SECOND REPORT ON INVESTIGATION INTO THE METHERELL RESIGNATION AND APPOINTMENT

September 1992

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INDEPENDENT COMMISSION AGAINST CORRUPTION

The Hon Max Willis, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon K R Rozzoli, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Gentlemen

On 19 June 1992 the Commission furnished to you its *Report on Investigation into the Metherell Resignation and Appointment*. That report was made public immediately.

It contained findings that each of the Hon Nick Greiner and the Hon Tim Moore had engaged in corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988. Subsequently they commenced proceedings in the Supreme Court, which resulted in a Court of Appeal decision on 21 August. Put shortly, the Court concluded that the Commission's finding of corrupt conduct in respect of each was a nullity.

Accordingly this second report in relation to the resignation from Parliament of Dr Metherell and his appointment to a public service position has been prepared. Its purpose is to correct the record, to state the effect of the Court of Appeal decision, and to raise issues concerning the ICAC Act and desirable changes to it. The Commission requests that it be tabled as soon as is practicable.

If statutory justification for this report is needed, it can be found in either s74(1) or s75 of the Act.

It remains the case that another report, dealing with the second and third parts of the terms of reference contained in the resolutions passed on 28 April 1992, will be provided at a later stage.

Yours faithfully

Ian Temby QC
Commissioner

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I – PRELIMINARY

On 10 April 1992 Dr Terry Metherell resigned as the Member for Davidson in the Legislative Assembly, and was promptly appointed to a public service position, from which he has subsequently resigned.

On 28 April both the Legislative Council and Legislative Assembly agreed to a resolution, which was conveyed to the Independent Commission Against Corruption (ICAC) by letter of the same date. The resolution requested the ICAC to investigate the facts and circumstances relating to the April 1992 resignation and appointment of Dr Metherell, with a view to determining:

a. whether any corrupt conduct has occurred, is occurring or is about to occur; and

b. whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct; and

c. whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

Part (a) of this was given priority. Hearings were held over 12 days between 5 and 29 May 1992.

A Report was then prepared and furnished to the presiding officers of the Parliament on 19 June. That Report was tabled in the Legislative Assembly on 24 June and in the Legislative Council on 30 June.

The Report contained findings of corrupt conduct against the then Premier, Mr Greiner and the then Minister for the Environment, Mr Moore. Put shortly, the Commission concluded in its Report that the conduct of each man involved the partial exercise of his official functions, that it involved a breach of public trust, and that it could involve reasonable grounds for their dismissal as Ministers. These conclusions were reached on the basis of the Commissioner's understanding of the ICAC Act, and in particular s8(1) and s9(1)(c).

Mr Greiner and Mr Moore each commenced proceedings in the Supreme Court, seeking relief by way of declaration. The matter was referred to the Court of Appeal, and argued between 30 June and 3 July. Between the date those proceedings were commenced and the first day of hearing, both Mr Greiner and Mr Moore resigned their Ministerial positions. Each has since resigned from the Parliament.

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II – STATUTORY PROVISIONS

To make sense of what follows, it is necessary to briefly state and in some instances quote the relevant statutory provisions.

Two of the principal functions of the Commission are, pursuant to s13(1) of the Act:

a. to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that corrupt conduct ... may have occurred, may be occurring or may be about to occur; and

b. to investigate any matter referred to the Commission by both Houses of Parliament.

By s7, corrupt conduct is for the purposes of the Act any conduct which falls within either or both of sub-sections (1) and (2) of s8, but which is not excluded by s9. It is not necessary to set out s8(2) for present purposes. Section 8(1) is of essential significance, and it reads:

> 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.

Section 9(1) is in these terms:

> 9. (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.

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III – COURT OF APPEAL DECISION

On 21 August 1992 the Court of Appeal - constituted by Gleeson CJ, Mahoney JA and Priestley JA - delivered its decision.

The Court had to decide whether, on the facts found by the Commissioner, he was entitled as a matter of law to say that the conduct of the plaintiffs was corrupt within the meaning of the Act.

Each of Gleeson CJ and Mahoney JA concluded that the conduct came within s8 of the Act. The former said that "... Mr Greiner and Mr Moore found themselves in a position where there was a conflict between duty and interest." He noted that "... the law refuses to countenance decision-making with a personal interest in the outcome", and said that "at the very least, the case seems to fall within s8(1)(a)." Mahoney JA said that it was within the scope of the Commissioner's functions for him to conclude that the conduct of Mr Greiner and Mr Moore involved partiality, and the Judge found no error in that respect. Priestley JA expressed no opinion concerning the s8 question.

