

The jurisdiction of a National Integrity Commission

A National Integrity Commission must have a broad jurisdiction to investigate any person whose conduct could affect the impartiality of public administration

Briefing paper prepared by the National Integrity Committee

Summary

- The majority of state integrity commissions have a broad jurisdiction to investigate any conduct of any person that could affect the impartial or honest exercise of public administration
- The state integrity commissions that have the broadest jurisdictions have been able to undertake more investigations
- Limitations placed on the jurisdiction of Victoria's Independent Broad Based Commission have led to allegations of serious misconduct not being investigated, for example the alleged connections between Opposition Leader Matthew Guy and the Victorian mafia, and the secret tapes scandal that led to Premier Ted Baillieu's resignation
- A National Integrity Commission must have a broad jurisdiction to investigate any person whose conduct adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, if the Commissioner deems the conduct to be serious or systemic.

The National Integrity Committee

The National Integrity Committee was established to design and advise policy makers on specific accountability reforms, including a national anti-corruption commission. Members of the committee are: Margaret McMurdo AC, David Ipp AO QC, Stephen Charles AO QC, David Harper AM QC, Paul Stein AM QC and Antony Whealy QC.

Jurisdiction of state integrity commissions

Each state integrity commission has a slightly different definition of corruption or misconduct, which determines its jurisdiction. A summary of each of the definitions of corruption are provided below.

New South Wales

The New South Wales Independent Commission Against Corruption has a broad jurisdiction, covering any conduct of any person that adversely affects, or could adversely affect the honest or impartial exercise of official functions of a public official.

Queensland

The Queensland Crime and Corruption Commission, too, has a broad jurisdiction, covering any person whose conduct adversely affects the performance of a public agency or public official and satisfies the definition of corrupt conduct.

Victoria

The Victoria Independent Broad-based Anti-Corruption Commission can investigate any conduct that adversely affects the impartial exercise of public office and breaches of public trust, but only if the conduct, if proven, would constitute an indictable offence. For the first year of its operation it did not have retrospective powers.

Western Australia

The jurisdiction of the Western Australian Crime and Corruption Commission is limited by not being able to use its powers retrospectively; and is limited to investigating only public officers.

Tasmania

The Tasmania Integrity Commission has a limited jurisdiction. It is limited to solely investigating the conduct of public officers, which includes people employed by the Parliament of Tasmania, in Ministers' or MPs' offices, government departments, the police service, a state owned company, local government or any other body funded by public money.

The Tasmanian IC is limited in its ability to investigate parliamentarians by the definition of misconduct, and by the protections of parliamentary privilege. The definition of misconduct provides that the Tasmanian IC cannot investigate conduct that is connected with a proceeding in Parliament.

South Australia

The South Australia Independent Commission Against Commission has a limited jurisdiction. It can only investigate corruption allegations that would be indictable offences, and misconduct allegations that would be a breach of a code of conduct. It also does not affect parliamentary privilege, meaning that parliamentarians could be immune from requests for information from the ICAC.

Similarities and differences

Table 1: comparison of the jurisdictions of state integrity commissions

Body	Any person?	Threshold?	Specific conduct? or any conduct that affects the impartiality of public office	Retrospective?
NSW ICAC	Yes	Serious or systemic Criminal offence, disciplinary offence, reasonable grounds for dismissal, or breach of code of conduct	Any conduct	Yes
Qld CCC	Yes	Serious or systemic Criminal offence or reasonable grounds for dismissal	Any conduct	Yes
Vic IBAC	Public Officers, including parliamentarians	Reasonable suspicion of indictable offence	Limited to conduct that would constitute a relevant offence	Yes (since 2012)
WA CCC	Limited to public officers	Disciplinary offence under the <i>Public Sector Management Act 1994</i>	Any conduct of a public officer	No
Tas IC	Limited to public officers	Complaint is to be reviewed and	Any conduct of a public officer	No

	Cannot investigate any conduct in relation to proceedings in parliament	recommended to IC by outside assessor appointed by Chief Executive Officer (who him/herself is appointed by the Governor)		
SA ICAC	Limited to public officers Parliamentary privilege not affected	Serious or systemic Could lead to prosecution for indictable offence	Limited to conduct that would constitute an indictable offence or a breach of a code of conduct	Yes

Effectiveness of broad jurisdiction

NSW ICAC and Queensland CCC can investigate any serious or systemic conduct that affects the impartiality of public administration. This has led to these commissions being able to investigate a broad range of conduct, beyond criminal offences of public officials.

