

**EMPOWERING ANTI-CORRUPTION AGENCIES:  
DEFYING INSTITUTIONAL FAILURE AND STRENGTHENING PREVENTIVE  
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**A Comparison between the Law Enforcement and  
Commission approach to corruption investigation**

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“Corruption is an insidious plague with wide-ranging and corrosive effects on societies. It undermines democracy and the rule of law and leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”

Former United Nations Secretary-General KOFI ANNAN, 31 October 2003 when announcing the United Nations Convention against Corruption

Corruption is worse than prostitution. The latter might endanger the morals of an individual; the former invariably endangers the morals of the entire country.

Karl Kraus Austrian satirist 1874-1936

## **Abstract**

*Public sector corruption is an insidious disease that undermines community and business confidence in a State or Country. It has been recognised as such by the United Nations, the World Bank, the European Union and numerous other States and countries.*

*However, corruption by its very nature is difficult to investigate because in some ways it is a victimless crime (the only “victims” being the community) and no one complains. Generally parties to the corrupt act are satisfied with the outcome – the money or benefit flows and life moves on until the next transaction.*

*This paper examines two methods of investigating corruption within a public sector environment. The first is the law enforcement method where the investigation complies with accepted practices such as the right of silence and the prevention of self incrimination. The second is the use of coercive powers – where privilege, the right of self incrimination and the right of silence are removed. This removal is generally accompanied by some protection against using the material in criminal matters.*

*The paper explores the single agency model of corruption investigation where investigation, prevention, research and education are within the agency. It compares this model to a multiple agency model where an investigation or prevention/education functions link with other investigative agencies such as an Ombudsman, External Review Panel, an Auditor General or law enforcement agencies.*

## **Author**

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Mr. Symons has a Master of Business Administration, a Graduate Diploma in Legal Practice, a Graduate Diploma in Public Administration (Policing), a Graduate Diploma in Fraud Investigation, a Graduate Certificate in Management, a Law Degree (with Hons) and a B. Bus (Marketing) Degree. He is admitted to the South Australian Bar to practice in that State. He is an adjunct lecturer on criminal investigation with Charles Sturt University and is currently studying for a Master of International Law and International Relations with Flinders University (South Australia).

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#### **Introduction**

Corruption is an insidious disease crippling all levels of society. It eats away at the social and economic fabric of governments, organizations and countries.

Corruption impacts on financial investment, the community and governments. If a country has a reputation for corruption then there is reluctance to invest in that country. The World Bank and other agencies require strict compliance agreements. Corruption handicaps development at all levels of society.

Corruption is not new – there is an argument it is either the oldest crime or the second oldest “crime” in competition with prostitution. What came first? Was it the act of prostitution or payment to an official to allow the act to occur?

Corruption is a private crime – generally there are two parties or entities involved. One is corrupted – the other corrupts. Both parties seek a favourable outcome whether it is not proceeding with criminal charges, the allocation of a contract or allowing some illegal (or legal) act to occur. If the outcome is achieved – both parties are happy. Even if the outcome is not achieved it is highly unlikely the “losing” party will complain to the authorities.

The private nature of corruption makes it difficult to detect, to investigate and to prosecute. This means investigative agencies have to step outside the normal regime of policing methods. The use of coercive powers in both questioning and the production of documents and other evidence is essential in the investigating of corruption because it tears apart the veil of secrecy that is crucial for corruption to succeed.

There is an increasing trend in Australia to legislate for the use of coercive powers to assist police in the investigation of serious and organised crime. However, the access to these powers is still through independent agencies such as the Australian Crime Commission, New South Wales Crime Commission, the Corruption and Crime Commission (CCC) (Western Australia) and the Crime and Misconduct Commission (CMC) (Queensland). The CCC and CMC have a joint function – part of their role is to investigate corruption in the public sector including police.

It would appear there is still a requirement for agencies with access to coercive powers to be independent of the police.

It is also of interest to note, which I will explore further, the issues surrounding the use of coercive powers and the presentation of evidence for a criminal conviction in Australian courts. The general approach is evidence obtained through coercive means cannot be used against the person who is subject to those powers. This does present some difficulties to law enforcement.

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This paper will explore corruption investigation within Australia as well as touching on various investigative methods used in other jurisdictions. Australia has a mix of independent agencies each with unique powers – the main being the ability to use coercive powers to rip open the investigation. However these agencies only operate in four States<sup>1</sup> – other States and Territories do not have independent agencies and rely on normal policing methods as well as a mix of investigations by an Auditor General (public finance) and the Ombudsman (administrative issues).

The focus of this paper is the investigation of corruption in two of these States – South Australia and New South Wales. South Australia does not have any “independent” commission specifically designed to investigate corruption in the public sector. There is an Anti Corruption Branch within the police. There is a Police Complaints Authority<sup>2</sup>, and Auditor General and an Ombudsman. While these agencies have some coercive powers they are not specifically designed to target corrupt activities.

