Submission No 10

PROSECUTIONS ARISING FROM INDEPENDENT COMMISSION AGAINST CORRUPTION INVESTIGATIONS

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Date Received: 1/08/2014

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Subject: The committee's self-referenced inquiry into prosecutions arising from ICAC investigations.

Dear Committee,

You are to be commended for initiating this inquiry. It will enable you to dispel the false notion that it is somehow ICAC's fault that prosecutions, if any, following ICAC findings may not result in guilty verdicts.

Best.

Evan Whitton

Summary

Public sector corruption has been endemic in England and NSW it was institutionalised by William II (d. 1100 AD).

Corruption is white collar crime; if systematic, it is organised crime. English law has always protected white collar criminals. Only mandatory prison terms will deter them.

Justice means fairness; fairness requires a search for truth. ICAC is supposed to use the truth-seeking inquisitorial system. Subsequent trials, if any, use the more costly and inaccurate truth-defeating adversary system.

Taxpayer-funded ICAC is a bastard mixture of the two; 20 years ago, ICAC suppressed two crucial chapters of a study it commissioned on how to properly use the inquisitorial system.

New corrupt offences.

The DPP is under-resourced; ICAC cases need a separately funded Special Prosecutor. Trials should take place in a LAT (Less Adversarial Court).

An inquisitorial law school is needed.

The adversary system can only be properly understood in terms of its origins. An Appendix notes the accident of history which caused its problems.

Terms of reference (I have taken the liberty of rearranging the order.)

Endemic public sector corruption (from other related matters)

NSW Supreme Court judge Edwin Lusher said corruption can only be treated successfully by assuming it is endemic. Slices of history from William II to Eddie Obeid suggest that corruption is endemic in NSW. Thus:

- William II (d. 1100) put every public office on sale; buyers in turn extorted bribes from people who dealt with the office.
- Count Egmont, having bribed the entire Royal Council in 1554, said "more could be done with money in England than anywhere in the world".
- The Duke of Marlborough, Sir Robert Walpole, James Brydges and others made fortunes from the job of Paymaster-General. Brydges cleared £600,000 (some $60 million today) while he held the job 1705-1713.
- Walpole, Prime Minister 1715-17 and 1720-42, said of politicians: "All these men have their price."
- In 1800, Viscount Castlereagh bribed Irish politicians to sign an Act of Union with England and vote their Parliament out of existence. bribes included £4 million (perhaps £1 billion today) and 40 peerages.
- The Rum Corps, [redacted]

On the Lusher logic, politicians should gracefully withdraw from connection with ICAC. (Politicians should likewise not appoint judges. Q. Did Obeid seek to influence the appointment of magistrates, judges, ICAC Commissioners?)

Recommendation. A Board of non-politicians of proved integrity to appoint ICAC Commissioners and oversee its operations.

Should gathering "admissible" evidence be "a principal" function of the Independent Commission Against Corruption?

First, justice. Former Federal Court Justice Russell Fox researched the two legal systems for 11 years. In *Justice in the 21st Century* (2000) he said justice means fairness and fairness and morality require a search for the truth, otherwise the wrong side may win.

ICAC is supposed to use the procedures of the world's most widespread legal system, the inquisitorial (truth-seeking) system reformed by Napoleon and used in Europe, Japan, Korea, South America, China etc. A subsequent trial uses the procedures of the (truth-defeating) adversary system used in common law countries, England and its former colonies. The inquisitorial system is more accurate and cheaper. Thus:

- In the French version of the inquisitorial system, evidence is not concealed; trained judges question witnesses and do not allow lawyers to pollute the truth with sophistry, a technique of lying by trick questions, false arguments etc. Jurors and judges sit together. Guilt can be inferred from silence. On a fixed wage, judges have no incentive to prolong the process; most hearings take a day or so. The system is quite accurate. In France and Germany, 95% of guilty defendants are convicted; the innocent are rarely charged, let alone convicted.
- In the adversary system, evidence is concealed; lawyers trained in sophistry question witnesses and, paid by the day, have an incentive to spin the process out; hearings can take weeks or months. (Yale law professor Fred Rodell said: "The legal trade … is nothing but a high-class racket.") Judges are generally passive. Jurors are isolated, and cannot infer guilt from silence. The system is not accurate. More than half guilty defendants get off; at least 1% (5% in the US) of people in prison are innocent.

(Judge Fox said the public knows that "justice marches with the truth". That means 99.5% of the population understand justice better than common lawyers, including judges and academics. He also said English law was originally designed to benefit landowners, and was "later adjusted to the requirements of the wealthy and the powerful". Eddie Obeid?)

"Admissible" evidence is what remains after the prosecutor has concealed relevant evidence, and the trial judge has concealed more – no one can guess how much – via the confusing *Christie* discretion. (See Appendix) Focussing on admissible evidence would make ICAC as inaccurate as a trial.