Gleeson CJ and Priestley JA concluded that the test of whether conduct (of a Minister) could constitute reasonable grounds for dismissal (by the Governor) is objective. It requires the application to the facts found by the Commission of legally recognised standards as to what constitute grounds for dismissal. It does not turn upon the subjective opinion of the Commissioner, formed by reference to unexpressed and possibly freshly created standards. The majority Judges concluded that there was reviewable error in relation to the conclusion that the conduct fell within s9 of the Act. Mahoney JA dissented, on the basis that the conduct of Mr Greiner and Mr Moore could constitute reasonable grounds for their dismissal within the meaning of s9.

The following orders were made in the action brought by each plaintiff:

1. DECLARE that the determination by the defendant, in the Report furnished by it to the President of the Legislative Council and the Speaker of the Legislative Assembly, and entitled "Report on the Investigation into the Metherell Resignation and Appointment - June 1992", that the plaintiff had engaged in corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 was made without or in excess of jurisdiction, and is a nullity.

2. DECLARE that, on the facts as found in the said Report, the said determination was wrong in law.

3. ORDER that the defendant pay the plaintiffs' costs.

Each of the Judges was critical of the ICAC Act, in certain and sometimes different respects. Where appropriate this is taken up subsequently.

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IV – CORRECTING THE RECORD

It is obviously inappropriate that the first Report, which contains a finding declared by the highest court of the State to be a nullity, should remain uncorrected. The best that can be done in the circumstances is to prepare this Report, which records the Court of Appeal decision formally, and have it tabled in the Parliament.

The Commission will also send a copy of this second Report to each known recipient of the first Report. So far as future distribution is concerned, the two Reports will be bound together for that purpose.

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V – DECISION NOT TO APPEAL

The Commission could have made application to the High Court for special leave to appeal against the decision of the Court of Appeal. Its decision not to follow that course was announced on 28 August. The following reasons were stated:

> ... the "Metherell affair" should be brought to an end sooner rather than later, in any event statutory amendments are very likely and therefore a High Court decision might not be of lasting significance, and to proceed further would involve substantial additional expenditure of public funds.
>
> There are various interesting questions that could have been debated before the High Court. However, it seems best for the Commission to devote its energies and resources to its continuing work rather than further legal disputation.

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VI – WHY AN ICAC?

From time to time there is criticism of the ICAC. That is not surprising. The Commission and its staff try always to be fair and not make mistakes, but an independent role is maintained and functions are exercised with some vigour. Since the Court of Appeal decision a couple of commentators have called for the abolition of the Commission. Many have expressed a contrary view: the ICAC should be retained as an independent and effective body, but some statutory changes are called for. Nevertheless the extreme criticism should be addressed.

Corruption can seriously damage the fabric of a community. Corruption not only may cost the community a great deal of money and result in great unfairness, but it can affect public health, public safety and basic human rights such as the right to privacy.

Most aspects of people's lives are regulated by laws made and enforced by public officials. Corruption of this process of regulation and enforcement can affect the community in many ways. For example, corrupt tendering processes not only cost the community a lot of money, but may result in the purchase of inappropriate, ineffective or even dangerous equipment for public use. Corrupt licensing practices are not only unfair, but may result in unqualified or incapable people propelling large boats, trucks and other pieces of equipment around the community. Corruption in the legal or judicial areas may result in the acquittal of those who should be convicted, the imprisonment of the innocent and civil and commercial injustice. One corrupt clerk at a computer terminal can enable a massive invasion of the privacy of everyone who has personal information in the databases the terminal can access. These are just a few examples. But through them it can be seen that if corruption can be reduced, the quality of life in the community will be enhanced in many ways.

The ICAC is an institution created to enhance the quality of life of the citizens of NSW by improving integrity in public life and attacking corruption. It is an agent of change. It aims to reduce corruption in three ways:

a. Exposure, through investigations and their consequences.

b. Prevention, through systems improvement.

c. Education, to change attitudes to the issue.

There is no criticism of the second two aspects. The few who mention them do so in glowing terms. They are not controversial. There is no call for legislative change concerning these latter two functions. Accordingly, it is only the investigation function that needs immediate discussion.

