Submission for the Independent Review of the Integrity Commission and the Integrity Commission Act 2009.

I have previously made submissions to

(a) The Parliamentary Committee considering the establishment of an Integrity Commission. (2008?), and
(b) The Parliamentary Committee undertaking the three year review of the Integrity Commission and Act in October 2014.

My submissions in (a) were to the effect that the State did not need a full time Integrity Commission, that it was my opinion that Tasmania did not suffer from such widespread serious misconduct in the public sector as would call for the establishment of a full time commission with wide ranging powers and a number of permanent staff. Most examples of serious misconduct in public office or the public sector , and there were very few, which I experienced in my 13 years as DPP for Tasmania were capable of investigation and resolution within existing agencies. I suggested that an alternative would be to establish a small and well defined office which could act as a clearing house and provide it with the power to co opt investigators external to State Police, should the need arise.(Even the Royal Commission in to the Rouse bribery attempt failed to disclose any participant not discovered by the police investigation).

I also suggested that the education function could be undertaken within other teaching or training institutions.

I made a written submission in (b) and also attended to give evidence, part of which was heard in closed session as I wished to discuss an Integrity Commission assessment of which I had first hand knowledge and my understanding was that the detail of that assessment was still classified as highly confidential. I will expand on that submission and the points I made verbally in this submission, because I believe that they are all still relevant.

Summary of my submissions to this Review.

Tasmania does not need an Integrity Commission of the size, cost and complexity of the one established under the Integrity Commission Act 2009. I believe that an informed and objective analysis of the Investigations/Assessments the Commission has undertaken in the last 5 years will show that most, if not all, matters investigated or assessed could have been dealt with within existing agencies available to investigate and 'deal with' the matters considered. The legislation is clumsy, establishes an unworkable governance model and does not give sufficient direction for the Commission to stay focussed on its core functions. This criticism is confirmed by the somewhat misguided use by the Commission of its investigative and assessment powers, matters appear to have been 'investigated' at length and then determined to be 'assessments', referred to the employer agencies to deal with as code of conduct breaches by the staff member(s) under investigation, when the assessment process, referred to as a 'triage' in the second reading speech, appears to have been both heavy handed and a quasi'investigation' without focus or control.

The Commission has established very useful training modules on integrity issues, but surely this could have been done by another body/institution.

The governance model is clumsy and one which will inevitably face problems. The 'Commission', because of its corporate status, is an all inclusive term, resulting in the Board, the CEO, staff, investigators and assessors constituting the 'Commission' and exercising the powers of the Commission, yet the Board, the governing body, does not appear to have sufficient authority to establish a framework around the day to day operation of the Commission.

Submissions.

The Second Reading speech provided a measure of reassurance to the Parliament and the community that the Commission had a role to play in educating the public sector and the community, dealing with instances of serious misconduct and expeditiously filtering (triaging) the complaints which involved minor matters or those which could be dealt with within Departments and dismissing vexatious matters. (The analogy of a sledgehammer and walnut was used to graphically provide a reassurance that the Commission was not being established to pursue minor matters or to duplicate the work of existing agencies/disciplinary regimes. But the reverse seems to have happened.)

My submissions will focus on (1) the operation of the Act in achieving the objectives of the Commission, (2) the operation of the Integrity Commission and (3) other matters relevant to the effect of the Act in improving ethical conduct and public confidence, being the matters referred to in section 106(1) (a), (b) and (f) respectively f the Integrity Commission Act 2009.

