Submission to the Select Committee on the establishment of a *National Integrity Commission*

Selected Terms of Reference:

(b)(ii); Legislative and Regulatory Powers

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Biography

Chesney O'Donnell is currently a Policy Manager and Senior Legal Advisor for a national professional doctor's association. He has been admitted to the Supreme Court of NSW as a legal practitioner. He has worked in criminal law enforcement for 8 years then worked as a senior policy and legal advisor for both the NSW Minister for Police and the Minister for Fair Trading for close to 2 years. He has also been an academic for 4 years and has taught law & policy, economics & business, international relations & geopolitics and cultural studies at University of Sydney, University of NSW and Macquarie University.

Introduction

My primary focus will be ***(b)(ii); Legislative and Regulatory Powers*** as stipulated in the Senate's terms of reference and how this can be supported by a satellite agency or Commissioner designed to pick up less serious acts of misconduct and treat them accordingly if they were actual acts of negligence, carelessness or ignorance on the part of a politician or public servant in question. *Education is the key not just prosecution.* Examples already exist as to what limitations need to be put into place for the National Integrity Commission (NIC) to work effectively in Australia. This however is fraught with problems associated with legislative and regulatory powers that I will examine in depth in my submission.

The Clerk of the NSW Parliaments' Legislative Council David Blunt who recommended an adoption with variants of the UK model for the state of NSW. The premise was that the NSW ICAC[1] would support a similar role whereby-

> "…a Parliamentary Commissioner for Standards who would receive and deal with all complaints about the conduct of Members. Appropriate information would be published in relation to the outcome or response to every complaint, including those not accepted for investigation. Serious matters would be referred to the ICAC (and could continue to be the subject of direct complaints to the ICAC)."[2]

I agree with this proposition for the NIC. However I must add that the UK model is not without its own flaws. I believe a Commissioner of this kind could be incorporated to work with the NIC much like a filtering mechanism. I will use the NSW Independent Commission Against Corruption (ICAC) as a useful comparison to the NIC. The objectives of such agencies designed to combat corruption are very similar. However consistency in state laws or a National Law is required at best when defining the meaning and legal parameters of what actually constitutes an act of 'corruption.'

I will conduct a global comparative examination of three different anti-corruption agencies in NSW, Hong Kong and the United Kingdom using several case studies. The thesis that I hope to test and prove are –

1. NIC requires a Trinity Oversight with closed hearings for less serious cases. Hearings of such cases will be revealed to the public annually by the relevant committees – The NIC must endure *continual oversight* which will keep a close eye on its orbit of power so to speak. This will comprise of three groups. Within the inner orbit of the NIC a Parliamentary Commissioner for Standards will filter less serious cases for minimal penalties and re-education. Secondly there should be the creation of an Inspector of NIC with the Commonwealth Ombudsman to continue as usual. All will meet for an audit annually during Parliamentary Committee hearings inclusive of the Standing Committee of Privileges and Members' Interests and Estimates. More serious cases will be passed on to the Commonwealth DPP. Less serious cases will be conducted in a closed hearing with the reports of all hearings made public annually

[1] Blunt, David *A Parliamentary Commissioner for Standards for New South Wales?* Paper to be presented at the 44th Presiding Officers & Clerks' Conference Canberra, 1-4 July 2013
[2] Ibid., p.2

2. Anti-Corruption agencies like NIC are not infallible – Cases which do not pass the burden of proof test by the Commonwealth DPP requires alleged actors who the NIC have accused of corrupt behaviour to be exonerated of criminal suspicion. No agency is infallible and the presumption of innocence and natural justice needs to be preserved in our common law system.
3. NIC should just be an *Investigative Body* not a *Law Enforcement Agency* - One of the main proposals of this paper is that the NIC should veer away from being a prosecutorial body, hence becoming a law enforcement agency would be counter-intuition. It would also provide too much power for an already powerful agency with great evidentiary coercive powers.
4. There needs to be a consistent Burden of Proof between NIC and the Commonwealth DPP – As I will demonstrate by using the NSW ICAC as an example, anti-corruption agencies utilise a civil burden of proof to make recommendations to a criminal prosecutorial body the DPP. This can result in incidences where the NSW DPP declines to pursue a matter due to a lack of evidence and a higher burden of proof but the NSW ICAC findings remain the same.
5. NIC does not require to prosecute – I am of the opinion that at this trajectory in our nation's history the degree of corruption is not as epidemic as Hong Kong. Furthermore the Hong Kong ICAC germinated through their police command structure which was already embedded in criminal law and their experience with extensive police extortions of their citizens. In Australia we must retain the autonomy of a prosecuting body like a DDP which works objectively within the confines of our criminal justice system and not influenced by the shifting winds of fortune associated with domestic party politics.
6. NIC should not investigate corruption in the police force – Following on from my previous point, the HK ICCA is not a suitable comparison to use for the creation of a Commonwealth NIC. Australia has had a history of inquiries concerning police misconduct in the past and has established agencies like the NSW Special Crime and Internal Affairs to deal with it.
7. NIC's success should not be tied to budgetary costs and the number of convictions made by the Commonwealth DPP following their recommendations to prosecute – The cost to run the NSW ICAC annually in recent years has been moving closer to $30 million while Hong Kong which has a similar population to NSW, their HK NSW costs around $120 million per annum. While cost effectiveness and a balanced budget is recommended, the price of stamping out corruption is never too high. Furthermore as stated before no independent anti-corruption agency should be viewed as infallible.

Part 1 - NSW

1.
Quis custodiet ipsos custodes?
"Who will watch the watchers?"
Plato

The relationship between Parliamentarians and an independent anti-corruption agency is a very close one. The NSW ICAC's jurisdiction is over state and local government with coercive powers equivalent to a Royal Commission to compel witnesses to testify. Independent oversight of the NSW ICAC aside from the Ombudsman and their Inspector is limited. To paraphrase Plato; *who watches the watchers?* There is an obvious issue with Parliamentarians being held under scrutiny by an agency that they help to maintain, fund and oversight via a Parliamentary Joint Committee as well as decide who the next Commissioner will be. Does this cyclic relationship work as an effective organisational oversight? Evidently the issue of neutrality comes into question; Bias v Objectivity.

When the NSW ICAC was formed back on the 13 March 1989 it was followed by the *Independent Commission Against Corruption Act* 1988 and it did not have any power to make a finding of corrupt conduct. Historically during the 1980s several corruption scandals broke in Australia involving Labor in NSW, the Liberal Party in Tasmania and the National Party in Queensland. As a result Nick Greiner as the then NSW Premier helped establish the NSW ICAC in 1988. ICAC's first task under Commissioner Ian Temby QC, (1989 to 1994) was to investigate possible corrupt activities during the Wran and Unsworth governments. No charges were held however in 1992 the NSW ICAC concluded that Greiner when offering former minister Terry Metherell a government job was engaging in an act of corruption. The charges were later dismissed in court. This demonstrates the tensions which exist between the request to investigate as is the case whenever the NSW ICAC is approached and the actual investigation itself. The Temby regime had created the initial template for the NSW ICAC's modus operandi; to educate in the hope of changing any culture of misconduct that would lead to corrupt activities rather than to simply act as a tool of enforcement which is not within the NSW ICAC's power to execute.