Recommendation. This suggestion should be rejected.

Deterring the corrupt

The corrupt and other white collar criminals do more harm than violent organised criminals, but English law has protected them for centuries in two ways.

First, unfair libel law has made it difficult to bluntly tell the truth about white collar criminals since 1275; more so since Defoe invented modern journalism in 1704. Today, libel law protects the corrupt by false presumption: all slurs are presumed to be false, damaging and intentional. There is thus a presumption of guilt for the defendant, and the onus of proof is reversed. American judges abolished the false presumptions and the reversed onus 50 years ago, but Australian judges have not.

Recommendation 1. The committee should urge Parliament to make libel law fair.

Second, NSW Chief Justice Tom Bathurst said in August 2012 that white collar criminals are "likely to weigh up the risks and benefits of being caught [and jailed]".

The risk is minimal; former Federal Court judge Ray Finkelstein wrote (*Targeting Tax Crime*, March 2012): "As a general rule the judge's rationale in sentencing [white-collar criminals] is different from sentencing true criminals … imprisonment, when available, is regarded as a last resort." Not many bankers go to prison.

Recommendation. Prison terms to be mandatory for corruption.

Can ICAC and DPP procedures be more effective?

a. ICAC. The ICAC legislation is clear; Parliament did not want ICAC to use the adversary system. ICAC hired an authority on the inquisitorial system, Bron McKillop, of Sydney University's law school, to advise how to use that system.

McKillop supplied a report, *Inquisitorial Systems of Criminal Justice*, in July 1994. He regarded two chapters of some 3000 words as being "the most directly responsive to the Parliamentary Committee's request". The chapters were missing when ICAC published the report in November 1994. ICAC procedures are still a bastard mixture of the two systems.

The report said in France the primary focus is on the investigation. Prosecutors supervise investigating magistrates and they supervise police. A dossier is built up from their inquiries. The suspect's lawyer has access to the dossier in case he can help with the truth. The

presiding judge dominates the public hearing; he calls witnesses and questions accused. The hearing is relatively brief; its function is the "manifestation of the truth".

At ICAC, proceedings are lengthy and partly adversarial; counsel assisting dominates; the Commissioner is generally passive; lawyers for suspects have sometimes been allowed to cross-examine at length. McKillop noted (p. 51): " … ICAC does much of its investigative work … by way of public hearings."

It is a matter of speculation how much the omission of McKillop's chapters has hindered ICAC's effectiveness, and how much it has unnecessarily cost taxpayers. The chapters have been available to ICAC since 2000. If the committee does not have a copy, I can supply it.

Recommendation a. The Committee should insist that ICAC implement Mr McKillop's advice.

Should there be new offences to capture corrupt conduct?

Endemic corruption affects the whole community.

Recommendations: On entering Parliament, politicians should take an oath not to be corrupt and to tell the truth, with prison be mandatory for a breach of the oath.

Those found to be corrupt should be stripped of all accrued entitlements and have the proceeds of their crimes confiscated.

Is resourcing adequate?

The DPP is over-worked and under-funded; in 2012-13, he got $107 million to try to put criminals in prison; legal aid lawyers got $247 million to try to keep them out. The case for a Special Prosecutor is compelling. For example:

The Woodward inquiry into the murder of politician Donald Mackay heard a lot about Bob Trimbole's 'Ndrangheta. A Special Prosecutor would have gone some way to wiping out the Mob. None was appointed; no organised criminal was charged.

The Fitzgerald inquiry heard evidence that corruption was endemic in Queensland. A Special Prosecutor charged 238; 148 (62%) were convicted; cost: $19 million.

Recommendation. A separately funded Special Prosecutor should deal with ALL prosecutions recommended by ICAC.

Could prosecutions be made in other jurisdictions?

The NSW Family Court has developed a Less Adversarial Trial procedure largely run by the judge rather than lawyers. This at least eliminates some sophistry.

Recommendation. A special Corruption Court like the Family Court.

Inquisitorial law school for careers in inquiries

Australia is supposed to use the inquisitorial system for inquests, Royal Commissions, ICAC and other corruption commissions, but none are as cost-effective for taxpayers as they could be; the child sex abuse inquiry is expected to cost $500 million.

McKillop suggested training for long-term careers in inquisitorial procedures. He wrote (p. 53): "The [French] lawyers who operate inquisitorial systems of criminal justice are trained from the outset to do so. They apply for places in judicial training schools …and are trained there for 2 or 3 years, partly full-time at the training school and partly on the job in the courts and the offices of prosecutors …They also absorb the values and ethos of legal service for the State."

McKillop also wrote (p. 58): "This should also help to remove the perception that private legal practice is in some way superior to legal service for the State." Training would also enable inquiries to use taxpayers' funds more efficiently.