1. Section 106(1)(a) "The operation of the Act in achieving the objectives of the Integrity Commission".
   The objectives of the Integrity Commission (the Commission) are to improve the standard of conduct, propriety and ethics in public authorities in Tasmania and enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with and enhance the quality of and commitment to, ethical conduct by adopting a strong educative, preventative and advisory role.
   (a)The Act therefore takes the position that generally standards of conduct, propriety and ethics need improving, that public confidence needs enhancing and that the quality of and commitment to ethical conduct requires enhancing. A rather unhelpful starting point, suggesting that Parliament has concluded that 'improvement and enhancement' are called for, rather than the need for further checks and balances, which seemed to be the Minister's position in her Second reading Speech (page 8) following her detailed outline of existing checks and safeguards.
   (b)The Commission must endeavour to achieve the 'objectives' of the Act by educating, assisting public authorities deal with misconduct, dealing with allegations of serious misconduct and making findings and recommendations in relation to its investigations and inquiries. (see section 3(3), and this is entirely consistent with the role of the Commission

anticipated in the Second Reading speech, emphasising education, followed by assistance to public authorities and confining the allegations that it will 'deal with' to allegations of serious misconduct or misconduct by designated public officers and confining 'findings and recommendations ' to its investigations and inquiries.
(c)The functions and powers of the Commission provisions (section 8) appear to maintain the prevention reassurance given in the Second Reading speech by placing the first five functions (8(1) (a-e) within the educative, advisory role of the Commission, and the next 3 (8(1) (f-h) to the assess and refer role. The functions provision then, without the proportionality assurance, or safeguard, given in the Second Reading speech and section 3(3), detail investigations in to ('dealing with') misconduct (8(1)(i,j,l,m,n,o and q), not confined to serious misconduct.
(d)Expressed in this unlimited way, the expectation would be that the 'principles of operation' (section 9) would more clearly define the triage, proportionality and duplication avoidance assurances from the Second Reading speech or, alternatively, the Act would give the Board of the Commission power to limit the conduct of the CEO and staff (also the Commission) within the principles in section 9 as given meaning by the Second Reading speech and section 3(3). (Why was section 9(1)(g) not extended to 'work' that 'can' be undertaken appropriately by a public authority?)
(e)The Act does not give the Board any role in defining the parameters of the Commission's role in dealing with complaints of misconduct (as opposed to serious misconduct) or any capacity to limit the conduct of the Commission within the confines of proportionality and avoidance of duplication which the public and the Parliament were assured of in the Second Reading Speech.

2. The operation of the Commission including exercise of its powers, the investigation of complaints and the conduct of Inquiries. (Section 106(1) (b).

I have had direct experience of the Commission's operation and the exercise of its powers. I am happy to provide further details of that experience but will confine my outline for the purposes of this submission.

On Friday April 4th 2014 at approximately 4.30 pm I was telephoned on my mobile phone by the CEO of the Commission to inform me 'as a matter of courtesy' that the Commission was looking in to a matter in an organisation in which I had a role. I was informed of the entity, but told that the information was limited to that, without any detail of the matter of concern or the person or persons involved. The CEO concluded the call by emphasising that the call was confidential, and that I could not disclose the fact of the Commission's involvement to anyone. The matter was, after 5 months, disclosed as an 'assessment' when a confidential report was provided to me. My experience with this matter demonstrated a number of fairly simple, but concerning misunderstandings by the Commission of its role under the provisions of the Act.

a. The only role of the CEO in an assessment is under section 35, where it is ultimately a matter for the assessor to make such a disclosure (the telephone call) (see sec 35(3)).

The section does not require or authorise the CEO to telephone me or a person connected with the entity under assessment, particularly with such vague and limited disclosure, and I question the use of the confidentiality requirement for something which does not appear to fall within section 98.

b. Approximately 3 months after the April telephone call I called the CEO to obtain further particulars of what was being looked in to by the Commission because of my concerns as to an obligation to make disclosure of that fact for a commercial transaction the entity was contemplating and the implications the Commission's involvement may have for that transaction (not knowing what it might involve!) I was informed by the CEO that there could not be any further disclosure and by way of explanation Section 48 of the Act was "recommended to me". I found this comment both baffling and concerning when I received the Assessor's report two months later. Section 48, which I read as "recommended", has nothing to do with assessments, it concerns investigations and provides the CEO with a discretion to disclose. The comment confirms my belief that the Commission, in its operation was (and has on other occasions?) confused the triage assessment function with investigations, and laboured through a process of quasi investigation when what was called for was a simple and expeditious assessment.