CONCLUSION – NIC requires a Trinity Oversight with closed hearings for less serious cases. Hearings of such cases will be revealed to the public annually by the relevant committees

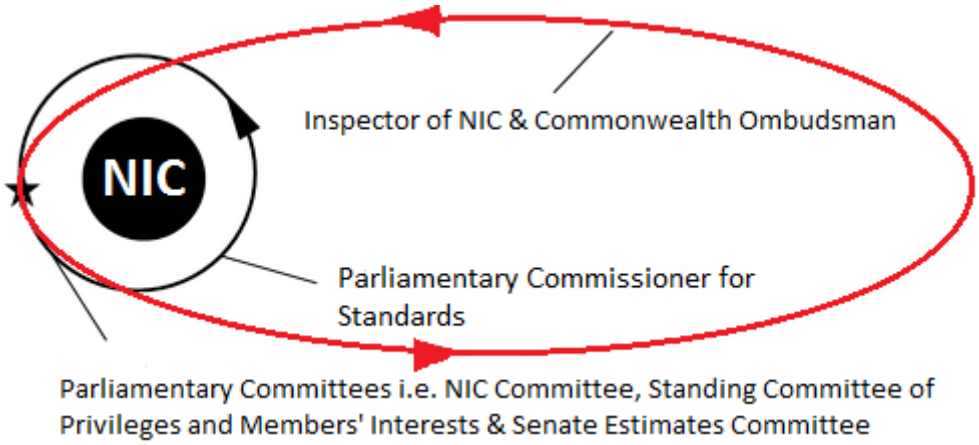
As I will examine in greater detail later on in this paper, I support a Parliamentary Commissioner for Standards to capture complaints and to forward more serious matters to the non-prosecutorial Commonwealth NIC. The creation of an Inspector of NIC could then be utilised to oversight the entire process and the existing Commonwealth Ombudsman to capture any complaints made to them.

The Inspector of NIC will perform their duties much like their equivalent the Inspector of ICAC.[3] The Inspector is an independent statutory officer whose duty is to hold the NIC

[3] Levine, Honourable David *The Inspector of the Independent Commission Against Corruption* [Last accessed 180416] http://www.oiicac.nsw.gov.au/

accountable in the way they carry out their functions. This can be set out when a legislation is created (i.e. *National Integrity Commission Act*). The Inspector's job is to undertake audits and ensure compliance, deal with complaints regarding the conduct of officers and proceedings and assess the NIC's effectiveness. Their powers are extensive to include investigation and can sit as a Royal Commissioner so as to conduct investigations while respecting the NIC's authority to continue with their independence. The Inspector's accountablity lies primarily with what will be a newly established bi-partisan NIC Committee.[4] The Committee's duties are to appoint a new Inspector, monitor and review the Inspector's functions while reporting back to both Houses.They will also conduct research to highlight trends and changes in corrupt behaviour over the years.

Annual oversight and audit meetings with the NIC Committee, Standing Committee of Privileges and Members' Interests or Estimates Committee must also be conducted and present itself at a critical meeting point where all parties will meet and have their say as demonstrated in my diagram below. This in effect creates a trinity grouping of different bodies that will oversight procedural complaints, investigations and their subsequent hearings.



The other point of contention is jurisdiction. Other state based anti-corruption agencies and commissions like the ICACs in NSW and South Australia as well as the Independent Broad-based Anti-corruption Commission in Victoria, the Corruption and Crime Commission in WA, Corruption Prevention Network Queensland will clash with a Commonwealth NIC.[5] A strict National Law[6] will need to be imposed so as to create a framework whereby state matters will fall within the jurisdiction of their own agencies. If there is a need for collaboration due to possible cases involving alleged corrupt collusion between state, commonwealth public officials and MPs then an overriding NIC legislation will outline the presentation of evidence to the Commonwealth DPP.

[4] A provision already exists with the NSW ICAC guided by the *Independent Commission Against Corruption Act 1988* ss64A and 64 whereby

[5] The question also exist as to how other states and territories absent of a legitimatised and well-funded anti-corruption agency will cope under these conditions

[6] The format of A National Law in practice already exists in health with the *Health Practitioner Regulation National Law Act* amongst various states and territories

2.
The Definition of Corrupt Conduct under the *NSW ICAC Act* 1988

When defining corruption as a guideline for the operations of the NIC, the state of NSW came across some difficulties of its own. In 2005 then NSW Premier Morris Iemma asked senior counsel Bruce McClintock to conduct a comprehensive review of the *NSW ICAC Act* of 1988 as it relates to the re-examination of the definition of *corrupt* conduct under s8(1). The provision basically states that corrupt conduct is conduct which adversely affects whether it be directly or indirectly, whether it been from a public official or not the "honest or impartial exercise of official functions by any public official." This was a major point of contention in the recent *Cunneen* case.

> *8 General nature of corrupt conduct*
>
> *(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.*

The conclusion by McClintock was that the current definition could not be improved. However when the NSW ICAC Inspector Graham Kelly stepped down in 2008, calls for changing the definition of *corrupt conduct* were voiced once again and this time by Kelly. This raises the question concerning the current definition of corrupt conduct as being too broad and which could lead to the ruin of many politicians based upon a NSW ICAC finding that is absent of any conviction by the DPP. In 2009 Frank Terenzini, Labor MP for Maitland and chair of the all-party parliamentary committee on the NSW ICAC made the suggestion that a two-tier system should be incorporated as to diminish the onset of trivial complaints. Two benchmarks were proposed in brief, one that is relevant to public servants and secondly the general public who make allegations of corrupt conduct.

In the Final Report made by Bruce McClintock, SC on an Independent review of the *Independent Commission Against Corruption Act* 1988 January 2005, it clearly stated that the main functions of the NSW ICAC were-

- Investigation[7]

[7] *NSW ICAC Act 1988* s13(1)

- Corruption prevention and education[8]
- Gather and assemble evidence furnished for the DPP & Criminal prosecutions[9]

The third point regarding 'Criminal prosecution' has been prone to much criticism in the past based upon the following point made by McClintock that there was a-

> "... low number of criminal convictions arising from findings of corrupt conduct and the long delay between publication of an ICAC investigation report and the initiation of criminal proceedings."[10]

However a low number of criminal convictions may also suggest that the NSW ICAC may have been incorrect in their findings. A sample of 69 persons subject to an investigation between 1998 and 2003 by the NSW ICAC saw 29 (42%) subsequent convictions and 40 (58%) who were not prosecuted or that their prosecution were unsuccessful.[11] However between 2009 and 2014 the NSW ICAC referred 31 matters to the NSW DPP and sought advice on whether prosecution should be brought against 70 persons.[12] Out of this number the DPP declined to commence prosecutions against 22 persons, 36 were convicted, 4 found not guilty and 1 was convicted but later had their conviction quashed and 7 at the time have yet to be tried. The number of successful convictions in the years 2009-2014 in comparison to 1998-2003 rose by 57%.

