3.2 Jurisdictions of other agencies

### 3.2.1 Police Integrity Commission, New South Wales

### 3.2.4 Independent Commission Against Corruption, Hong Kong

In Hong Kong, the ICAC's jurisdiction covers all crown servants, public servants and public bodies.

The Prevention of Bribery Ordinance sets out the definition of "public body" in the following terms:

- (a) *the Government;*
- (b) *the Executive Council*
- (c) *the Legislative Council*
- (d) *the Urban Council*
- (da) *any District Board*
- (db) *the Regional Board*
- (e) *any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Governor or the Governor in Council; and*
- (f) *any board, commission, committee or other body specified in the Schedule.*

"Crown Servant" is defined as "a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government".

"Public Servant" is defined to include Crown Servants, employees of public bodies, office holders of public bodies which are clubs or associations, and members of councils, boards or committees of educational institutions.