c. In early September when I received my copy of the Assessor's report, I found that rather than complete a simple assessment the Commission had, after 5 months, reported on a quite detailed investigation in to the matter of complaint which had expanded in to other areas of operation, concluding with recommendations. The 'triage' process intended by the Bill when it was presented to the House, appears to have been completely misunderstood by the Commission.

d. The covering letter with the Report of Assessment, from the CEO, informed me that she had referred the report to the Secretary of the relevant Department, the Auditor General (a board member of the Commission) and me, under section 38(1) (b), (c) and (f) respectively. I informed the CEO that I was concerned that the referral of the matter to three people was not in accordance with the provisions of the Section which seemed to me, by the use of the joinder 'or', to limit the referral power to only one of the entities or persons named in 38(1). I was informed that the Commission (the Board?) had considered this section and concluded that it authorised the steps which she had followed. I think this is wrong. Contrast the "or" sections (37, 38, 57, 58 and 78(3) with the specific language (" any one or more of the following") in 78(2).
After 5 months of assessment and costly document examination , interviewing and interruption to the work schedules of a number of very busy people, the CEO could see no difficulty in requiring three people to separately take action 'and investigate' a now muddied pond, and report to her. Overuse of power and resources and all far too late.

e. The other statutory misunderstanding which I pointed out to the CEO was that under section 38(1)(f) there could be no referral to me to 'investigate' but rather to take action, and while section 43(1) does refer to 'the investigation', this could not apply to me, because I did not have a power to investigate in my role as chair of the Board.

The experience I have reported above demonstrates the difficulties which arise without sufficient clarity or restriction on functions to achieve quite well defined objectives. The matter I speak of was referred out to the three persons I have mentioned as it was deemed capable of being dealt with as a code of conduct breach, which it plainly was at the outset. A 5 month triage conducted in secrecy with the use of powers which are normally confined to Royal Commissions.

I suggest that an examination of the Commissions work over the last 5 years will demonstrate that the "investigations or Inquiries" which it conducted were few in number and could all have been undertaken within the powers of the agencies concerned or the investigative agencies available to do so.

Which leaves the educational role of the Commission.

I have examined the programmes/modules developed by the Commission and they are good and will achieve the educational purpose, but at what cost. And could they have been provided from elsewhere?

If the cost to agency time and distraction inflicted by the heavy handed approach I have outlined was experienced widely throughout the sector then the $2.5 million annual budget originally forecast is not a true reflection of the cost to the State of the Integrity Commission.

The attitude of some in the Commission may have been encouraged by the negative language used in the objectives provision, section 3(2), referred to earlier. I do not have access to the findings of the Parliamentary Committee which I appeared before in 2008 and therefore do not know if it reached such a conclusion. (See pages 1-3 of the Second Reading speech).

3. Any other matters relevant to the effect of the Act in improving ethical conduct and public confidence in public authorities

I will limit my submissions under this head to issues concerning the Act and the provisions of the Act which are in need of amendment or review.

a. I have described the governance model as clumsy. I say this for two reasons. Firstly, it is strange that originally three, now two ex officio members of the Board of the Commission are also the heads of integrity entities as defined under the Act. The inclusion of the Ombudsman and the Auditor General may well have demonstrated an inclusiveness of such entities within the Integrity framework, but because they are likely to be the recipients of matters of complaint referred to them after assessment or investigation by the CEO of the Commission or the Board (of which they are members) See sections 38(2) and 58(1) and the Board's role under section 13, they may be seen by the objective onlooker to be uncomfortable fits in the governance structure of the

Commission. They may for example, be accused of referring matters to the Commission which they should have addressed in the first instance.