The NSW ICAC investigation into the distribution of mining licenses involving Eddie Obeid and Ian Macdonald began with an anonymous phone call tip off. NSW ICAC had little evidence to begin with, but with the use of all of its investigative powers it was able to reveal serious misconduct in public office in relation to the Doyles Creek mining licenses. This would not have been possible if NSW ICAC was limited to beginning investigations only where there was a reasonable suspicion of indictable offence.¹

Queensland CCC's recent investigation into local council elections found "widespread non-compliance with legislative obligations relating to local government elections and political donations." It made 31 recommendations including the real time disclosure of all electoral expenditure, and the prohibition of political donations from property developers. However the CCC was not able to pursue the breadth of allegations regarding the conduct of councilors, as the CCC's jurisdiction is limited to conduct that

¹ Charles (2018) *Victoria's IBAC is still too weak*, <http://www.tai.org.au/content/victorian-ibac-not-model-federal-watchdog-%E2%80%93-former-judge-and-ibac-adviser>

would constitute a criminal offence or a disciplinary breach providing reasonable grounds for dismissal. As the *Local Government Electoral Act 2011* does not include any disciplinary standard, the decision to dismiss a councilor is at the discretion of Minister and the Governor in Council. The investigation was therefore unable to investigate any disciplinary breaches or conduct beyond criminal offences.²

A broader jurisdiction has allowed NSW ICAC and Queensland CCC to hold more investigations into allegations of corruption and misconduct. Holding investigations is key to meeting the commission’s objectives of promoting integrity, and investigating and exposing corruption and misconduct.

Table 2: investigations of state integrity commission 2012-2017

Body	Investigations commenced
NSW ICAC	290
Qld CCC	293
WA CCC	250
SA ICAC	219
Vic IBAC	90
Tas IC	14

Importance of jurisdiction beyond public officials

A National Integrity Commission must have the ability investigate any person, whether or not they are a public official, whose conduct affects the impartial exercise of public administration.

The limitations of the jurisdiction of the Victorian IBAC has meant it was not able to investigate recent allegations of the Opposition Leader Matthew Guy dining with and soliciting donations from people allegedly involved in the mafia.³ It did not investigate allegations of misconduct involving tape recordings of senior ministerial staff offering donations to an adviser who was accused of working against the police commissioner.⁴

² Queensland CCC (2017) *Operation Belcarra*, p 3, <http://www.ccc.qld.gov.au/corruption/operation-belcarra-public-hearing>

³ Baker and McKenzie (2017) *Anti-corruption watchdog IBAC says no to Matthew Guy's request to probe his lobster dinner with alleged mobster*, <https://www.theage.com.au/national/victoria/anticorruption-watchdog-ibac-says-no-to-matthew-guys-request-to-probe-his-lobster-dinner-with-alleged-mobster-20170830-gy7h38.html>

⁴ Campbell (2013) *IBAC won't probe Liberal trio over secret tapes affair that doomed Ted Baillieu*, <http://www.adelaidenow.com.au/news/national/ibac-wont-probe-liberal-trio-over-secret-tapes-affair->

It also would not have been able to investigate the Eddie Obeid case, as this investigation began with an anonymous phone tip off to NSW ICAC and involved business people, union officials and a network of others beyond the public service. One former union official, John Maitland, was found guilty of being an accessory to misconduct in public office and profiting \$6 million from the mining deal.⁵ His role in the deal would not have been able to be properly investigated, exposed and prosecuted under the Victorian model that limits investigations to the conduct of public officials.