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VII - GENERAL CRITICISMS

Some criticisms of the Commission are based on a misunderstanding of its role, or its powers, or the law. Others raise serious issues which do merit discussion and consideration. It may be useful initially to deal with the arguments based on misunderstandings.

1. "The ICAC has too much power".

The ICAC has similar investigatory powers to other bodies such as the National Crime Authority, the Australian Securities Commission or the NSW Crime Commission. Corruption, like organised crime, is often covert, insidious and very hard to detect; accordingly special powers are necessary. The Commission can make "findings", but this is no different from the power of Royal Commissions to make findings. Royal Commissions have been utilised in NSW for many years.

2. "The ICAC is not accountable".

The Commission is substantially more accountable than Royal Commissions, in that it has a permanent monitoring Parliamentary Joint Committee which can and does scrutinise the Commission's actions, by calling for evidence on oath from ICAC officers or otherwise. Further, it has an independent Operations Review Committee which includes the Commissioner of Police and community representatives, that can advise about the commencement or cessation of any investigation.

3. "The ICAC public hearings allow witnesses to defame people under privilege".

Privilege exists to protect witnesses in all court and investigatory hearings. Accordingly the ICAC should not be singled out for criticism. Witnesses are usually interviewed beforehand and evidence is led from them in a responsible manner by counsel assisting. Further, the Commissioner and Assistant Commissioners have the same power as any other presiding officer to limit evidence to relevant material. Where allegations are weak yet scandalous, or for any other reason the public interest dictates, evidence may be taken in private or suppressed from publication. The Commission puts a lot of effort into the principled protection of individuals.

4. "Persons should not be branded corrupt on the civil onus of proof".

The civil onus is reasonably high when, as it must be, the Briginshaw principle is applied. The High Court in Briginshaw v Briginshaw (1938) 60 CLR 336 provided, in effect, that the more serious was the allegation, the stricter the proof requirements. Further, it is the same onus that Royal Commissions have always applied. The criminal standard of proof - "beyond reasonable doubt" - is restricted to criminal proceedings, ie the hearing of a charge which could result in legal punishment.

5. "The ICAC is both investigator and prosecutor." "No-one knows what's going on except the Commissioner or Assistant Commissioner and Counsel Assisting." "Persons don't know exactly what they are facing because the terms of reference may be vague." "People don't. have the same opportunity to defend themselves when they don't have a particularised allegation."

This type of criticism seems to stem from unfamiliarity with the concept of an investigatory tribunal. Lawyers in Australia are raised on and educated in adversarial litigation. They are used to having a criminal charge or a civil claim that is specific and particularised, on paper, well before anyone gets near a courtroom. They find it difficult to understand with the concept of an investigation which, by its very nature, will not

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have discovered the extent or the particularity of the problem at the outset of the investigation. But to infer axiomatic unfairness, as some do, is wrong.

The principles of procedural fairness imposed by the courts are well understood by the Commissioner and by the experienced senior counsel who to date have fulfilled the role of Assistant Commissioner. These principles require that persons understand and are given an opportunity to answer any matter that may go to their detriment, before a final determination is made. This requires that there be an opportunity to cross-examine witnesses whose evidence may affect the outcome as it affects the person, and to give and call evidence themselves. These principles are plain and easily understandable. Further, they are fully enforceable. In Ainsworth v CJC the High Court recently made it clear that courts have power to remedy any departure by tribunals from the principles of procedural fairness.

6. "There is no right of appeal from the ICAC." "The ICAC should be subject to the Courts."

The ICAC is subject to the Courts. Ainsworth emphasised that the Court will intervene to correct any breach of the rules of natural justice and the principles of procedural fairness they involve. Further, the Court has the same common law power to regulate the ICAC as it does any other quasi-judicial tribunal on the well recognised principles of judicial review. Judicial review allows the court to intervene if the ICAC makes any jurisdictional error of law i.e. if it attempts to go beyond its powers in any way. An example would be if a finding was not based on provable and relevant material: Australian Broadcasting Tribunal v Bond (1980) 170 CLR 321 at 368 per Deane J. So the ICAC is subject to the Courts in relation to both the fairness of its procedures, and the extent of its powers.

If there were any doubts as to the ICAC being subject to the Courts, they are surely dispelled by the recent Court of Appeal decision.