Secondly, The Board does not appear to have any meaningful control over the day to day conduct of the CEO and staff. If the Board has the high governance role suggested within section 13, I do not believe that the Act provides it with sufficient power to give directions and guidelines for the exercise of the functions in section 8 when the Board's role under section 13 is confined to performing functions and exercising powers in accordance with the objectives of the Act which are considerably narrower than the functions and powers of the Commission under section 8.

Section 18 provides that the CEO is responsible to the Board for the general administration, management and operations of the Integrity Commission, a usual corporate governance function, yet the Board's powers appear constrained by the provisions referred to in the previous paragraph.

b. Section 3(3)(c) focuses the attention of the Commission on "dealing with allegations of serious misconduct or misconduct by designated public officers", but that limitation or direction is not maintained within the Act which appears to make no distinction between misconduct and serious misconduct (e.g. section 8), leaving the nut open to the sledgehammer, the analogy used in the Second Reading speech.
c. Section 32 seems to be out of place. An Act which establishes the Integrity Commission may not be the most appropriate place for a provision such as this. Is this a provision for the State Service Act?
d. Section 45(1)(b), (c) and (d) do not appear to align with the objectives in section 3(2)(b).
e. The layering of Investigations and the Tribunal work seems heavy handed. Under the Act, an Assessment may become an Investigation which may then become a Tribunal examination or inquiry, after which it may then be referred through the same "or" choices I have referred to following an assessment (see section 78(3)). This is clumsy.

In conclusion I refer to the summary provided on page 1 of this submission.

Dated March 7th 2016

Damian Bugg AM QC

Addendum

When I made my submissions about the Integrity Commission to the Parliamentary Committee in 2014 (see my submission to this Review) I referred to the New South Wales ICAC statutory provisions which confined the exercise of ICAC's powers to instances of "serious" corruption. The attached article, which I think correctly interprets the NSW 'public officer' provisions, which the High Court failed to do, concludes with reliance upon the "serious" limitation in that Act, which appears to have been ignored in the Cunneen case. So, better statutory direction is called for.

Regards,

Damian Bugg

Corrupt conduct: the ICAC's Cunneen inquiry

By the Hon Peter Heerey AM QC*

The New South Wales Independent Commission Against Corruption commenced an inquiry into alleged corrupt conduct by Margaret Cunneen SC, the state's deputy senior Crown prosecutor.

The alleged corrupt conduct was that Ms Cunneen 'with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, ... to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol at the scene of a motor vehicle accident.'

Ms Tilley was the girlfriend of Ms Cunneen's son. In fact a blood alcohol test was conducted at a hospital and showed zero alcohol.

The ICAC's inquiry, on its face, was not concerned with any conduct by Ms Cuneen in her official capacity as deputy senior Crown prosecutor. In theory, the same conduct would have provoked inquiry by ICAC had it been engaged in by Bruce from Bondi or Cheryl from Chatswood. However, as Gageler J in the High Court delicately put it, the question before the courts was 'not about the propriety or prudence of the ICAC choosing to undertake the particular investigation in this case.'[1]

Ms Cunneen challenged the legality of the inquiry in the Supreme Court of New South Wales. She failed at first instance before Hoeben CJ at CL[2] but succeeded in the Court of Appeal (Basten and Ward JJA, Bathurst CJ dissenting).[3] The ICAC sought special leave to appeal to the High Court of Australia. Special leave was granted but the appeal was dismissed (French CJ, Hayne, Kiefel and Nettle JJ, Gageler J dissenting).[4]

The central point of the majority judgment in the High Court was that the expression in the definition of 'corrupt conduct' in s 8(2) of the *Independent Commission Against Corruption Act* 1988 (NSW), viz conduct which 'adversely affects, or could adversely affect ... the exercise of official functions by any public official,' was confined to conduct which affected the *probity* of the official, as distinct from the *efficacy* of the exercise of an official function. In other words, conduct causing an official to act in a way which was without fault or lack of probity on the part of that official was not within the Act. Since in the instant case any police officer whom Ms Tilley deceived would be acting innocently, her conduct, and that of Ms Cunneen in counselling her to engage in it, was outside ICAC's jurisdiction.