New South Wales (NSW) has two independent agencies to specifically investigate corruption in the public sector. The Police Integrity Commission<sup>3</sup> (PIC) and the Independent Commission Against Corruption (ICAC). The former, as the title implies, investigates allegations of corruption involving police officers. This paper will address the activities of the NSW Independent Commission Against Corruption. The focus of this Commission is on the public sector apart from police officers.

I will briefly examine the structure of various corruption investigation agencies explaining how these agencies operate in comparison to the two agencies in Australia. I then propose to highlight the operating methods of the Anti Corruption Branch in South Australia and the ICAC in New South Wales.

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<sup>1</sup> The Australian Commission for Law Enforcement Integrity is a federal agency with the charter to investigate allegations of corruption in the Australia Federal Police and Australian Crime Commission.

<sup>2</sup> The Police Complaints Authority is an independent statutory authority answerable to Parliament. It was established in 1985 with a role to oversight complaints against the police. It has an investigative function if required (rarely used) but does review all investigations conducted by the police into allegations of misconduct. See <http://www.pca.sa.gov.au>

<sup>3</sup> Police Integrity Commission formed as a result of recommendations flowing from the Wood Royal Commission into the NSW Police Service. See Interim report issued February 1996. Wood stated there was a need for a “focused, sophisticated and aggressive approach is necessary to uncover and combat serious police misconduct and corruption”. He believed the combination of ICAC, the Ombudsman, the Office of Professional Responsibility (internal police agency) and the NSW Crime Commission was not achieving the desired result – hence his recommendation for an independent commission to investigate serious and systemic police corruption. See <http://www.pic.nsw.gov.au/RoyalCommissionReports.aspx> for the full report.

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I will then explore what I believe to be the essential ingredients of a corruption investigation agency in order to both investigate and prevent corruption. After all it is pointless cutting off the head if the body is allowed to grow another one.

### The “impact” of corruption

Corruption is recognised as an impediment on development and confidence in the business sector. In September 1997 the World Bank highlighted the critical importance of anti corruption measures by releasing an anti corruption strategy where it defined corruption as the abuse of public office for private gain. The strategy required the Bank to address corruption in line with four dimensions:

1. Preventing fraud and corruption in Bank projects;
2. Helping countries that request Bank assistance for corruption;
3. Mainstreaming a concern for corruption into the Bank’s work; and
4. Giving active support to international efforts to address corruption.<sup>4</sup>

### The World Bank asserts public sector corruption

“ ... cannot be properly understood or addressed as an independent phenomenon. Rather it is a symptom of failed governance at the country level. The presence and prevalence of corruption therefore depend on factors relating to the governance environment, such as the quality of public sector management, the nature of the accountability relationship between the government and its citizens, the legal framework for development, and the degree to which public sector processes are accompanied by transparency and the dissemination of information.”<sup>5</sup>

This assertion highlights the importance of the integrity of the public sector coupled with the accountability of a government and transparent public sector activities in maintaining the credibility of government “business” and encouraging investment in the State.

In 2003 the United Nations issued their Convention against Corruption in the preamble to this Convention highlights the following areas of concern:

- Concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,
- Concern also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

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<sup>4</sup> World Bank Report No. 29620 (2004), “Mainstreaming Anti-Corruption Activities in World Bank Assistance. A Review of Progress Since 1997” Operations Evaluation Department, July 14, p1

<sup>5</sup> *ibid*, p5

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- Concern further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States.<sup>6</sup>

Finally, the European Union (EU) also regards corruption as an important factor when considering the integrity of Member States. The European Criminal Law Convention on Corruption (Strasbourg, 27/1/1999) provided specific guidelines on what action was to be taken by member States in relation to the fight against corruption across the EU.

### **Anti Corruption Agencies**

There are a variety of models of Anti Corruption Agencies – they vary from advisory bodies through to law enforcement to a combination of law enforcement coupled with a prevention process.

Meagher (2004:3) highlights the trend towards moving investigation and prevention into a single agency as distinct from “adding one or more special anti corruption bodies to the traditional mix of judicial and administrative institutions.”

A single agency incorporates a “number of key capabilities, responsibilities, and resources.” This creates a powerful “centralized agency” with the ability to focus solely on corruption. (*op cit*) There is still a need, in some instances, to liaise with other agencies such as prosecutors, courts and other law enforcement or administrative agencies.

The “multiple-agency” approach incorporates the addition of either investigation or prevention agencies with specific anti-corruption responsibilities to work in conjunction with other agencies including those responsible for public finances and/or the ombudsman. Meagher (*op cit*) states, “this strategy avoids setting up a strong ‘lead’ agency in the anti-corruption field, thus posing a lower risk than many single-agency approach of upsetting the balance and separation of governmental powers.”

Manion (2004) supports the single agency approach by highlighting the “importance of an independent, powerful and well financed anti corruption agency, a comprehensive anti corruption strategy and the existence of the rule of law.”