The Independent Review of the Jurisdiction of NSW ICAC in 2015 by the Hon Murray Gleeson AC and Bruce McClintock SC found that:

Certain kinds of fraudulent conduct, not necessarily involving any actual or potential wrongdoing by a public official, should be treated as corrupt conduct where they impair or could impair confidence in public administration.⁶

In the High Court case brought by Margaret Cunneen, the dissenting judgement of Gageler J emphasised the importance of the jurisdiction to investigate not just public officials acting corruptly, but those third parties whose conduct impacts the effectiveness of a public official's function:

I consider it sufficient, to be investigated by ICAC, that criminal conduct has the potential to impair the *efficacy* of an exercise of an official function by a public official. I do not consider it necessary that the criminal conduct has the potential to affect the *probity* of an exercise of an official function by a public official.⁷

Gageler J argued that the majority decision to limit the meaning of corrupt conduct to conduct that affects the probity of the exercise of official functions by a public official was incorrect as it departed from the natural and ordinary meaning of corrupt conduct. He described the potential impact of limiting the jurisdiction in this way, noting that it could limit ICAC's power to investigate collusion among tenderers and other third party conduct:

The choice, starkly illustrated, is between two extreme consequences. At one extreme is that to which the broader efficacy reading of s 8(2) leads: ICAC

[that-doomed-ted-baillieu/news-story/112b15dfe5f21a17bda4afd7a7919ab7?sv=bcf263b0436b252ef11bf9cc20b209a5](https://www.abc.net.au/news/2015-07-30/that-doomed-ted-baillieu/news-story/112b15dfe5f21a17bda4afd7a7919ab7?sv=bcf263b0436b252ef11bf9cc20b209a5)

⁵ R v Macdonald, R v Maitland [2017] NSWSC 638

⁶ Gleeson and McClintock (2015) *Independent Panel Review of the Jurisdiction of the Independent Commission Against Corruption Report*, 30th July 2015, p ix

⁷ *Cunneen v Independent Commission Against Corruption* [2015] HCA 14 at [74]

having power to investigate an isolated case of a witness telling a lie to a police officer. 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)).⁸

A recent example of an investigation that was conducted using the wider interpretation of corrupt conduct was Operation Nickel. This was a NSW ICAC investigation into a scam where a licensing authority had delegated responsibility for assessment of the suitability of candidates for heavy trucking licences to a private contractor. That private contractor then took bribes from people obviously unsuited to driving dangerous heavy trucks – these were people who were criminals, unwell, addicted to drugs or alcohol, or simply dangerous drivers. The officers of the regulatory authority – acting entirely innocently – issued the trucking licences.⁹

Investigating misconduct of the federal judiciary

No arm of government or public power should be without proper scrutiny. Serious allegations of corruption and misconduct within the judiciary should be investigated by a National Integrity Commission. The legislation establishing the National Integrity Commission will need to address the provisions in the constitution and any significant High Court decisions relating to the federal judiciary, respecting the separation of powers and the independence of the judiciary. This work requires a detailed research project by constitutional experts.

For example, the constitution provides that a federal judge cannot be removed except by the Governor-General in Council on an address from both Houses of Parliament on the ground of proved misconduct or incapacity. These provisions would need to be

⁸ *Cunneen v Independent Commission Against Corruption* [2015] HCA 14 at [92]

⁹ NSW ICAC (2014) *Investigation into false certifications of heavy vehicle competency-based assessments by a Roads and Maritime Services accredited assessor (Operation Nickel)*, <http://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/199>

taken into account in the drafting of the legislation of the National Integrity Commission, ensuring allegations of misconduct can be investigated while respecting the independence of the judiciary and the separation of powers.

Recommendation

That a National Integrity Commission be established with a broad jurisdiction, including the ability to investigate any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, if the Commissioner deems the conduct to be serious or systemic.