CONCLUSION – Anti-Corruption agencies are not infallible

The low rate of convictions as emphasised by McClintock and others presents a distorted view that an ICAC or NIC should be infallible when confronted with contrary views from their respective State and Commonwealth DPPs alike. This goes against our common law system of natural justice and equal legal representation. More importantly it goes against our primary legal principle of the presumption of innocence.

3.
Balog Case – The Early Days of NSW ICAC

In the case of *Balog v Independent Commission Against Corruption*[13] the High Court held that the NSW ICAC was not entitled to report pursuant to s74 any statements alluding to any person stating that they were found guilty of a criminal offence or corrupt behaviour by the Commission. At the time s74(5) was in place it stated that the NSW ICAC could only make a finding concerning criminal liability if there was sufficient evidence to warrant consideration for a prosecution for a specified offence. The High Court noted that the NSW ICAC was an

[8] *NSW ICAC Act 1988* s13(1)(k)
[9] *NSW ICAC Act 1988* s14(1)(a)
[10] McClintock SC, Bruce *Independent review of the Independent Commission Against Corruption Act 1988, Final Report,* January 2005, p.31 at 3.1.6
[11] Ibid, p.40 at 3.4.28
[12] Law Society of NSW, Young Lawyers Submission to the Criminal Law Committee, Public Law & Government Committee, *Submission to the NSW Parliament Committee on the Independent Commission Against Corruption*, Parliament of New South Wales, 15 August 2014, p.4
[13] [1990] 169 CLR 625.

investigative body and not a law enforcement agency. It possessed no judicial or quasi-judicial function and that its investigative powers carried with it no implication but merely a recommendation to prosecute further.[14] However the 1990 amendments to the *NSW ICAC Act* to omit s74(5) meant a report could be made under s74A "without first informing the plaintiffs of any adverse findings which it might make under that section and giving the plaintiffs an opportunity to be further heard."[15] Coupled with the corruption finding powers under s13(2)(a) this led to unrestrained investigative powers as to whether or not a corrupt conduct had actually occurred. What then transpires was that the function of the NSW ICAC had evolved into an agency which communicates the results of its findings under s13(1)(c) but based upon its considerable coercive powers outside the confines and protections of our common law system. The main powers that are available to the NSW ICAC as an agency and not to other agencies like the Ombudsman or even the Auditor General are as follows. The NSW ICAC has coercive powers to conduct covet investigations, it can compel production of documents and answers, it can expose its findings and it can utilise what it has uncovered or gained from its investigations to inform corruption prevention and educational programs.[16] It is not designed to replace other criminal justice institutions and oversight agencies but rather to complement them which begs the question is the NSW ICAC is susceptible to overreaching its original principles?

CONCLUSION – NIC should just be an *Investigative Body* not a *Law Enforcement Agency*

The question is whether the NIC should be deemed an investigative body or a law enforcement agency. The NSW ICAC holds no judicial function. Should the NIC maintain a similar structure? Yes, since a law enforcement agency will also have the power to prosecute. The NSW ICAC already possesses considerable and problematic coercive powers which allows investigations to be conducted without an opportunity for plaintiffs to be aware as to any adverse findings thus overriding common law principles. The component within our concept of natural justice is that parties are given ample time to prepare and to ready themselves like in the instance where a witness is given fair warning to justify any contradictions between their evidence & their testimony, *Browne v Dunn*.[17] Such coercive powers creates an inconsistency within our judicial system, especially in light of the low number of convictions the NSW ICAC has had in the past one begins to question the effectiveness of such a systemic process which borders on the arbitrariness of a Star Chamber.

4.
NSW ICAC's Failure to Interpret Intention and Jurisdiction

Significant amendments to the *NSW ICAC Act* were made in 2005 following criticisms made by Gleeson CJ in *Greiner v Independent Commission Against Corruption.*[18] This case argued that to base a finding of corrupt conduct on the possibility that a relevant conduct had

[14] Ibid at [636]
[15] Independent Commission Against Corruption, *Annual Report To 30 June 1991*, p.40
[16] McClintock, p.23 at 2.1.7
[17] (1893) 6 R 67
[18] (1992) 28 NSWLR 125 at 129-130.

occurred[19] would have meant that an act of unconditional corrupt conduct in form which was based on a premise which was conditional in substance, obscures whether or not there was ***actual intent***. The arrangement by Greiner and Environment Minister Tim Moore to provide Terry Metherell an executive position in the Environmental Protection Authority on the proviso that he resign his independent parliamentary seat was in the then NSW ICAC Commissioner Ian Temby's view not criminal nor intended to be corrupt but was "contrary to known and recognised standards of honesty and integrity."[20]

After threats of a vote of no confidence in Parliament led by the Independents and Labor MPs, Greiner resigned but later lodged a case with the New South Wales Supreme Court and winning on the basis that the NSW ICAC had ***exceeded its jurisdiction*** even though the Commissioner argued that the 'jobs for the boys' mentality were actions stepping outside the requirements of the *Public Sector Management Act.* Furthermore Gleeson CJ stated that the NSW ICAC Commissioner was not objective and did not use legally recognised standards in his conclusions but had merely expressed his own "personal and subjective opinion."[21] The amendments which followed creates the framework for the NSW ICAC to report a finding when a person has engaged in corrupt conduct and only if the conduct constitutes in a relevant way a criminal offence, s13(3A) and s9(5)[22] From this case we can observe the complicated interlocking elements which require careful consideration and interpretation; ***intent and jurisdiction***.

When examining issues to do with ***intent*** one recent case which demonstrates the tensions associated with the NSW ICAC's interpretation of the law was *D'Amore v Independent Commission Against Corruption.*[23] The NSW ICAC sought with respect to the prosecution of Ms D'Amore for two common law offences of misconduct in public office. The facts of this matter as it was presented in the NSW ICAC was that Sitting Day Relief entitlement ("SDR") forms were completed by Ms D'Amore's staff so as to provide a third staff member as a temporary officer in the electorate office for when the MP would bring their permanent electorate officers to Parliament House on sitting days. This was introduced in 2006. The forms were incorrectly filled out by Ms D'Amore's staff and Ms D'Amore signed these documents trusting that they have been filled out correctly. It was argued that there was no wilful dishonest intent to make any false claims so as to misrepresent or defraud the NSW Parliament of SDR entitlements. It also begs the questions why didn't anyone at the NSW Parliament House bureaucracy sought it fit to inform the electorate office that a form had been incorrectly filled out at the time? In a case taken by Ms D'Amore against the NSW ICAC McClellan CJ argued that-

> "…the jurisdictional facts created by ss 13(3A) and 9(5) (of the ICAC Act) will be found to exist where the Commission forms, in good faith, an evaluative judgment that the person under investigation has committed an offence or breached an identified law,

[19] Hansard Transcript (Legislative Assembly, 23 February 2005), *Independent Commission Against Corruption Amendment Bill*, Second Reading.
[20] Independent Commission Against Corruption (19 June 1992). *Report on Investigation into the Metherell Resignation and Appointment*, at 57-8.
[21] (1992) 28 NSWLR 125 at 141.
[22] *Independent Commission Against Corruption Amendment Act 2005 No 10.*
[23] [2012] NSWSC 473.