The Hong Kong ICAC is a single agency model with extensive powers to assist in the investigation of alleged corruption within the public and private sector. These powers extend to the right to arrest offenders as well as using coercive and covert investigation techniques. The model also includes a corruption prevention section as well as an education program. The education program extends from primary school through to the general

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<sup>6</sup> Preamble to the 2003 United Nations Convention on Corruption.

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community and emphasizes zero tolerance towards corruption. The court system within Hong Kong imposes substantial penalties for persons found guilty of corruption or associated offences.

The New South Wales ICAC follows the Hong Kong single agency model with the exception of the ability to enforce the criminal law and the HK additional focus on corruption within the business sector. Generally investigators do not have the power to arrest offenders for criminal offences.<sup>7</sup>

The "exposure" of corrupt activities occurs through a "commission" process controlled by specific legislation (*Independent Commission Against Corruption Act 1988*).<sup>8</sup> The agency also has a mandate for corruption prevention, education and research.

The Anti Corruption Branch of the South Australia Police is part of the multi-agency approach. The Branch reports directly to the Commissioner of Police (Chief) and is responsible for the investigation of allegations of corruption within the public sector in South Australia. The Branch may liaise with other government agencies such as the Ombudsman, the Auditor General (audits public finances), the Police Complaints Authority and the applicable government agencies. The Branch operates within the "restrictions" of law enforcement including the right to silence, proving allegations beyond a reasonable doubt (rather than on the balance of probability within a civil jurisdiction) and has no "coercive" power.

### **The New South Wales<sup>9</sup> ICAC**

The genesis of the NSW ICAC was a series of corruption scandals in the 1980's involving the police, Members of Parliament, the judiciary and public officials. It reached the stage where there was a need for an independent agency to restore faith in the public sector. The scandals diminished public confidence and indicated the State was not a fit place to invest or to conduct business.

ICAC was established as a Statutory Authority in 1988. It commenced operation in March 1989. Initially it acted in an oversight role for all public officials across the State. However, a Royal Commission resulted in the establishment of the Police Integrity Commission (PIC) in 1996. PIC has the responsibility to oversight the activities of police officers in the State.<sup>10</sup>

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<sup>7</sup> Section 105 ICAC Act allows seconded NSW Police to retain their powers but it would be highly unusual for these officers to arrest a person for corruption.

<sup>8</sup> See [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/icaca1988442/](http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/) for this legislation.

<sup>9</sup> New South Wales has the most population in of all States and Territories in Australia with a population of 6.77 million and an area of 800,642 (km<sup>2</sup>) or 10.4% of the Australian continent.

<sup>10</sup> See foot note 3 for information on the Police Integrity Commission



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The appointment of ICAC by special statute is important because it clearly states it is not a tool of the Executive government: ICAC reports to the Parliament through a legislative process (Parliamentary Joint Committee – see Part 7 of the ICAC Act). This highlights the independence of the agency (Reed 1995:74)

ICAC has a responsibility to oversight the activities of 381,000 public sector employees. The NSW Public Sector comprises of approximately 80 government departments and statutory authorities.

ICAC has a staff of 114 with 43 members in the Investigation Division.<sup>11</sup>

Section 2A of the *Independent Commission Against Corruption Act 1988* sets out the principal objects of the Act. These are:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
  - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
  - (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

The Act (Section3) defines *public officials* as:

“... 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 or both,
- (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),

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<sup>11</sup> See <http://www.icac.nsw.gov.au/> for details of the activities and other publications from the NSW ICAC

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- (g) an officer or temporary employee of the Public Service or the 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 office 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.

#### ***Corrupt conduct* is defined as (Section 8)**

- (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 or her 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 – then lists a series of 25 offences

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The Act places a “restriction” on corruption to ensure the focus is on systemic and serious corruption (as required by Section 12A). Section 9 of the Act states:

Limitation on nature of corrupt conduct

- (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.
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section: "applicable code of conduct" means, in relation to:
  - (a) a Minister of the Crown--a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
  - (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)--a code of conduct adopted for the purposes of this section by resolution of the House concerned.

"*criminal offence*" means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

"*disciplinary offence*" includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- (5) Without otherwise limiting the matters that it can under section 74A (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 constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

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#### Functions of ICAC

Section 13 of the ICAC Act outlines the principal functions. These include, *inter alia*, investigating any allegation or complaint which, in the “Commissioner’s Opinion” may imply corrupt conduct or conduct liable to allow, encourage or cause corrupt conduct or any conduct connected with corrupt conduct which may have occurred, may be occurring or may be about to occur.

The functions also include but are not limited to:

- Providing advice to appropriate authorities on the results of investigations;
- Examine and report on practices and procedures of public officials and public authorities to determine if such practices and procedures are conducive to corrupt conduct;
- To provide corruption prevention advice and recommendations to public officials and public authorities;
- To educate and disseminate information to the community on detrimental impact of corruption and importance of maintaining the integrity of the public sector; and
- To enlist and foster public support in combating corrupt conduct.