Defining corrupt conduct

At common law 'corruption' is not a term of art, so drafters of the Act had to define the term with care since it would be the gateway to the exercise of what the High Court majority referred to as ICAC's 'extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges)'.[5]

Section 8 commences with sub-s (1) which provides:

> (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.

This seems to accord with the general understanding of corruption, that is to say conduct involving dishonest or improper conduct by a public official.

Sub-section (2) however goes on to provide:

> (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters:
>
> (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
>
> (b) bribery;
>
> (c) blackmail;
>
> (d) obtaining or offering secret commissions;
>
> (e) fraud;
>
> (f) theft;
>
> (g) perverting the course of justice;
>
> (h) embezzlement;
>
> (i) election bribery;
>
> (j) election funding offences;
>
> (k) election fraud;
>
> (l) treating;
>
> (m) tax evasion;
>
> (n) revenue evasion;

(o) currency violations;

(p) illegal drug dealings;

(q) illegal gambling;

(r) obtaining financial benefit by vice engaged in by others;

(s) bankruptcy and company violations;

(t) harbouring criminals;

(u) forgery;

(v) treason or other offences against the Sovereign;

(w) homicide or violence;

(x) matters of the same or a similar nature to any listed above;

(y) any conspiracy or attempt in relation to any of the above.

These offences will be referred to as 'the s 8(2) offences'.

It will be observed at the outset that not all of the s 8(2) offences necessarily involve dishonesty or wrongdoing on behalf of the public official. Indeed with some of them, e.g. tax and revenue evasion, it is of the essence that the public official is innocent.

Tax evasion usually involves conduct such as concealing income which should be reported in tax returns, constructing false documents and the like, essentially for the purpose of deceiving innocent tax authorities, with a consequent loss to public revenue.

Another example is homicide or violence, which in this context would primarily bring to mind the murder or assault of a public official.

Other s 8(2) offences, such as perverting the course of justice, might or might not involve wrongdoing on the part of a public official. For example, essential exhibits in a court case might be destroyed with, or without, the connivance of a public official.

The only other part of s 8 which need be mentioned for present purposes is sub-s (6) which provides:

> The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

Section 9(1) provides an overall limitation on s 8:

> 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.

There is obviously some overlapping between sub-sections (1) and (2). Both extend to 'any person (whether or not a public official)'. It is not difficult to hypothesise conduct which could fall within both. Nevertheless, provisions of a statute are not necessarily to be treated as separate, watertight compartments, as s 8(6) explicitly reminds the reader.

In s 8 there appears to be a logic in the relationship between the two sub-sections (1) and (2) and a different emphasis in each. Sub-section (1) is primarily directed at the conduct of public officials themselves. Impropriety of such persons is at the forefront, both in paragraph (a)'s 'honest or impartial exercise of official functions' and paragraphs (b), (c) and (d), all of which specify different kinds of wrongful or improper conduct by an official.

By contrast, sub-s (2) aims at the conduct of someone *other than* the public official the exercise of whose official functions is adversely affected, even though that other person may be a public official. But whether that other person happens to be a public official is not relevant. What is relevant is that such 'other person'

- has engaged in conduct which involves any of the s 8(2) offences, and
- that conduct adversely affects, or could adversely affect, the exercise of official functions by a public official.

The drafters' strategy seems to be to provide for some element of illegality or impropriety in each limb of the definition of 'corrupt conduct'; cf 9. In sub-s (1) it is in the conduct of the person whose conduct adversely affects the honest and impartial exercise of official functions or who, as a public official, engages in the wrongful or improper conduct in (b)–(d). In sub-s (2) it is the commission of a s 8(2) offence which adversely affects the exercise of official functions by someone else, who is a public official.