7. "The ICAC causes great stress and anxiety as people are interviewed, homes are searched and personal records are requested.

It is accepted that stress and anxiety are caused to some people. These factors are the natural consequences of every form of thorough investigation whether by police, or by any other of the various investigatory bodies that exist in Australia today. They are largely unavoidable parts of the ordinary investigatory process, so it is quite wrong to single out and criticise the ICAC on this basis.

8. "People are having to go to enormous expense for legal representation to defend themselves, even when they don't know whether they need to defend themselves."

Firstly, people will usually know whether they have something to worry about on the basis of the terms of reference, and will have a good idea whether they have either committed wrongdoing or there are general circumstances which may incorrectly imply that they have done the wrong thing. Further, it is no different from a Royal Commission situation. In any event a rational and economical approach can massively reduce costs. Often, a reasonably priced solicitor can be quite adequate unless a situation arises calling for increased forensic skill.

9. "The definition of corruption is so wide as to be unworkable and a positive disincentive to go into public life."

The definition is what Parliament has prescribed. Section 8 defines the behaviour and s9 in effect provides that the s8 behaviour must be of a sufficient level of seriousness. The definition provisions effectively state that public office must be exercised honestly, impartially and without breaching the public trust, and that persons ought not incline

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public officials otherwise. Where behaviour of that sort is sufficiently serious as to be a criminal or disciplinary offence or grounds for dismissal, that is "corrupt".

It could not be seriously questioned that the community is entitled to expect the highest level of integrity from all who hold public office. It is at least possible that improved integrity in public life, to which all attest, will attract better people than would have been interested in serving the public otherwise.

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VIII – DEFINING "CORRUPT CONDUCT"

The definition of corrupt conduct - see II above - is significant for two reasons. One is that it limits the jurisdiction or "reach" of the Commission. It is only in relation to allegations of or circumstances implying corrupt conduct as defined that the Commission can conduct an investigation, hold hearings and use its coercive powers. There has to be such a jurisdictional limitation. There is no reason why it should not be broad: the types of official wrongdoing are certainly wide. The public interest would be harmed by a narrow definition which invited frequent legal challenges to the Commission's jurisdiction.

Secondly, the statute at present requires that conduct as found be fitted within ss8 and 9, or otherwise. This is "labelling" to which some take exception.

The existing definition does have its strengths. Its key concepts are honesty, impartiality and upholding the public trust which is a necessary incident of working in the public sector. 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.

There are broadly two options. One is to clarify the definition of corrupt conduct. The other is to retain that definition, but restrict its operation to the matter of jurisdiction. The latter would only use the definition to limit the reach of what the Commission could look at.

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IX – CHANGE THE DEFINITION?

There was specific criticism of the definition of corrupt conduct in the Court of Appeal decision. Gleeson CJ at 4 said it was "wide and, in a number of respects, unclear". He made the point 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 s8 conduct to could" constitute or involve a criminal or disciplinary offence or reasonable grounds for dismissal. Priestley JA at 3-4 said the definition was sufficiently broad to embrace conduct which was not "corrupt in any ordinary sense of the word". Mahoney JA made similar comments at 65.

There has been more general criticism over a period. Most- of it is emotive in tone and anecdotal. The most frequent statements are along these lines:

> "Corruption should mean corrupt as ordinary people understand it. "
> "Corruption means taking money." "Corruption should mean a criminal offence." "Corruption only covers deliberate knowingly wrong behaviour."

Accordingly, when amendment to the definition is considered, the central issues will be:

1. Should corrupt conduct be limited to knowingly wrong conduct?

2. How far beyond the criminal law does the existing definition extend, and should it extend beyond it at all?

The answer to 1 is surely "no". The whole point of the legislation was to combat a corrupt culture, a culture that regards nothing wrong with things like jobs for the boys, or giving a Government contract to a mate and accepts corruption as part of the way things are done. To let through the net those who are sufficiently amoral that they do not recognise wholly unacceptable behaviour would be to abrogate the central charter the Commission tries to fulfil.

The second question requires more analysis. It is of a technical legal nature, and will be found in the Appendix. Putting the matter shortly, there are rarely used but available offences applicable to public officers which go well beyond bribery and the Crimes Act. There may be little A conduct which does not fall within s9(1)(a).