#### Advice to ICAC re allegations of corrupt conduct

Section 13 (1) (b) states the Commission will investigate any matter referred by both Houses of Parliament.<sup>12</sup>

Section 10 of the ICAC Act provides for any one to make a complaint to the Commission about any matter that may be corrupt conduct.

One of the problems with corruption investigation is a reluctance to report any incidents. This may stem from a belief by management that incidents of corruption within their area may infer incompetency. This perception is strengthened when public sector managers are offered incentives based on performance in various areas. The reluctance to report is addressed by Section 11 which makes it compulsory for the Ombudsman, the Commissioner of Police, the principal officer of a public authority, or an officer who constitutes a public authority to report to the Commission any matter the officer suspects on reasonable grounds concerns or may concern corrupt conduct.

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<sup>12</sup> The New South Wales Parliament is a “two” House model with a lower and upper “house”. The Legislative Assembly is known as the Lower House or the Seat of Government due to the fact that the Government is formed by the political party which has the majority of Members in the Legislative Assembly. The Legislative Council is the Upper House and is often referred to as a House of Review.

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Section 20 sets out how an investigation can be triggered. ICAC may conduct investigations at its own initiative, on a complaint or a report made to it or on a reference made to it. It can exercise coercive powers at its own discretion and is not bound by any external terms of reference.

#### *Coercive Powers*

The NSW ICAC has a series of coercive powers it can utilize in the investigating allegations of corrupt conduct. These include:

##### *Section 21 – Power to obtain information*

For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of information.

##### *Section 22 – Power to obtain documents*

For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person:

- (a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
- (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.

##### *Section 23 – Power to enter public premises*

For the purposes of an investigation, the Commissioner or an officer of the Commission authorised in writing by the Commissioner may, at any time:

- (a) enter and inspect any premises occupied or used by a public authority or public official in that capacity, and
- (b) inspect any document or other thing in or on the premises, and
- (c) take copies of any document in or on the premises.

The Commission has “inquisitorial” powers through Sections 30 and 31. Section 30 states the Commission may, if satisfied it is in the public interest to do so, conduct a compulsory examination.

In these cases the normal practice is to serve a notice on a person requiring them to attend a compulsory examination. They are advised of the nature of the allegations or complaint being investigated. The person must attend at the nominated place and time. These investigations are conducted in private before the Commissioner or an Assistant Commissioner. The examinations are conducted in a formal sitting where the person can either take an oath or affirmation and is then examined (interviewed) by a representative of the Commission. This can either be by an investigator or by a solicitor attached to the Commission.

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Section 31 relates to Public Inquiries. The Commissioner is required to determine whether it is in the public interest to conduct a public inquiry. In the course of these deliberations the Commissioner is to consider:

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

As the name implies, a Public Inquiry is open to the public and generally attracts considerable media attention due to the nature of the allegations being canvassed. The Commissioner has the right to hold part of the enquiry in private if he believes this is in the public interest [Section 31(9)]. The Commissioner can also suppress segments of the evidence before the commission.

A person called before either a compulsory examination or a Public Inquiry has the right to legal representation. The person can be examined and cross-examined. The witness is required to give evidence either under oath or affirmation.

#### Various "offences" under the ICAC Act

There are various offences relating to investigative procedures and hearings. These offences provide various penalties for non compliance.

Section 80 relates to obstruction of the Commission, Inspector and others. This section states:

A person shall not:

- (a) without reasonable excuse, wilfully obstruct, hinder, resist or threaten:
  - (i) the Commission or an officer of the Commission in the exercise of functions under this Act, or
  - (ii) the Inspector or an officer of the Inspector in the exercise of functions under this Act, or
  - (iii) an Australian legal practitioner appointed by the Commission to assist the Commission as counsel in the exercise of functions as such counsel, or
  - (iv) an Australian legal practitioner or other person authorised to appear before the Commission in relation to that appearance, or
- (b) without reasonable excuse, refuse or wilfully fail to comply with any lawful requirement of the Commission or an officer of the Commission, or the Inspector or an officer of the Inspector, under this Act, or
- (c) wilfully make any false statement to or mislead, or attempt to mislead, the Commission or an officer of the Commission, or the Inspector or an officer of the Inspector, in the exercise of functions under this Act, or

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- (d) disrupt a compulsory examination or public inquiry before the Commission.

It is also an offence for a person to fail to comply with the notice served under Section 21 (Power to obtain information) and for a person to fail to comply with a notice under Section 22 (Power to obtain documents).