> provided the Commission has properly construed relevant criteria such as the elements of the offence or the requirements of the identified law." At [75]

Ms D'Amore took the matter to the Supreme Court claiming that findings of "corrupt conduct" were invalid due to jurisdictional error. The issue revolved around ICAC's power in making their findings based on jurisdictional fact and whether it was made on the basis of no evidence or no rationally probative evidence resulting in an irrational or illogical reasoning process following *Citizenship v SZMDS*. [24] The matter was dismissed at the first instance and failed in the appeals process. The Court found that ICAC's findings was based on rationally probative evidence: at [88] and [96]. Following the case in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 1Q; (2010) 240 CLR 611), the Court concluded that the conclusion made by the Commission "was not irrational or illogical."[25] The NSW ICAC in the Court's opinion had made their findings based on "jurisdictional fact" and "in good faith" based on "rationally probative evidence." However the Department of Public Prosecution (DPP) advised the NSW ICAC that there was insufficient evidence to support a criminal prosecution based on the NSW ICAC's adverse findings lending credence to the argument that the actions were technically negligent and careless, not corrupt or an act of clear misconduct. The NSW ICAC has yet to publically exonerate Ms D'Amore by lifting their findings other than accept the decision of the DPP on their website.[26]

This case presents some legal quandaries in relation to anti-corruption agencies. Civil law and criminal law differ in terms of their objectives when seeking to pursue, redress or punish. In the case of *D'Amore* there is an obvious disjuncture between the findings of the NSW ICAC and the DPP declining to pursue the matter in a criminal court. In any criminal court the onus of proof lies with the prosecution. This means that a prosecution must demonstrate in a court of law that the accused is guilty beyond a 'reasonable doubt.' A civil action is more closely related to the issue of damages. The bar of evidence appears to be far higher in a criminal case than a civil case where the burden of proof is on the balance of probabilities and the scope for negligence could be argued. Negligence or an action in tort relates to a failure to act in a reasonable fashion that is foreseeable whereby the risk of such an action could be avoided. Acts of corruption could also be mistaken as acts of administrative and systematic failure or a simple mistake as filling a form incorrectly where no real financial gain had been achieved (*D'Amore v Independent Commission Against Corruption*). Obviously this goes back to the fundamental legal principles of intent and mens rea which refers to the state of mind of the accused and the determining factors relating to whether or not the state of mind was in fact a 'guilty mind.' An act of negligence does not require a guilty mind but a careless mind. Corruption in this context fundamentally relates to conduct which is designed by a third party to affect the honesty and impartiality of a public official's conduct in authority via inducements or payments with the intent to affect a favourable outcome for the said third party. So it would appear we have an agency with no power to prosecute but utilises a civil principle of proof to appeal to the DPP who has the power to prosecute but utilises a criminal burden of prove. Here lies the disjuncture.

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[24] [2010] HCA 16; (2010) 240 CLR 611.
[25] [2012] NSWSC 473 at 95.
[26] ICAC "Recommendations for prosecutions and updates"
http://www.icac.nsw.gov.au/component/investigations/article/3792?Itemid=0 [Last accessed 180416]

In the case of *Independent Commission of Corruption v Cunneen & Ors*[27] more problems arise as to the various elements concerning the concepts of efficacy and probity and how they relate to "corrupt conduct" that "adversely affects" "the exercise of official functions by any public official" under s8(2) of the *NSW ICAC Act*. In the first review of the NSW ICAC's powers since its inception by the High Court the Court felt that probity related more to acts considered as corrupt and that in this case Cunneen wasn't a police officer but her advice to a young lady to feign a chest problem so as to avoid being tested for alcohol consumption could have an effect on the efficacy or the efficiency of administrating justice by the police officer who pulled over this young lady in question. The Court decided that Cunneen's actions were not corrupt. One may argue that this matter relates more to an issue of candour and ethics for a legal practitioner to allegedly known to be subverting the course of justice rather than a public official committing an act of corruption.

This was an issue concerning a third party but not as the *NSW ICAC Act* was designed to deal with thus equating to the argument that the NSW ICAC had over reached their powers by focusing on the actions between private citizens. In short the Court decided that a private citizen can only be investigated if their actions impacts directly on the probity of a public official's conduct. This resulted in the NSW Parliament and a bipartisan decision to pass the *Independent Commission against Corruption Amendment (Validation) Bill 2015* on 6 May 2015 which validates all the NSW ICAC findings prior to the 15 April 2015 the date of the Cunneen judgement and actions to date in current inquiries.

CONCLUSION – There needs to be a consistent Burden of Proof between NIC and the Commonwealth DPP

These cases highlights the differing burden of proof between an ICAC and the DPP whereby the bar is much higher for the later as it relates to "beyond a reasonable doubt". Ultimately the question would be is there a 'case to answer' or 'no case to answer'? The more serious the allegations made in pleadings the more persuasive the supporting evidence must be. 'He who asserts must prove.' In a civil case the burden rest on the plaintiff, in a criminal case it rest on the prosecution. In effect whichever party who discharges their burden successfully wins the case. The NIC will be confronted with the notion of whether or not it should solely adopt the *Briginshaw v Briginshaw*[28] principle of "on the balance of probability" and the gravity of consequences flowing under the auspice of s140 of the *Evidence Act* 1995. To be subject to a higher bar would only open up the argument that all state ICACs and the NIC should adopt prosecutorial powers. Furthermore the case of *Cunnenn* demonstrates a clear boundary for the NSW ICAC not to have breached. The NIC should also fall within these boundaries so as not to bring jurisdictional confusion after the recent High Court decision as this may open up a can of worms concerning whether or not legislations in the States should be amended and what limits exist if any retrospectively for cases which has since been determined.

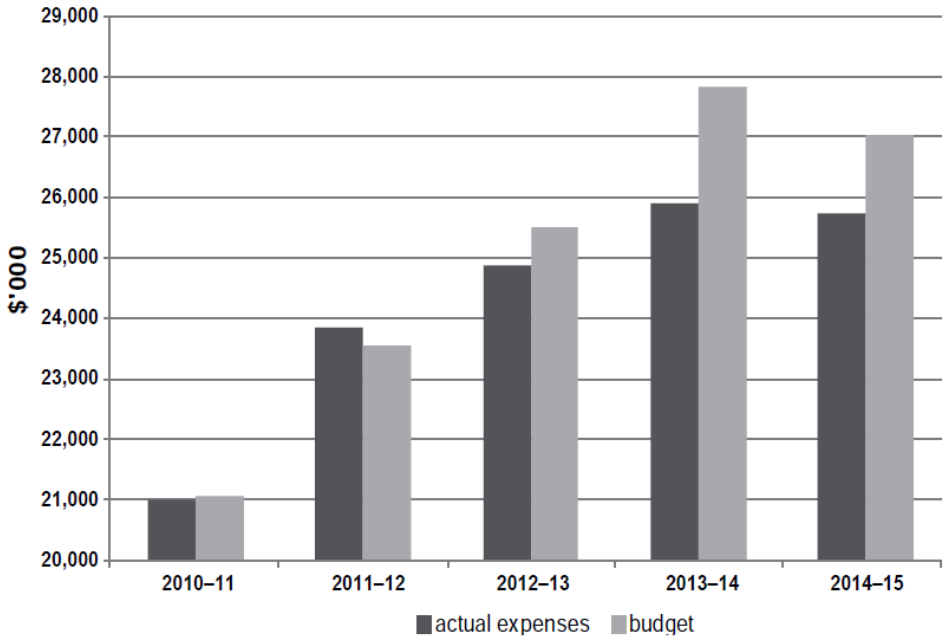
[27] [2015] HCA 14.
[28] (1938) 60 CLR 336

