ICAC: BEAUTY OR BEAST?

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By Monica Kelly

"I would probably give it 1 per cent", answered Eddie Obeid when asked about the chances of the DPP taking action against him, having been found to have acted corruptly by the Independent Commission Against Corruption (ICAC).

The ICAC was formed on noble intentions on 2 May 1988. In his second reading speech, Nick Greiner (then NSW Premier and father of the ICAC), said: "It would be ...crass and naive to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this state". That was 26 years ago. Can we look at the ICAC and say it has enhanced integrity and built community confidence in public administration of NSW?

ICAC's survey

The ICAC gauges public perception of it through periodic studies. The most recent of these studies, *Community Attitudes to Corruption and to the ICAC; Report of the 2013 Survey*, looked at perceptions of the extent of corruption, awareness of the role of the ICAC, perceptions of the ICAC's effectiveness, and understanding of and willingness to report corruption. Unfortunately, the survey had a low respondent rate. Out of 3548 people approached, only 506 provided responses. The respondents were both public servants and members of the public.

Awareness of the ICAC has steadily reduced over the past 20 years, decreasing from about 97 per cent in 1992 to 80 per cent in 2012. Importantly, the perceptions of those respondents who were not public officials of whether the ICAC has been successful at exposing corruption over time has also decreased over the same period, from 80 per cent in 1992 to about 68 per cent in 2012.

While 95 per cent of respondents thought the ICAC was a "good thing" for NSW, only 10 per cent of those respondents who indicated they were aware of the ICAC understood it was supposed to prevent corruption.

Snapshot

- A recent study, *Community Attitudes to Corruption and to the ICAC; Report of the 2013 Survey*, looked at perceptions of ICAC
- The survey showed that while a large proportion of respondents indicated they would likely report corruption, less than half believed something would be done if serious corruption was reported
- If the penalty matches or exceeds the motivation, the probability of corruption would dramatically decrease because the perceived benefit becomes outweighed

The survey showed that while a large proportion of respondents indicated they would likely or very likely report corruption (83 per cent), less than half (49 per cent) believed something useful would be done if serious corruption was reported over time.

Community confidence in the ICAC is diminished partly because it is rare that convictions are secured against those found to have acted corruptly, and when these convictions are recorded and reported upon, many months, and even years, have passed.

ICAC's structure

So why is the ICAC perceived as ineffective in assisting to secure convictions? The answer lies in its structure. The ICAC is an investigative body, not a judicial one. It would rest more comfortably within the French inquisitorial legal system rather than our own adversarial legal system, yet it needs to work alongside the adversarial system in order to achieve convictions.

The structure of the ICAC, including its broad powers, is what binds and restricts the DPP from securing convictions.

The ICAC is not bound by the rules of evidence and has very broad powers, including:

- seeking the issue of a warrant under the *Surveillance Devices Act* 2007 [s19(2)]
- requiring a public authority or official to produce a statement of information [s21]
- power to obtain documents [s22] and enter premises [s23]
- power to override rights of privilege or duties of secrecy [ss24 and 25]
- seeking injunctions from the Supreme Court restraining conduct of a person [s27]
- requiring a person to attend a compulsory, private examination [s30] or a public inquiry [ss31(6) and 31A]
- permitting a person appearing before it to be legally represented (presumably to also deny being legally represented) [s33]
- summoning a person to give evidence or produce documents or other things [s35]
- issuing arrest warrants for those people required to appear but failing to do so [s36]
- authorising the attendance of a prisoner at an inquiry [s39]
- issuing search warrants, entering premises and seizing documents or other things [s 40] including the power to use force [s43]; and
- "all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of its functions, and any specific powers conferred on the Commission by [the ICAC] Act shall not be taken to limit by implication the generality of this section" [s19(1)].

Proponents of the ICAC may state that these powers are absolutely necessary

in order for the ICAC to undertake an inquiry. However, civil libertarians may consider these powers extreme and potentially unacceptable in a society that respects and understands its legal rights. It is this divergence of views that was a concern at the ICAC's inception and it is these same concerns that require us to investigate the utility of the ICAC now, for the public benefit must outweigh the civil imposition.

When entities are created with unusual powers the average person is likely to misunderstand their rights and methods of dealing with the entity. While the ICAC has peers, such as the Police Integrity Commission, the *Community Attitudes to Corruption and the ICAC: Report on the 2009 Survey* provided that only 7 per cent of respondents would be likely to report corruption to the ICAC, whereas 53 per cent said they would report corruption to the police. This question is not addressed in the most recent survey.

The ICAC is empowered to make findings, form opinions and formulate recommendations after conducting investigations [s13(3)]. However, it cannot make findings of guilt [s13(4)].

ICAC's problem

Crucially – and this is the rub – the quid pro quo for relinquishing one's civil rights of self-incrimination is protection from prosecution. Witnesses before the ICAC are entitled to make a s37(3) *declaration whereby any evidence the* person provides to the ICAC cannot be used against her or him in civil or criminal proceedings, except for an offence against the ICAC Act or for certain disciplinary proceedings.

Making such a declaration and telling everything there is to tell is the wisest choice of anyone who has something to hide. First, it gives the evidence a chance to be tested but, perhaps more importantly, as they hang all their dirty washing on the line for everyone to see (if anyone is interested) they are protected by their section 37(3) declaration. This means the DPP has very limited evidence to use towards prosecution.

Further, the ICAC considers evidence on the civil standard of proof (the balance of probabilities), whereas the DPP must consider whether evidence will meet the higher criminal standard of proof (beyond reasonable doubt) after it has been tested and having had large portions of it quarantined.

Many actions of corruption are also crimes, such as bribery, fraud, blackmail and theft, which the DPP could prosecute independently of the ICAC. Uncovering corruption that is cleverly and secretly crafted is difficult, though, particularly without the ICAC's powers. Yet the interplay between the inquisitorial system and the adversarial system acts to prevent the ICAC and the DPP from conjointly securing convictions.

On 20 June 2014, the ICAC Commissioner, Megan Latham, took the unusual step of publishing a press release outlining the prosecutions that have been successful following ICAC inquiries. She wrote, "In the last 30 months, in addition to the three specific cases referred to above, 32 people have pleaded guilty or been found guilty of charges arising from ICAC investigations. Of those 32 people, four people have been sentenced to full-time imprisonment, five people have been sentenced to imprisonment to be served by way of home detention, and eight people have been sentenced to imprisonment but had the execution of that sentence suspended on condition they enter into a good behaviour bond." Unfortunately, Commissioner Latham failed to detail the charges that were successful. One may presume that the common charge was lying to the ICAC, as this has been the most successful, historically. However, this charge fails to penalise the person for the corrupt act, therefore it does not act as a deterrent to *corrupt future conduct*.

ICAC's solution

When asked to define corruption, the respondents to the survey mostly answered "self-interest at the expense of government, one's employer or the public" (33 per cent), which points to greed as the predominate reason for corruption. Where the perceived risk of penalty is low and the incentive or the perceived benefit is high, the probability of corruption is elevated.

If the penalty matches or exceeds the motivation, the probability of corruption would dramatically decrease because the perceived benefit becomes outweighed.

Hopefully the Committee will look at the fraught interaction between the ICAC and the DPP and consider that it may be possible to avoid these difficulties by permitting the ICAC to impose penalties. By amending the ICAC's structure and making it a form of tribunal, the ICAC could impose severe and harsh financial penalties, rather than imprisonment, thereby adjusting the punishment so it acts as a deterrent. **LSJ**