Other offences include:

- Obstructing Commission officers in executing a search warrant (Sect 84);
- Offences relating to a compulsory examination or public enquiry:
  - Failing to attend (after being summoned) at compulsory examination or public inquiry [Section 86 (a)];
  - Failing to be sworn or make an affirmation [Section 86 (b)];
  - Failing to answer any question relevant to an investigation put by Commissioner or other person residing at the compulsory examination of public enquiry, [Section 86 (c)];
  - Failing to produce any document or other thing which is in the custody or control of the person - required by summons or by a request from the presiding officer at the hearing, [Section 86 (d)];
- Knowingly give false or misleading evidence at a compulsory examination or public inquiry (Section 87);
- Offences relating to documents and other things (Section 88)
  - a person, knowing that a document or other thing is or may be required in connection with an investigation, wilfully destroys it or makes it incapable of identification or, if it is a document, renders it illegible, indecipherable or unusable, with intent to prevent it being used in connection with the investigation commits an offence and [Section 88 (1)];
  - a person, with intent to delay or obstruct an investigation by the Commission:
    - destroys or alters any document or other thing relating to the subject matter of the investigation, or
    - scenes or attempts to send, or conspires with any other person to send, out of New South Wales any such document or thing, or any property of any description belonging to or in the disposition of or under the control of any person whose affairs are the subject matter of the investigation. [Section 88 (2)]

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- A person, with intent to delay or obstruct a Commission investigation, or with intent to mislead the Commission, fabricates any document or other thing, commits an offence if the document or other thing is produced in evidence to the Commission in purported compliance with requirements under Section 21 or 22, [Section 88 (3)].
- It is an offence to procure false testimony by a witness (Section 89)
- It is an offence to either bribe or attempt to bribe a witness. It is also an offence to seek a bribe to either lie or withhold evidence (Section 90)

#### *Evidence taken at a Compulsory Examination or Public Inquiry*

A person cannot refuse a summons. If necessary, the Commissioner can issue a warrant to ensure a person attends either a compulsory examination or public inquiry. The person is “arrested” and brought before the Commissioner who may release the person on conditions including the surrender of a passport to ensure attendance. (Section 36)

A witness is not excused from answering a question or producing an exhibit on the basis of self incrimination, any other ground of privilege, on a duty of secrecy or any other restriction on disclosure on any grounds at all, [Section 38 (2)]

There is also a provision to exclude evidence obtained in the course of a compulsory examination or public inquiry from criminal, civil or disciplinary proceedings [(Section 37 (3)]. Section 38 allows the Commissioner to “declare” on application by the witness or legal representative that all answers given, all or any classes of documents or other things produced to be produced on “objection” by the witness. This excludes the evidence in line with Section 37(3).

A witness is not entitled to claim legal professional privilege unless this privilege relates specifically to advice as to the appearance before the Commission [Section 38 (5) (a) (b)].

In addition to coercive powers, investigators can utilize search warrant powers, telephone intercept, covert electronic surveillance, controlled operations and assumed identities. These investigation strategies have to comply with various legislative processes and may require, depending on the nature of the activity, affidavits sworn before the Court (not the Commission). This is in line with normal law enforcement procedures.

Evidence obtained through these various means can be tendered at a public inquiry. As it was not obtained through coercive means it can also form part of a criminal brief.



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### Findings of the Commission

It is important to appreciate the Commission makes findings in accordance with the *Independent Commission Against Corruption Act 1988*. Section 13 (5) provides examples of the findings that can be made by the Commission. These include findings of fact, findings that particular persons have engaged, are engaged or about to engage in corrupt conduct. The Commission can also provide an opinion as to whether the advice of the Director of Public Prosecutions should be sought to determine if criminal proceedings should commence against particular persons for criminal offences.

As previously stated, another function of the Commission relates to areas within the public sector which may be susceptible to corruption through inappropriate processes and practices. The Commission will provide advice in relation to such areas if deficiencies are identified in the course of an investigation.

Section 14 (1) (a) states another function of the Commission is to gather evidence that may be admissible in any criminal offence in connection with the corrupt conduct and provide this to the Director of Public Prosecution (DPP)

It is important to note any evidence provided to the DPP cannot include evidence obtained in the course of coercive action by the Commission where a Section 38 declaration has been made.<sup>13</sup>

This may lead to a situation where there is a finding of corrupt conduct in accordance with the administrative procedures of the Commission (on the balance of probability using coercive powers) but there is insufficient evidence to convict a person in the criminal court where matters must be proved beyond reasonable doubt.

### **Anti Corruption Branch of the South Australia Police**

The Anti Corruption Branch (ACB) is an “independent” branch within the South Australia<sup>14</sup> Police. It is independent in the sense that it reports to the Commissioner. The focus of the Branch was initially on corruption but that has shifted in recent years as there has been a blurring of responsibilities with senior officers involved, as a matter of organizational expediency, in other policing activities.

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<sup>13</sup> See also Section 26 which relates to self-incrimination flowing from the production of material under Sections 21 and 22. If the person “objects” then the material cannot be used against him/her other than for offences against the ICAC Act.

<sup>14</sup> South Australia is fourth in size of the Australian States and Territories with a mass of 985,335 sq. Km (12.7% of Australia's total). It has a population of approximately 1.55m. One police department is responsible for policing across the total State.