5.
What the NIC can or can't do

What such continual refinements and inconsistencies in the NSW ICAC's history demonstrates are the inherent uncertainties as to what an agency like the NSW ICAC or NIC can or can't do with their legislative and regulatory powers to investigate and subsequently form a binding decision. What we have just examined were three cases which show ICAC's inability to complete, a weakness in its conclusions to come to full closure with respect to their findings in the higher courts when considering the cases of Griener and Cunneen. As well as the DPP's inaction to prosecute in the case of D'Amore due to a lack of evidence has led to suggest that there was some credibility in the argument that there was no intention by the parties to make a false claim to either misrepresent or defraud the NSW Parliament.

The NSW ICAC has clearly failed in all three cases and the reason has been an excessiveness on the part of the NSW ICAC to literally attempt to ***'swat a fly with a sledgehammer'*** and present this whole process to the general public as 'educational' while spending millions of taxpayer's money. And what lesson was learnt from this very expensive education? In the last the NSW ICAC Annual Report indications suggest that the NSW ICAC has fallen under budget since 2012-13. The expenditure is still quite high exceeding twenty million plus annually since 2010-11. Creating a Parliamentary Commissioner for Standards will not lessen the costs by any means. Below is a diagram which demonstrates the 'Total expenditure budget and actuals' for the NSW ICAC[29]-

Figure 1: Total expenditure budget and actuals



I have indicated before we mustn't assume that 'success' should be measured in terms of cost and convictions as no commission is infallible, no decision final unless determined by our High Court. To accept this assumption would negate the necessity for any appeals avenue and in some cases have a defendant be exonerated if it was determined a judge in the lower courts

[29] Independent Commission Against Corruption, *Annual Report 2014-2015*, p.12

had erred in their decision. The clash that exist between the NSW ICAC and the NSW DPP for example can be identified as it relates to how evidence is gathered. There is also the issue of what constitutes a guilty mind in the context of a corrupt action when a legal defence has been constructed with the argument that the act itself was not wilful but merely negligent and careless. With the burden of proof lower in an ICAC inquiry and higher during a DPP court hearing, the credibility of effecting cultural change renders ICAC a toothless tiger. When examining what powers the NIC should possess so as to become a more effective body we should examine if it should possess the power to prosecute. The problem of uniformity and consistency associated with this relates to other Commissions such as the NSW Crime Commission and if they should in fact possess similar powers. The obvious overseas example is the Hong Kong ICAC. However to provide agencies like the NIC and other state ICACs the power to prosecute may well create a domino effect raising the question should other Commissions follow suit?

If the NIC were to possess prosecution powers then wouldn't it stand that it should also follow our common law system? Take the case of *Browne v. Dunn*[30] which is a British House of Lords decision. It had a profound effect on the rules of cross examination in our Australian common law system. The rule in effect says that counsel cannot surprise a witness under cross-examination that is contradictory to the testimony of a witness without first putting forward that evidence to the witness, so as to allow the witness a fair opportunity to prepare and justify any suggested contradictions placed upon them by the opposing party. When investigating, the NSW ICAC possesses statutory powers to compel witnesses to answer questions at compulsory examinations (private hearings) or public inquiries. This becomes a potent tool for gathering information but could also be deemed contrary to the *Browne v Dunn Rule* when taken into consideration various state ICAC's powers that use surveillance devices and interception of telephone calls under the *Telecommunications (Interception and Access) Act 1979* (Cwlth). To compel a witness to answer questions can at times mean surprising them with a recording of a telephone conversation to demonstrate during a hearing a contradiction which may exist in the witness' testimony without forewarning. By doing so it diminishes the witness' credibility in the eyes of the Commissioner. Questions still need to be asked if a NSW ICAC public inquiry is actually designed to provide a prima facie case to present to the NSW DPP and not a product of natural justice in itself. Are NSW ICAC's decisions pre-determined and a public inquiry merely an indicator that the party in question in their opinion had committed an act of misconduct or corruption?

CONCLUSION – NIC does not require to prosecute

Only prosecutorial bodies like the police and the DPP should have the power to instigate a criminal prosecution. Investigative bodies like the NSW ICAC and past Police Integrity Commission (PIC) have existed with strong and some might say over-reaching investigative powers in the past. NSW Attorney-General Gabrielle Upton had proposed to amend the *Criminal Procedure Act 1986 (NSW)* to give the NSW ICAC and PIC the power to press charges for common law offences inclusive of serving a court attendance notice followed by the NSW DPP to prosecute a case in a timely manner. This has been supported by Barrister Bruce McClintock SC.

[30] (1893) 6 R. 67, H.L.

However this takes away from the autonomy of a prosecuting body to independently assess the merit of any investigation conducted by the NSW ICAC. Both Barrister Charles Waterstreet and former director of the DPP Nicholas Cowdery QC have expressed similar thoughts. Prosecuting bodies should be beholden and objectively guided by the principles of criminal law and not influenced by political objectives. At the time of writing NSW Attorney-General Gabrielle Upton has only agreed with the alternative option that the ICAC and PIC will only be able commence proceedings if the DPP approves and allows it.

Part 2 - Hong Kong

6.
HK ICAC - The Power to Prosecute

The HK ICAC may not be an appropriate comparison when establishing whether or not the NIC should possess prosecutorial powers. This is based upon the socio-economic histrionics which influenced the HK ICAC's formation in the first place. The HK ICAC was established in 1974 amidst an atmosphere of systemic corruption within the police force whereby money was extorted by constables on the streets which would then be syphoned up through the ranks and to the highest levels of the agency.[31] Historically going back to the colony's creation in 1842 a culture of extortion and the payment of illicit fees to government officials had existed and thrived.[32] The British colonial policy was to not disturb such 'Chinese customary practices' unless it directly affected the colonial law enforcement agencies and became an epidemic. Prior to HK ICAC's establishment the Anti-Corruption Branch of the Police was given the authority to investigate. This was problematic since the catalyst for the creation of the HK ICAC was in fact police corruption and not necessarily politicians.