However and in any event, the Commission surely should not be restricted to consideration of only criminal misconduct. To give but one example, the public sector employee who abused his position for personal gain by giving a contract to himself in the manner described in the *Report on Investigation into the Maritime Services Board and Helicopter Services* - July 1991 had committed no criminal offence. But surely his deplorable conduct was well worth exploring, together with laxity in both systems and supervision which enabled him to feather his own nest.

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. That distinction would go some way towards reflecting some recently expressed public views.

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

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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.

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X - ICAC TO FIND FACTS ONLY?

The Commission is obliged to conduct its investigations with a view to determining whether corrupt conduct has occurred. Whenever it receives a Parliamentary reference, or conducts public hearings, it must report to the Parliament. Accordingly findings of corrupt conduct have been made in many Reports against large numbers of individuals, whose conduct ranges from obvious criminality to a departure from appropriate standards. A possibility worth considering is to change the ICAC Act so as to make the prime function of the Commission, when investigating matters, to find facts rather than try to fit conduct into a particular definition.

It would however be important to retain the right of the Commission to make findings and recommendations. Traditionally Royal Commissions have used forthright language in describing the conduct of individuals. Indeed in the final Report of the Royal Commission into Productivity in the Building Industry at 59 a given individual was described as "both corrupt and a liar". This Commission should be free to speak plainly. It must be able to make findings and recommendations. If the path the Commission has to tread is excessively narrow, then those who contend it has strayed will be able, with ease, to hold up hearings through resort to the courts. As Grove J said in *Aristodemou v Independent Commission Against Corruption* (Supreme Court 14 December 1989): "The courts may not be used as a vehicle for frustrating the legitimate conduct of investigation. " It is essential to avoid this: the Commission must be able to get on with the job in the public interest. Difficulties of this sort existed before the decision in Balog and Stait v ICAC (1990) 169 CLR 625 and the subsequent statutory amendments.

Putting the matter simply, it would be necessary to retain s74A(I.) and s74B.

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XI - RECOMMENDING PROSECUTIONS, DISCIPLINARY ACTION?

Strictly speaking the Commission does not recommend that prosecution, disciplinary or dismissal action be taken. It is presently required by s74A(2) to 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 taking of any such action. However such statements are generally looked upon as recommendations, and if they are not acted upon then that is seen as being an unfavourable outcome for the Commission. That is not so when the function is properly understood.

As Assistant Commissioner Roden QC pointed out in the *Report on Unauthorised Release of Government Information* - August 1992 at 192, the present provision is inconvenient in practice. It is also unnecessary in principle. The witnesses who are "affected" persons within the meaning of s74A(3) 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 Commission has shown an inclination to speak plainly. It would continue to do so when appropriate even if it neither had to find corrupt conduct nor recommend prosecution, disciplinary or dismissal action.

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.

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XII – MINISTERS IN A SPECIAL CATEGORY?

The earlier *Metherell Report* dealt with a Premier and a Minister, and the recent Court of Appeal decision states the law concerning dismissal of such public officers. In the view of the majority Judges, which of course prevails, there must be a serious departure from standards of conduct recognised and enforced by the law if any such office holder is to be dismissed. Accordingly findings of corrupt conduct cannot be made against Ministers under the present definition of corrupt conduct unless that requirement is satisfied, or there has been criminal misconduct.

Following the Court of Appeal decision, there are now several classes of public officials for the purposes of the ICAC Act, some more privileged than others. The only common characteristic is that the criminal law applies to all, and does so equally.

The most strictly controlled are public sector employees to whom specific disciplinary offences apply. That class includes, but is not restricted to, most caught by the Public Sector Management Act 1988. In relation to them disciplinary action can be considered, as can dismissal.

All employees owe a duty of fidelity to their employer, and breach can warrant dismissal. The degree of conduct that will suffice is usually a question of fact, and an actual repugnance between acts of the employee and the master/servant relationship must be found. It will suffice to justify dismissal if the employee is guilty of conduct which is destructive of the necessary confidence between employer and employee, or involves a conflict between private interests and duty to employer. See generally Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66.

The next class comprises employees with respect to whom no disciplinary offences have been created. That includes, but is not limited to, the most senior officers. Part 5 of the Public Sector Management Act, which relates to discipline of public servants, does not apply to chief executive officers: s65A.