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The “independence” of the Branch is also tested because of the “master/servant” relationship between the Executive (Minister for Police) and the Commissioner as head of the Police Service. The Branch operates under Ministerial Directions<sup>15</sup> which can be changed by the Minister or the Commissioner.<sup>16</sup> The Directions require, in part, a report to the Minister every six months on the activities of the Branch.

The Directions also provide for an external auditor to review all matters investigated by the Branch. The auditor conducts at least two audits a year to ensure all matters are investigated appropriately. The auditor is normally a retired or serving judge.

There is also an accepted reporting practice where the Commissioner advises the Minister as to the status of inquiries that may “affect” the Government (Executive) of the day.

This structure does not allow for public exposure of corruption in the “Commission” sense due to restrictive reporting practices preventing media comment<sup>17</sup> coupled with restrictions imposed when a person is charged with an offence and is before the Court.

There is potential in such a structure for political interference in the activities of the Branch due to its dependence on the policing structure to function. The advice to the Executive on the status of an investigation provides information which would not be forthcoming with an independent agency.

The Anti Corruption Branch investigates allegations of corruption across the total Public Sector (about 75,000) including police officers. It comprises of a Chief Superintendent, an Operations Inspector, an Operations Senior Sergeant, six investigators and one analyst. (This will increase shortly with the appointment of another analyst and an investigator). There are two support officers. There is also a technical support unit which assists in covert electronic and physical surveillance. The Branch has access to telephone intercept facilities. It can conduct targeted integrity tests and use, in accordance with legislation, undercover operations.

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<sup>15</sup> Sections 6-8 of the *Police Act* 1998 relate to the right of the Minister to give directions to the Commissioner ... see [www.austlii.edu.au/au/legis/sa/consol\\_act/pa199875/](http://www.austlii.edu.au/au/legis/sa/consol_act/pa199875/) for this legislation.

<sup>16</sup> Changing the Directions is not a simple process – The proposed changes go to the Minister (or from Minister to Commissioner). Amendment/s are then published in the Government Gazette within 8 days of the change and then placed before Parliament within six days from the date of the changed Directions. If Parliament is not sitting, then within six sitting days from the commencement of the next session. This is to prevent at whim changes for political purposes.

<sup>17</sup> Such comment would not comply with the administrative law principle of a right of reply

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The ACB operates as a policing agency enforcing the criminal law in relation to corruption matters. The *Criminal Law Consolidation Act 1935*<sup>18</sup> is the principle operating legislation. The *Public Sector Management Act 1995* and the *Police Act 1998* (and *Regulations*) are also used for disciplinary matters.<sup>19</sup>

The *Criminal Law Consolidation Act 1935* (Section 237) states a *public official* includes:

- (a) a person appointed to public office by the Governor; or
- (b) a judicial officer; or
- (c) a member of Parliament; or
- (d) a person employed in the Public Service of the State; or
- (e) a member of the police force; or
- (f) any other officer or employee of the Crown; or
- (g) a member of a State instrumentality or of the governing body of a State instrumentality or an officer or employee of a State instrumentality; or
- (h) a member of a local government body or an officer or employee of a local government body; or
- (i) a person who personally performs work for the Crown, a State instrumentality or a local government body as a contractor or as an employee of a contractor or otherwise directly or indirectly on behalf of a contractor,

and *public office* has a corresponding meaning;

*State instrumentality* means an agency or instrumentality of the Crown or any body (whether or not incorporated) that is established by or under an Act and—

- (a) is comprised of persons, or has a governing body comprised of persons, a majority of whom are appointed by the Governor, a Minister or an agency or instrumentality of the Crown; or
- (b) is subject to control or direction by a Minister.

The principle corruption offence is *Abuse of Public Office*:

Section 251—Abuse of public office

- (1) A public officer who *improperly*—
  - (a) exercises power or influence that the public officer has by virtue of his or her public office; or
  - (b) refuses or fails to discharge or perform an official duty or function; or
  - (c) uses information that the public officer has gained by virtue of his or her public office,with the intention of—
  - (d) securing a benefit for himself or herself or for another person; or
  - (e) causing injury or detriment to another person,

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<sup>18</sup> See [http://www.austlii.edu.au/au/legis/sa/consol\\_act/clca1935262/](http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/) for this legislation.  
<sup>19</sup> Other specific legislation such as the *Education Act 1972*, and the *Local Government Act 1999* may be used depending on the nature of the inquiry.

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is guilty of an offence.

Penalty: Imprisonment for 7 years.

- (2) A former public officer who improperly uses information that he or she gained by virtue of his or her public office with the intention of—
- (a) securing a benefit for himself or herself or for another person; or
  - (b) causing injury or detriment to another person,

is guilty of an offence.

Penalty: Imprisonment for 7 years.