A Commission of Enquiry into the 1966 Star Ferry Riots was a turning point when it became clear that there was widespread mistrust and even hatred towards the police because of past practices of extortion.[33] What occurred over three nights on the streets of Kowloon on the mainland within Hong Kong borders was a peaceful demonstration against the British colonial government's decision to increase the fare of the Star Ferry which transported citizens daily between the island and the mainland by 25%. There were 332 people sentenced to imprisonment most of whom breached curfew with an additional 59 convicted for serious offences of disorderly conduct like larceny and malicious damage. The vast majority were "young, poorly-educated, poorly-paid, inadequately-housed, over-worked males"[34] and who as a result were vulnerable to intimidation and extortion by a corrupt law enforcement.

[31] Lethbridge, Henry *Hard Graft in Hong Kong* (Hong Kong: Oxford University Press, 1985) passim
[32] Scott, Ian *Corruption Control in Hong Kong Rules, Regulations and Policies*, Department of Public and Social Administration, City University of Hong Kong, December 2011, p.1.
[33] Hong Kong Government, *Kowloon disturbances 1966: report of the Commission of Inquiry* (Hong Kong: Government Printer, 1967); Sir Lindsay Ride, *Papers of Sir Lindsay Ride*, Hong Kong collection, University Press, 2003) passim
[34] Scott, Ian *Political Change and the Crisis of Legitimacy in Hong Kong*, University of Hawaii, December 1989, p89

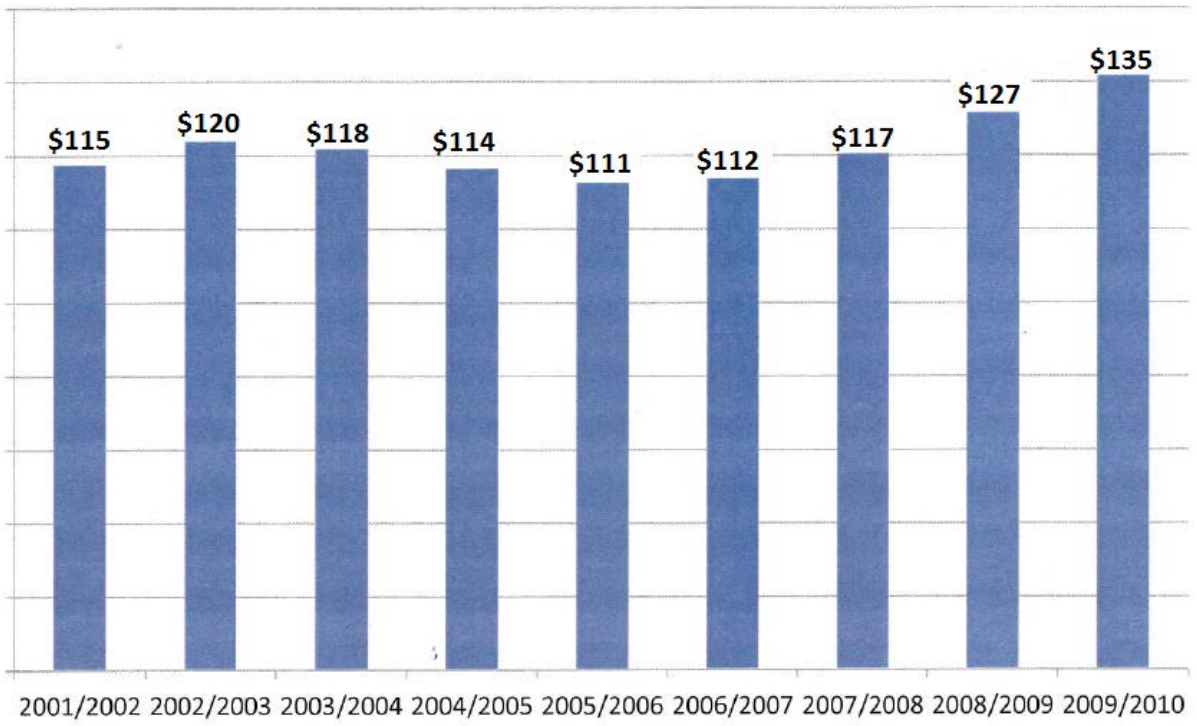
The *Prevention of Bribery Ordinance* (POBO) was the first real legislative step towards controlling corrupt behaviour in Hong Kong surpassing *The Prevention of Corruption Ordinance* of 1948 which defined corruption exclusively in terms of bribery and the payment of a bribe to a civil servant."[35] With its introduction in October 1970 the then Attorney General Denys Roberts thought it was "novel"[36] as there was no mention of the word corruption or bribery as far as it relates to an offence but the Ordinance does define corruption as an act of bribery. It also widen the investigative powers of the police which may as the Attorney General stated inconvenience the public with "some infringement of traditional liberty and privacy involved, then I believe it is a price which the community ought to be prepared to pay, if it really wishes to see corruption ousted from our daily life."[37] Such infringements include powers to investigate bank accounts, tax returns, property and other expenses which by today's standards is common legal practices amongst some of our various commissions from ICAC to ASIC.

It has been suggested that this was done deliberately so as to "overcome the problems of judicial representation that had arisen with the words 'corruptly accept' in *The Prevention of Corruption Ordinance*."[38] Under s4 of the POBO to accept "an advantage" had a wide definition removing the need to prove specific intent which was a requirement under the "corruptly accept" provision of the previous legislation and "removed the need to prove a connection between acceptance of a bribe and the performance of official functions."[39] When prosecuting a civil servant it was only required to show that they had obtained an "advantage." Hence the onus shifts whereby the "only defence is lawful authority or reasonable excuse and the burden of establishing this proof is on the defence."[40] This appears contrary to the Australian common law system but when we examined the NSW ICAC and the differing burdens of proof with the NSW DPP, then the similarities starts to take form but only up until to the power to prosecute.

The eventual creation of the HK ICAC came to fruition when the Chief Superintendent in the Hong Kong Police Force Peter Godber was issued with a notice under s10 of the POBO concerning the possession of unexplained property and the existence of disproportionate assets when compared with his official income. Godber first fled to Britain only to be extradited back to Hong Kong in January 1975 to face trial in Hong Kong and eventually served four years in jail.[41] In the four months from October 1973 to February 1974 Hong Kong citizens saw the creation of the HK ICAC without a single dissenting voice in their Legislative Council.[42] It was an independent body whose Commissioner reported directly to the Hong Kong Governor.

[35] Scott (2011), op.cit., p.2.
[36] Hong Kong Hansard 21 October, 1970, p.143.
[37] Ibid, p.133, 137.
[38] Scott (2011), op.cit., p.5.
[39] Ibid.
[40] McWalters, Ian *Bribery and Corruption Law in Hong Kong* (Hong Kong: LexisNexis, 2010) Second edition, p.19.
[41] Blair-Kerr, Sir Alastair *Second Report of the Commission of Inquiry* (Hong Kong: Government Printer, September 1973) p.3-11
[42] Scott (2011), op.cit., p.11.