The next class comprises those who are not employees, but rather hold an office. That includes, but is not limited to, Members of Parliament and Judges, as well as Ministers. All of them can be removed from office by Parliamentary action, and generally no other means of removal is available. As to such people, there are no disciplinary offences. Accordingly in terms of s9 of the ICAC Act, the practical reality of the Court of Appeal decision is that if their conduct is not such as could constitute or involve a criminal offence, they are not at risk of a finding of corrupt conduct. This interpretation means behaviour such as bias, favouritism, nepotism and jobs for the boys may be "corrupt" if done by a public servant but not if done by the holder of a high office.

It seems axiomatic that the ICAC Act should apply the same standards equally to all in the public sector. The Parliament has enacted legislation which confers special powers in relation to public servants and other public sector employees. Most of these ordinary citizens accept the Commission and its powers, although some complain when those powers are used against them as individuals. Nobody can expect general acceptance of the Commission to continue if the "great and powerful" are beyond its reach.

That having been said, there are sound reasons in principle why Judges and Members of Parliament should be treated slightly differently in a procedural sense. It is important to the functioning of a liberal democratic society that the rule of law prevail, and that is predicated upon an independent judiciary. One of the hallmarks is that Judges cannot be removed from office by the Executive. This can only happen through the Parliament, which is the ultimate democratic institution. So far as Members of Parliament are

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concerned, they again must be free from Executive control, and the notion of sovereignty of Parliament requires that that institution have control of its own Members.

It may be the Commission should be entitled to investigate everybody in the public sector, from the Governor down, but with respect to those who hold constitutional offices the Commission should not have power beyond reporting its findings and recommendations to the Parliament. That should not include recommendations for removal from office, if only because the Parliament should not be told what to do by the Commission which is a body of the Parliament's own creation.

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XIII – CONCLUSION

It was seen as important to correct the record without delay. This report does that. It does not contain firm recommendations, which will be forthcoming from the Parliamentary Committee on the ICAC in due course of time. An attempt has been made to identify the more important issues for consideration. The Commission stands ready to work with the Parliament and the Government to see rectified such deficiencies in the statute as the recent Court of Appeal decision has made evident.

Whatever is done, the independence and effectiveness of the Commission should not be cast in doubt.

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APPENDIX

The criminal law as it applies to the exercise of public office in NSW is not simple. It is a patchy amalgam of statute and common law. There are limited statutory provisions in part 4A of the Crimes Act. Section 249B applies in the case of the offering to or acceptance by agents of any corrupt benefit, s249D applies in the case of corrupt inducements for advice, and s249E applies in the case of corrupt benefit to trustees and similarly positioned persons. There is no statutory definition of, nor offence of, corruption in public office.

The common law of bribery is:

> "... receiving or offering any undue reward by or to any person in a public office, in order to influence his or her behaviour in that office and to incline that person to act contrary to known rules of honesty and integrity."

Neither bribery nor the Crimes Act provisions cover situations where there is no actual reward ie the wrongful exercise of office on the basis of nepotism, bias, friendship, or collateral benefit.

It is however also an offence at common law for a public officer to commit a breach of trust, or fraud or imposition in a matter affecting the public, or to neglect to perform a statutory or common law duty, *see* "Criminal Law in New South Wales", Watson and Purnell paragraph 2210. The law relating to the public trust, in brief terms, provides that anything whereby an act would give a basis for civil relief between parties, if performed by an official against a citizen, is a common law offence of breaching the public trust. See R v Bambridge (1783) 22 State Trials at 155, as discussed in 51 ALJ 313 at 315. (All partiality and dishonesty does not necessarily ground civil action between parties, and therefore not all partiality or dishonesty would constitute the common law criminal offence of breach of public trust.) Further, where a statute or regulation that prescribes the behaviour of public servants is breached, unless a civil penalty is prescribed, a common law offence is committed, *see* "Criminal law in New South Wales", Watson and Purnell paragraph 2214. The Commission has not substantially considered the reach of these latter common law offences in any report to date.

These latter common law offences are old, in some respects the exact extent of their application today is not clear, and they are rarely resorted to.

It would seem that there may in reality be only narrow scope for s8 and s9 to operate beyond the criminal law when the full common law position is considered. Sections 8 and 9 will only extend beyond the criminal law where the action is not bribery, and does not fall within ss249B, 249D and 249E of the Crimes Act due to lack of benefit, and is not sufficient to ground civil action between parties so as to constitute the common law offence of breach of public trust, and does not breach any statutory or common law obligation.

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