Recommendation. The committee should urge the Government to institute an inquisitorial law school.

Appendix

Why the adversary system is broken

Note. The data below is derived from *Our Corrupt Legal System* (*OCLS*). The book is largely sourced to 300+ judges and lawyers who had pieces of the jigsaw. The committee can see the text at netk.net.au/whittonhome.asp, a section of a website maintained by an Adelaide legal academic, Dr Robert Moles.

Judge Russell Fox agreed with the ancient Egyptians; Maat, Egyptian goddess of justice c. 2700 BC, had a feather in her cap; it symbolised justice, truth, morality.

Sophists taught Athenian lawyers the techniques of sophistry, i.e. how to lie plausibly c. 500 BC. Socrates said the Sophists were morally bankrupt; Plato said they were charlatans. Sophistry has proved enduring; some lawyers could be termed morally bankrupt charlatans. But the old joke – it's only the 99% of lawyers who give the rest a bad name – is not accurate. The bad name comes mainly from the 40% who are trial lawyers; the other 60% may never resort to sophistry.

England and Europe used an inquisitorial system during the Roman Empire, but lawyers were not above sophistry; Cicero (106-43 BC) said if you have no case, abuse your opponent.

One meaning of corrupt is "broken". The English system has been broken for 1500 years; the European system was broken for 1300 years. Western Europe and England changed to a non-truth accusatorial (prove it) system in the Dark Ages after the Empire fell in 476. Trial was by ordeal; an unknown god was supposed to deliver the verdict. For example, suspect witches were thrown in the river; if they sank, they were innocent; if they floated, they were guilty and were fished out and hanged or burned at the stake.

The accident of history that eventually led to the adversary system is that William of Normandy got control of England in 1066 and divided the country among 300 of his mercenaries. These landowners became Magnates, the great men of the country. They were part-time judges and full-time robber barons, i.e. white/blue collar criminals. William introduced trickle-down extortion called the feudal system: he extorted from the Magnates; they extorted from the previous owners; and so on down to peasants.

His son, William II, who was shot dead on 2 August 1100, institutionalised trickle-down extortion in the public sector. The common law thus began (in 1166) as an extortion racket; investors bought the job of judge from the king and in turn extorted bribes from litigants. Judges no doubt used lawyers as bagmen (as they did in Chicago recently). That relationship may explain other curious aspects of the common law:

- US judge Richard Posner said judges and lawyers have always been a cartel. That would mean the independence of the judiciary is a myth; members of a cartel collude to increase prices and profits and protect their interests.
- Judging is different from laweyring, but judges have never been trained as judges; they are lawyers trained in sophistry elevated to the bench.

England was represented at a church-state conference which recommended a return to the inquisitorial system in November 1215. European courts shortly adopted that system but it was broken for the next five centuries: like the CIA, European judges wrongly believed that torture is a reliable way of finding the truth.

English judges decided not to change to the inquisitorial system in 1219. London's population was then about 25,000; citizens are entitled to ask lawyer-politicians: why should we be robbed of justice and money just because a few corrupt judges in a small town in England decided eight centuries ago that truth does not matter?

Edward I's *Scandalum Magnatum* (libelling the Magnates) of 1275 made it a criminal offence to tell the truth about the wealthy and the powerful. In 1378, the legislation was extended to judges, prelates and other officials.

By 1350, the cartel had all the bases covered; lawyers had become the "dominant influence" in Parliament. They still are. Lawyers today are one-fifth of one per cent of the population, but are 60% of the US Senate, and 58% of the current Australian Cabinet. Hence the difficulty in changing to a system of justice.

In the 15th century, the cartel began to organise a racket more profitable than judicial extortion. They began with civil law, which is where the money was and is. (Lawyers did not defend criminals until late in the 17th century; blue collar thieves had little money, and white collar thieves were protected.).

Judges were originally in charge of evidence. On a fixed wage (plus the bribes), they had no incentive to spin the process out; most procedures took a day or so. Lawyers paid by the day do have an incentive to prolong out.

The adversary system began via pleadings, which are supposed to narrow the issues. Pleadings originally took judge and lawyers an hour or two of oral discussion. About 1460,

lawyers began send written pleadings to each other. Judges, now cut out of the process, could have stopped the lawyers, but didn't.

Written pleadings are largely useless because they don't have to be true, but they can go back and forth for months with the meter running: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter … Lawyers gradually got control of the entire civil process; by 1560 they could question witnesses interminably.

Lawyers use the fallacy of tradition to defend the adversary system: it's always been done this way. In fact, England used an inquisitorial system until the Dark Ages.

Defoe reinvented journalism on 19 February 1704 at the beginning of the notoriously corrupt 18th century. Corrupt Whig judges appointed by Walpole and his bagman, the Duke of Newcastle, increased the severity of libel law.