Early amendments were made in 1976 whereby the HK ICAC could make arrests like their policing counterparts. Regardless of anonymity the HK ICAC was required to investigate any corruption reports. Investigation of private sector corruption suddenly grew after 1984. By 1997 there were fears that the HK ICAC could not cope with the possible rise of cross-border corruption when Hong Kong resumed its Chinese sovereignty. A rise did occur but it wasn't as significant as expected.[43] However in 1995 the Chinese Deputy state prosecutor made the comment that cases involving a mainland firm in Hong Kong should be dealt with by Beijing and not the HK ICAC.[44] Between the years of 2001 to 2010 the HK ICAC budget in Australian dollars grew from $115 million to $135 million.[45]



CONCLUSION – NIC should not investigate corruption in the police force

The population in Hong Kong was 7,234,800 in 2014.[46] This is in stark contrast to Australia's population being 24,048,616 in 2016.[47] The HK ICAC has prosecutorial powers and investigates private sector corruption with a budget of over $100 million AUS. In comparison the NSW ICAC's budget in recent years has been pushing close to $30 million AUS and the population of NSW is similar to Hong Kong standing at 7,565,500 in 2014.[48]

[43] Ibid, p.21.
[44] Horlemann, Ralf *Hong Kong's Transition to Chinese Rule* (London: RoutledgeCurzon, 2003) p.36
[45] As adjusted from Hong Kong dollars, Scott (2011), op.cit., p.26.
[46] Hong Kong Census and Statistics Department "Mid-year Population for 2014 [12 Aug 2014]" [Last accessed 180416]
http://www.censtatd.gov.hk/press_release/pressReleaseDetail.jsp?charsetID=1&pressRID=3461
[47] Australian Bureau of Statistics, "Population Clock" [Last accessed 180416]
http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument
[48] Australian Bureau of Statistics, "3101.0 - Australian Demographic Statistics, Sep 2015" [Last accessed 180416]
http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/

The cost of running a NIC with prosecutorial powers will have an impact on the tax payer. But is the HK ICAC a fair comparison? I would argue that it isn't. This is due to the differences in our history of corrupt behaviour. There has been inquiries in Australia's past which dealt with police misconduct. The more well-known ones have been the Fitzgerald Inquiry into "Possible Illegal Activities and Associated Police Misconduct" (1987-89).[49] The processes are already in place to tackle corruption in the Australian police force with such commands like the Special Crime and Internal Affairs (SCIA) in NSW so there is no need for doubling up with NIC. The NIC should maintain its focus as it relates to public officials and not the police.

Part 3 - UK

7.

UK Parliamentary Standards Commissioner and The Independent Parliamentary Standards Authority

My support for a Parliamentary Standards Commissioner for the NIC is largely inspired by an equivalent role for such an officer existing in the British House of Commons.[50] It has also been put forward by the Clerk of the Parliaments, Legislative Council Parliament of New South Wales David Blunt in a paper recommending an adoption of the UK model for the state of NSW.[51] I too see its merits however the UK model is still vulnerable to public opinion and other flaws. But it remains a useful guide as to how the NIC can be assisted and what troubles it may face in the future if created. The Parliamentary Standards Commissioner's primary role is to help regulate MPs' conduct and propriety by overseeing the Register of Member's Interests. This registrar ensures that there is transparency in regard to the ***financial interests in association to a MPs' Parliamentary duties***. Their appointment is made by a Resolution via the House of Commons. For the House of Lords there is a Lords Commissioner for Standards[52] which would be the equivalent of an overseer for the Senate in Australia. We will only require a Parliamentary Standards Commissioner for both Australian houses as our MPs and Senators amount to 226 while the UK Parliament has 1,462 Lords Temporal and Spiritual as well as MPs.

The Parliamentary Standards Commissioner at the British House of Commons investigates alleged breaches of the Rules of Conduct as set out in Part V[53] of the *House of Commons Code of Conduct*. Making a complaint is open to both the public and other MPs but not allowed from an anonymous source, an agency or on behalf of another person. A decision to pursue

[49] Fitzgerald, G.E. (Chairman), *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct 3 July, 1989*, Premier Department passim
[50] UK Parliament, "Parliamentary Commissioner for Standards" http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/ [Last accessed 180416]
[51] Blunt, 2013 op.cit., passim
[52] UK Parliament, "House of Lords Standards and Interests" http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/the-commissioner-for-standards/ [Last accessed 180416]
[53] UK Parliament, "The Code of Conduct for Members of Parliament" http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107602.htm#a5 [Last accessed180416]

a matter is dependent upon the evidence given and the Commissioner's discretion. The Commissioner will then report on any breaches of Parliamentary privileges to either the Committee on Standards or the Committee on Privileges. The UK Committee will then consider the report and any penalties and report their conclusions to the House and then it will be for the House to decide whether to impose that penalty or not.

For example in 2015 Labor MP Jack Straw and Conservative MP Sir Malcolm Rifkind were contacted separately by The Daily Telegraph and Channel 4 News posing as representatives of a bogus Chinese company (PMR) who said they wanted to set up an advisory council. Cash for access, questions and in this case cash for doing parliamentary work was being scrutinised by these media outlets. Their conversations were recorded. Straw was heard implying he received payment in return of Parliamentary influence, "£5,000 for preparing and delivering a speech" and that he was paid £60,000 p.a. for his work for ED&F Man.[54] It was also alleged that Rifkind "had offered to use his position as a politician to lobby on behalf of (this) fictitious Chinese company (PMR) in return for payment."[55]

What the media had claimed to be exposing were the methods of lobbying which could include letters sent and presentations made but doesn't necessarily deter receiving money. UK MPs can be remunerated via employment outside Parliament provided they register their financial interests. MPs can also work as consultants and be paid to provide advice but cannot act as a paid advocate for speaking in the House and effecting legislative change. Accordingly the Code of Conduct Rules covering this aspects is -

- 14. Information which Members receive in confidence in the course of their parliamentary duties should be used only in connection with those duties. Such information must never be used for the purpose of financial gain.[56]

The House of Commons Committee on Standards reported that both of Straw's figures he had mentioned during his recorded conversations with the fake Chinese company reps were reflected in his entries in the Register of Members' Financial Interests and that the rules of the House permits MPs "subject to certain conditions, to take on external employment."[57] Both Rifkind and Straw were cleared of any breach of the Code of Conduct since they could find no clear evidence to suggest that their conduct "in itself, caused significant damage to the reputation and integrity of the House as a whole, or to other Members generally."[58]

The Code of Conduct Rules referred to were rules -

- 13. "…to fulfil conscientiously the requirements of the House in respect of the registration of interests…"

[54] House of Commons Committee on Standards, *Sir Malcolm Rifkind and Mr Jack Straw First Report of Session 2015–16*, Published on 17 September 2015, p.45
[55] Ibid, p.6
[56] UK Parliament, "The Code of Conduct for Members of Parliament - V. Rules of Conduct" http://www.publications.parliament.uk/pa/cm201012/cmcode/1885/188502.htm [Last accessed 180416]
[57] House of Commons Committee on Standards, (2015), op.cit., p.36
[58] Ibid, p.55

- 15. "…are personally responsible and accountable for ensuring that their use of any expenses, allowances, facilities and services provided from the public purse is in accordance with the rules laid down…"
- 16. "…shall never undertake any action which would cause significant damage to the reputation and integrity of the House of Commons…"[59]

An act of *serious misconduct* is required to show that the rules had been breached but in this instance no member were "caught within the letter of other existing rules." What the Committee did add was that the "distorted coverage of the actions and words of the Members concerned had itself been the main cause of the damage." However the allegation created enough damage to Rifkind who effectively ended his career as a politician and caused enough damage in the eyes of the public diminishing their trust for their Parliamentarians. The excessive public expenditure and costs to all parties had been high. In the matter of Rifkind and Straw the Standards Committee highlighted the fact that the media reportage had resulted in a presumption of guilt in the public's eyes with extreme adverse effect "before any authoritative examination of the facts had taken place. This damage would have been limited if the Commissioner had had the opportunity to investigate before people rushed to judgment."[60] Would a private hearing make any difference in light of this remains speculative.