The majority of the High Court held that the expression 'adversely affect' in s 8(2) meant 'to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)–(d).'[6]

There are problems with this reading.

First, the plain meaning of the expression 'the exercise of official functions' in s 8(2) is not limited by any qualification as to the legality or propriety of such exercise, whether good, bad or indifferent.

Secondly, the majority read into s 8(2) words that are not there. One is reminded of the oft-cited[7] passage in the speech of Lord Mersey in *Thompson v Goold & Co*[8]

> It is a strong thing to read into an Act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

See also *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service.*[9] In the present case s 8(2) conveys a rational meaning without any such insertion.

Thirdly, the immediately preceding sub-s (1) speaks of 'the *honest or impartial* exercise of official functions.' (Emphasis added.) There must have been some reason for the drafters omitting those qualifications in sub-s (2). Presumably it was some reason other than absent-mindedness. The most likely explanation is that the drafters intended the expression 'exercise of official functions' in sub-s (2) not to be concerned with the honesty or impartiality of such exercise.

Fourthly, it does violence to the syntax of the sub-sections to drag pars (b)–(d) of sub-s (1) across to do, as it were, double duty in sub-s (2) – especially when that sub-section already has the s 8(2) offences.

Fifthly, if the true intention was to restrict the definition of 'corrupt conduct' to official conduct that was not honest and impartial, there would be no need for s 8(2) at all. Sub-section (1) could simply be written differently. The target would be conduct which adversely affects the honest or impartial exercise of official functions by a public official. The (rewritten) sub-section would cover:

- such conduct by the public official himself or herself;
- the type of conduct presently described in pars (c) and (d);
- conduct involving what are now the s 8(2) offences.

'Corrupt conduct'; a taker as well as a giver?

At an early stage of the argument before the High Court, Hayne J put to ICAC's counsel the proposition:

> Well, corruption has a giver and a taker and this Act is directed against both conduct which would be the giving of and the taking of, is it not?[10]

Once it is assumed that parliament had the same assumption, that corrupt conduct must involve a taker as well as a giver, the reading of the majority would follow. But is this assumption correct? Bear in mind that the critical words are not so much 'corrupt conduct' but 'the exercise of official functions' and the suggested qualifying insertion of 'honest or impartial'. It is a question whether those qualifications are 'clearly required by [the provision's] terms or its context.'[11]

Competing absurdities

A familiar forensic technique is to argue that an opponent's case, say on the construction of a statute, would logically lead to absurd results. *Ergo*, it is argued, such a construction could not have been intended by the legislature.

The majority judgment contains no less than ten examples of what are said to be absurd results if ICAC's construction is correct.[12] My favourite is number two: the contention that the theft of a garbage truck would qualify as corrupt conduct since the garbage collecting authority could be rendered less able to discharge its official function of collecting garbage.

However, Gageler J in dissent counters with some equally surprising counter-absurdities.[13] His Honour points out:

> At the other extreme is that to which the narrower *probity* reading of s 8(2) leads: ICAC having no power to investigate, expose, prevent or educate about state-wide endemic collusion among tenderers in tendering for government contracts; as well as ICAC having no power to investigate, expose, prevent or educate about serious and systemic fraud in the making of applications for licences, permits or clearances issued under New South Wales statutes designed to protect health or safety (such as the *Child Protection (Working with Children) Act* 2012 (NSW) or the *Work Health and Safety Act 2011* (NSW)) or under New South Wales statutes designed to facilitate the management and commercial exploitation of valuable State-owned natural resources (such as the *Mining Act 1992* (NSW), the *Fisheries Management Act 1994* (NSW) or the *Forestry Act 2012* (NSW)).