Judge Richard Posner said academics are part of the lawyer-judge cartel. The first academic was a serial liar and failed barrister, William Blackstone. He began teaching law at Oxford in 1753. His aims were to lay down "the Laws of England" and "to deduce their History". He deduced that the law was "dictated by God Himself". Jeremy Bentham, a lawyer, said Blackstone was "ignorance on stilts". Oxford became a law school with Blackstone as professor in 1758. Other law schools followed: Cambridge 1800, Harvard 1817, Yale 1843, Sydney 1855, Chicago 1902.

Another accident of history on Saturday 14 June 1800 – a fluke of timing which won the Battle of Chicken Marengo – gave Napoleon a breathing space of three years. He used to begin work on his monument, reform of the inquisitorial system. (Details at *OCLS* pp 62-68.) Admiral Villeneuve did not follow Napoleon's instructions in 1805. Had he done so, Australia would probably use the inquisitorial system and there would be no need for ICAC.

Lawyers had first appeared in the English criminal courts in 1695, but the system still had only a few truth-defeating mechanisms, and sophistry was apparently not enough; conviction was almost certain. In 1795, almost two-thirds of accused did not hire lawyers. What followed may not be coincidence.

George Orwell said: "The omission is the most powerful form of lie." In the 19th century and later, five rules for omitting relevant evidence and other truth-defeating devices encouraged rich criminals to pay lawyers. Lawyers say the devices make trials fair, but fairness means truth. *OCLS* details 24 devices at pp.156-220.

American lawyer Alan Dershowitz said "almost all" defendants are guilty. The devices and lawyers' sophistry ensure that a majority of guilty defendants get off. Georgetown law professor David Luban said in 1995: "The [televised] O. J. Simpson trial has persuaded most Americans that the adversary system is at best grotesque."

The devices were also imposed on civil law. This made litigation a lottery and appeal courts a casino. David Goldberg QC said: "It is, I think, generally accepted that every case or virtually every case which goes to the House of Lords could be decided either way." Some devices:

The rule against self-incrimination. Based on a lie by Blackstone, the "right" of silence became a rule in the 19th century. It gets off about half the guilty defendants who refuse to give evidence.

The rule against similar facts. Invented in 1894 by a corrupt judge, Farrer Herschell, the rule conceals evidence of a pattern of criminal behaviour. It has thus enabled countless repeat offenders to escape justice, e. g. serial rapists, paedophiles, the corrupt, organised criminals, and other white collar criminals.

The *Christie* discretion. The discretion is an invitation to corrupt judges and a cause of confusion to honest judges. It was invented in 1914 by Rufus Isaacs, Lord Reading, who should have been in prison for inside trading in Marconi shares.

The discretion said judges should conceal evidence if they think it is only slightly probative (tending to show guilt) and think it is highly likely to unfairly prejudice the jury against the accused. A London detective said: " … as far as I can see, prejudicial means evidence that proves he did it."

What is "slightly"? What is "highly"? A Queensland judge, John Helman, admitted there might be "chaos" if different judges used the discretion on the same evidence.
Jurors were said to be stunned when they learned of the evidence they didn't hear at the corruption trial of Sir (as he then was) Terry Lewis. (*OCLS* pp. 196-202.)

Plea Bargains. Prosecutors can offer a suspect a deal: plead guilty and accept a year or two, or plead not guilty and risk a long term. It amounts to blackmail for people who may not even be guilty. The French system does not accept guilty pleas; judge and jury and have to find the truth for themselves.

Beyond reasonable doubt. Jurors don't know what "reasonable" means, and Australian judges are not allowed to tell them it means: Are you sure? A judge has said the formula gets off about a quarter of guilty defendants.

It may seem surprising that any criminal gets found guilty, but most cannot afford a lawyer. They plead guilty and get the discount.

Finally, and despite the evidence ICAC found against Obeid, I will be surprised if he spends a day behind bars. A barrister, Gregory Melick, explained the legal system to the federal parliamentary committee with oversight of the National Crime Authority 17 years ago. He said:

"The criminal justice system is all about making the crown prove its case; it is not about the search for the truth. There is no room for searches for the truth in the criminal justice system in the way it is set up in Australia at the moment or in the common law world. I think that is one of the fundamental problems.

"I am firmly of the view that it is about time we started looking at the trial processes ... In an investigation the prosecution must negate every one of the 100 possible defences as part of the crown case. There is no compulsion on the defence to say before the trial starts what the issues in the trial are ...

“So as long as we have a system of justice like that in Australia, it will be a system of injustice. It means that anybody who can afford it can probably avoid the consequences because, if you have got the money – and it takes millions of dollars – you can protract the system for as long as you like.”