The Independent Parliamentary Standards Authority (IPSA) is an independent body designed to monitor the ***expense schemes*** for all MPs of the House of Commons. The catalyst for such an agency stemmed from the 2009 UK parliamentary expenses scandal. Former senior civil servant Sir Thomas Legg headed a panel to investigate claims disclosing the misuse of allowances and expenses permitted by UK MPs after an Information Tribunal allowed a *Freedom of Information Act* request to release such details. Subsequently the House of Commons lost a legal case in the High Court to prevent the disclosure where most claims revolved around second homes in London over the past five years.[61] Sir Legg ordered 390 MPs, over a half, to payback £1.3 million as stated in the Additional Costs (or 'Second Homes') Allowance report.[62]

However the cost of the review itself was approximately £1.16 million.[63] There was some resistance by MPs because Sir Legg imposed retrospective rules previously allowed by the Commons authorities for what they could claim for, like £2,000 maximum for cleaning each year. The so called Legg audit was disputed. Cases arise and were reviewed by former judge Sir Paul Kennedy who was invited by the Commons to do so. Sir Paul concluded that it was too harsh in the Legg review that MPs' practices over the years should include behaviour for actions committed prior to these actions being outlawed. One example was for recouping claims made for rent paid to the family members of MPs before 2006. There were 73 MPs who appealed with 44 being successful in having their charges reduced or wiped clean.

[59] UK Parliament, "The Code of Conduct for Members of Parliament" http://www.publications.parliament.uk/pa/cm201012/cmcode/1885/188502.htm#a5 [Last accessed 180416]
[60] House of Commons Committee on Standards, 2015, op.cit., p.5
[61] *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin), [2009] 3 All ER 403 (DC)
[62] House of Commons Members Estimate Committee, *Review of past ACA payments, First Report of Session 2009-10*, London Stationary Office, February 2010, p.25
[63] Legg, Sir Thomas *ACA REVIEW Report*, Appendix 1, 1 February 2010. At 103.

Inconsistencies in retrospective claims extended beyond rent and included gardening and cleaning but not for food or mortgages.[64]

CONCLUSION – NIC's success should not be tied to budgetary costs and the number of convictions made by the Commonwealth DPP following their recommendations to prosecute

Subsequent in a UK study conducted by the London School of Economics on the electoral accountability of MPs in light of the UK Parliamentary Expenses Scandal reflected negatively. A "Populus poll taken soon after the scandal broke indicated that 86% of respondents "thought all the parties equally bad on expenses.""[65] The House of Commons Committee on Standards as shown in the Rifkind and Straw cases showed that what they had done were within their Code of Conduct. Regardless of what the public may think, due process and natural justice should always be maintained.

Australia's Standing Committee of Privileges and Members' Interests abides by the *Parliamentary Privileges Act 1987* and various standing orders in particular *standing orders 51* (when House is sitting) and *52* (when House is not sitting) with a breach required to be of a prima facie case in the eyes of the Speaker before it can be referred to the Committee. The role of the Committee in Australia is referred in *standing order 18*. There are 8 senators (4 from the government, 3 from the opposition and 1 from the independents) who sit and "investigate conduct which is apprehended to obstruct the work of the Senate."[66] It must receive a reference from the Senate to do so and as a high priority it will protect witness identities. A right of reply to any allegations can be provided as stipulated under *standing order 5.*

As I articulated earlier in this paper 'success' shouldn't be equated with the number of convictions an anti-corruption agency has 'achieved.' IPSA is not an infallible agency and nor are any other anti-corruption agencies like the NSW ICAC or a NIC for that matter. What this example demonstrates is the continual need for oversight. The other concern is the retrospective aspect of any investigation amidst parliamentary rules which frequently change.[67] How far back should one go? Sir Legg imposed retrospective rules and cost the taxpayer £1.16 million which was nearly the cost of the money alleged was owing by the MPs at £1.3 million. I would add that 'success' shouldn't be equated with the high cost of an investigation by an anti-corruption agency provided there was due diligence.

[64] Kennedy, Sir Paul *Review of past ACA Payments - Members Estimate Committee Contents, Appendix 2: ACA repayment appeals*, January 2010
http://www.publications.parliament.uk/pa/cm200910/cmselect/cmmemest/348/34806.htm
[Last accessed 180416]
[65] Eggers, Andrew & Fisher, Alexander., "Electoral Accountability and the UK Parliamentary Expenses Scandal: Did Voters Punish Corrupt MPs?"., *Department of Government, London School of Econo*mics, 2011 p.6
[66] Parliament of Australia, Standing Committee of Privileges and Members' Interests "Role of the Committee" [Last accessed 180416]
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Role_of_the_Committee
[67] This was so in the Australia with *D'Amore's* case when what was once deemed as misconduct by the NSW ICAC is now considered standard practice.

Conclusion

A National Integrity Commission should be designed to objectively investigate, reveal, educate and change any culture of corruption within the public sector. Parliamentarians are the custodian to its funding, to its appointment of a NIC Commissioner and a Commonwealth NIC Parliamentary Joint Committee created to examine the NIC effectiveness. One watches the other so to speak. The problems I examined should not be treated in isolation and separate from the NIC which will have to contend with if formed. This is demonstrated in the following –

- the NSW ICAC cannot prosecute but their bar of proof is too low to affect consistent convictions by the NSW DPP,
- the HK ICAC was born within a culture of extortion in the police force as well as within the parameters of criminal law so that a prosecutorial body that it became was a smooth transition, and
- the UK has created a Parliamentary Standards Commissioner in an attempt to lessen the weight of cases when trivial matters are presented

A NIC will have to contend with several issues. Here are some final points that it will need to consider for the NIC to become an effective agency -

1. An act of negligence to replace "misconduct" or "corrupt behaviour" only when proven that a politician has made a genuine mistake. This is to be followed by an educational program and necessary reimbursements by the alleged in order to fiscally correct whatever mistake was made
2. An independent Parliamentary Standards Commissioner to improve how complaints about MPs are to be considered for when the smaller complaints need to be filtered from the more serious allegations as opposed to being examined by the main body of the NIC
3. Hearings need to be closed until the final decision is made instead of open hearings supported by high media profiling which can lead to an assumption of guilt in the eyes of the public outside of due process and natural justice considerations

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