The key criterion in this offence is the concept of acting improperly. This is defined in Section 238

#### Section 238—Acting improperly

- (1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.
- (2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.
- (3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—
  - (a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or
  - (b) there was lawful authority or a reasonable excuse for the act; or
  - (c) the act was of a trivial character and caused no significant detriment to the public interest.
- (4) In this section—

*act* includes omission or refusal or failure to act;

*public officer* includes a former public officer.

This requires the investigators to assess the conduct in line with Section 238 to determine if the conduct would be “improper”.

There are a series of other offences relating to bribery or corruption of public officers (Section 249), Threats or reprisals against public officers (Section 250), Demanding or requiring benefit on basis of public office (Section 252) and Offences relating to appointment to public office (Section 253).

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As previously stated these offences are criminal based and require proof beyond reasonable doubt. Investigators, as police officers, are bound by procedures including the right to silence. There are no coercive powers available to the investigators for criminal investigations. Regulation 14 of *The Police Regulations* 1999 states a police officer must comply with a lawful order<sup>20</sup>. This is used to compel police officers to answer questions and to produce material relative to a discipline investigation. However, any answers given or material provided cannot be used in a criminal investigation.<sup>21</sup> It is of interest to note the South Australian Supreme Court in *Commissioner of Police v Justin* (1991) SASR held the duty to obey orders under Police Regulations removed from police the privilege against self-incrimination in respect to criminal matters.<sup>22</sup>

It appears the High Court of Australia in *Police Service Board v Russell John Morris/ Robert Colin Martin* [1985] HCA 9; (1985) 156 CLR 397 took into account the discipline and hierarchical nature of a police service and “its special role in society to reach the conclusion that the privilege against self-incrimination had been impliedly excluded.”(South Australia Crown Solicitor Opinion 2006)

Gummow J in *Comptroller-General of Customs v Disciplinary Appeals Committee* (1992) 35 FCR 466 held the requirement to answer questions did not extend outside of the police service. In this instance it was determined a customs officer did have the right to refuse to answer questions on the basis of self incrimination. Gummow distinguished it from *Morris* on the basis of the nature of employment

This judgement has been used as the rationale for not using coercive powers – direction to answer and/or produce documents etc. – against public servants. (*ibid*)

### Comparison of the two agencies

I have worked in both areas. I was the officer in charge of the Anti Corruption Branch of the South Australia Police on two occasions as well as working there as the Operations Inspector. This was over a period of approximately 8 years. I was directly involved in the investigation of corruption matters as well as monitoring and managing other corruption investigations.

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<sup>20</sup> See [http://www.austlii.edu.au/au/legis/sa/consol\\_reg/pr1999184/](http://www.austlii.edu.au/au/legis/sa/consol_reg/pr1999184/) for the Police Regulations

<sup>21</sup> The right to compel answers to police disciplinary investigations was addressed and supported in *Police Service Board v Morris* (1985) 156 CLR 397 and the High Court in *Police Service Board v Russell John Morris/ Robert Colin Martin* [1985] HCA 9; (1985) 156 CLR 397

<sup>22</sup> This is a contentious decision even though it was a full court bench. Three of the justices (King CJ, Millhouse J and Debelle J held the reasoning of *Morris* indicated the duty to obey orders under *Police Regulations* removed from police the privilege against self-incrimination in respect of criminal offences, (SA Crown Solicitor opinion 2006)

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My current role is the Executive Director of the Investigation Division at the NSW ICAC. I have a similar role in that I monitor and manage investigations. There may be instances where I become directly involved but that is rare.

The first issue to accept is there is a significant difference in the outcomes. The ACB operates as a law enforcement agency in accordance with criminal law and the discipline process. It operates within the “adversarial” environment with matters generally being addressed in a criminal court or disciplinary tribunal. There is continuum of proof with the criminal law requiring beyond reasonable doubt and the disciplinary process on the balance of probability. It is important to note the more serious the disciplinary offence the further it moves along the continuum towards beyond reasonable doubt because of the potential consequences.

The ICAC operates in both an investigatory and inquisitorial manner within the confines of specific legislation. This method of investigation/inquisition inquiry coupled with media exposure has been criticized in some quarters as trial by media and a “name and shame” process. The private versus public hearing was addressed in *ICAC v Chaffey* (1993) 30 NSWLR 21 where it was held Commissions have a discretionary power to determine whether they sit in public or private. Mahoney JA at 60 stated that in some cases “... (T)he public interest or other ends to be served by the discretion (to hold public or private inquiry - *author*) may outweigh the rights of the individual not to be harmed by the proceedings.” ICAC by virtue of Section 31 has to consider the “public interest” when making a decision to hold a “private” hearing.