It may be conceded that either construction of s 8(2) could produce some surprising hypothetical applications. So the suggested absurdities rather cancel each other out. The expression 'exercise of official functions' must mean *something.*

It might be accepted that a general understanding of the concept of corrupt conduct involves some dishonesty or lack of probity by a public official. However, parliament was entitled to take the view that the integrity and accountability of public administration could also be affected by unlawful or improper conduct which affected the exercise of official functions even though the public officials themselves were innocent of any unlawfulness or impropriety. The numerous ways in which this could occur are powerfully demonstrated in the passage from the judgment of Gageler J cited above.

'Serious and systemic conduct'

Section 12A introduces the concept of 'serious and systemic corrupt conduct' as follows:

> In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

Encouraging a family member to invent an excuse to a police officer to avoid a breath test is conduct to be deprecated, but would stand rather towards the bottom end of the scale of human wickedness. When it turns out there was no alcohol anyway, the possibility of societal harm is minimised. And there is no suggestion that Ms Cunneen was part of some organisation which regularly used or promoted such tactics.

The 'responsibility and role of other public authorities and public officials' brings to mind the normal functions of the NSW Police Force, who would seem to be the logical authority to pursue such a complaint, bearing in mind that the conduct alleged would involve the deception of its members.

It does not seem to have been argued that any failure of the alleged conduct to satisfy s 12A went to the jurisdiction of ICAC to launch the inquiry against Ms Cunneen. Such considerations go rather to the 'propriety or prudence' of the Commission's conduct. It might also be noted in this context s 20(3) of the Act provides:

> The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion):
>
> (a) the subject-matter of the investigation is trivial; or
>
> (b) the conduct concerned occurred at too remote a time to justify investigation; or
>
> (c) if the investigation was initiated as a result of a complaint – the complaint was frivolous, vexatious or not in good faith.

Parliament must be taken to have been fully aware that the Act would confer extraordinary coercive powers with consequent abrogation of fundamental rights and privileges. Also, that its reach might extend to conduct perhaps not falling within the popular understanding of the meaning of the term 'corrupt conduct'.

Perhaps there was discussion along these lines in the parliamentary Drafting Office:

> Drafter 1: This draft of the Act is going pretty far. Taken literally it would apply to somebody stealing a garbage truck.
>
> Drafter 2: True, but if we limit it to 'adversely affecting the honest or impartial exercise of official functions' it wouldn't catch, for example, widespread collusion amongst tenderers for government contracts, or fraud in applications for mining licences.
>
> Drafter 1: I suppose that's right. But what if we put something in the Act making it clear ICAC should only investigate corruption, as we define it, that is serious? After all, it will be an eminent body, staffed with experienced people, so the public can rely on them to act sensibly.
>
> Drafter 2: Good idea. We could also say something to the effect that ICAC should confine itself to serious conduct that was somehow extensive and extending beyond an individual – what's the word?
>
> Drafter 1: Systemic?
>
> Drafter 2: That's it. And we could say ICAC should leave something better investigated by another body.
>
> Drafter 2: Great. I think it's time for morning tea.

ICAC appear to have ignored the statutory advice in s 12A and 20(3). In the absence of any explanation perhaps the charitable conclusion is that there is such a high level of purity in the public administration of New South Wales that ICAC has nothing better to do than investigate *l'affaire Cunneen*.

Endnotes

* Victorian Bar, former judge of the Federal Court of Australia.

1. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [73].
2. *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571.
3. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.
4. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.
5. [2015] HCA at [3], [8].
6. [2015] HCA 14 at [45].
7. Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed, 2014, at 69.
8. [1910] AC 409 at 420.
9. (1995) 184 CLR 301 at 310 per Brennan CJ, Gaudron and McHugh JJ.
10. [2015] HCA Trans 47.
11. PMT Partners, ibid.
12. [2015]HCA 14 at [52].
13. [2015] HCA 14 at [92].