There has also been some criticism that persons named by the Commission as being corrupt have not been convicted in a criminal court. It appears there is an expectation that a finding of corrupt conduct should automatically convert to a criminal conviction. This perception highlights a lack of understanding of the two processes. It also indicates the critic is not aware of the function of ICAC as set out in Section 13 of the ICAC Act. This clearly indicates ICAC is responsible for exposing unconscionable conduct and encouraging high standards of behaviour in public officials, even if that conduct cannot be proven to be criminal. The compilation of admissible evidence for prosecutions by the Director of Public Prosecutions pursuant to Section 14 is a secondary function (Parliamentary Committee on ICAC 2001:10)

The emphasis on the public exposure of corruption and the potential reduction of corruption through the education process is based on the concept of improving the present processes for future benefit. This is explained in a comment by Commissioner Fitzgerald when discussing his approach to the exposure of corruption in the course of his Inquiry into illegal activities of police in Queensland.<sup>23</sup> He argued it was vital:

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<sup>23</sup> ‘Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct’ 1987-89 known as the Fitzgerald Inquiry.

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"... that whatever steps are available to be taken to maximise the prospect that the truth is told. If individuals escape, even important criminals, even if all escape, a basis is laid for a new and better future, that is preferable to a continuation of the past." (ibid : 11)

The former President of the New South Wales Court of Appeal, Athol Moffitt also highlighted the benefit of exposing corruption:

" ... the exposure of corrupt practices to public view in itself is a powerful means of bringing them to an end, warning the public of them and gaining public support of a strong action against those involved".(Roser 1992:231)

I stated at the beginning that corruption is a "private crime". The crime is generally committed behind a veil of secrecy. This veil is very hard to lift using traditional policing methods where parties to the corrupt act rely on a presumption of innocence and a right of silence.

Society has recognized and accepted the need for alternative investigation methods in the cases of serious crimes such as corruption. The use of "standing commissions" such as ICAC is an acceptable method to investigate crimes with a major impact on society. Corruption is such a crime.

The primary focus of the New South Wales ICAC is the exposure of corruption within the public sector. This is coupled with the corruption prevention, education and research components of ICAC to guide the public sector in forming a rigid barrier against corruption. It is pointless to highlight the corrupt activities and then do nothing to prevent further corruption.

It would appear both State and Federal parliaments have recognized the benefit of coercive powers and have now extended these powers into the arena of organised crime, serious paedophilia, and, in some instances, terrorist activities (linked to organised crime). Bodies such as the Australian Crime Commission, the New South Wales Crime Commission use coercive powers to investigate serious and/or organised crime. The Corruption and Crime Commission (Western Australia), and the Crime and Misconduct Commission (Queensland) use coercive powers for the investigation of serious crime and corruption. The New South Wales Police Integrity Commission, the Office of Police Integrity (Victoria) and the recently formed Australian Commission for Law Enforcement Integrity to address alleged corruption within the Australian Crime Commission and the Australian Federal Police use coercive powers in the investigation of corruption.

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### **Summary**

Corruption is an insidious disease. It can undermine public confidence in the government, deplete the public purse, and destroy the integrity of a society.

There is a need to use every weapon in the arsenal of law enforcement to rid society of corruption. The use of standing commissions such as ICAC is a primary weapon against corruption.

The single agency model incorporating investigation, prevention, education and research addresses causal factors, prevention, and investigation is the most effective model to address corruption at all levels.

The process of the NSW ICAC in exposing corruption is a key factor in educating and alerting the community to the insidious nature of corruption which impacts on their daily lives.

When speaking at a recent conference,<sup>24</sup> the New South Wales Premier<sup>25</sup> Morris Iemma said:

“Any jurisdiction that doesn’t have its own ICAC type body is just crazy . . . If you don’t have one, you have either discovered a secret to human nature that has eluded the rest of us, or – as is more likely to be the case – you are kidding yourselves.”

I rest my case.

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<sup>24</sup> Australian Public Sector Anti-Corruption (APSAC) Conference, Sydney 23-26 October 2007

<sup>25</sup> Leader of the elected State government (New South Wales)



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### References

- Manion, M. (2004). *Corruption by Design: Building clean government in mainland China and Hong Kong*, Harvard University, Massachusetts
- Meagher, P., (2004), *Anti Corruption Agencies: A Review of Experience*, Discussion Paper on Institutions and Development, Paper 04/02, Centre for Institutional Reform and the Informal Sector at the University of Maryland.
- Parliamentary Committee on the ICAC (2001), "Issues Paper: Review of the ICAC Stage III: The conduct of ICAC hearing - A comparison with the conduct of hearings like other Commissions of Inquiry"
- Reed, H., (1995), "The 'Permanent' Commissions of Inquiry - A Comparison with Ad Hoc Commissions – Part 1" *Australian Journal of Administrative Law*, **2**, 69-90
- Roser, W.G., (1992), "The Independent Commission Against Corruption: The New Star Chamber?" *Criminal Law Journal*, **16**, pp 225-245
- South Australia Crown Solicitor Opinion 14 July 2006 relative to "Power to direct public servants/public sector employees to answer questions"
- (Wood) Royal Commission into the New South Police Service, Interim Report issued February 1996.
- World Bank Report No. 29620 (2004), "Mainstreaming Anti-Corruption Activities in World Bank Assistance. A Review of Progress Since 1997" Operations Evaluation Department, July 14