



Cunneen, ICAC and unintended consequences

OPINION

By Michael Bradley

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Most people will agree that the NSW Independent Commission Against Corruption should have left crown prosecutor Margaret Cunneen alone. But in its majority decision the High Court has substantially neutered ICAC and killed off a huge part of its ability to expose systemic corruption. Michael Bradley writes.

Justice is an entirely subjective and abstract concept - like good art, we know it when we see it, but it cannot be defined. This distinction is critically important, not least because when courts seek to deliver justice rather than law, the consequences are usually unintended.

That, regrettably, is exactly what the majority of the High Court has done in the case of ICAC v Margaret Cunneen SC. In delivering a result about which most people will think, "Yep, seems right", the Court has substantially neutered ICAC and killed off a huge part of the power the people of NSW thought they had given to ICAC to expose the kind of systemic corruption about which we've learned in recent years solely because ICAC investigated it. That won't be happening in the future.

What Cunneen allegedly did was to advise her son's girlfriend, who had had a car accident, to pretend she was having chest pains so that the police would not give her a breath test. ICAC launched an investigation. Cunneen challenged its power to do so, eventually winning four to one in the High Court. The result for her is that there will be no ICAC inquiry, although the police could still investigate and she would be guilty of a serious crime if the allegations proved correct.

So far, so good. It's hard not to agree that Cunneen's case looked a bit trivial to be warranting ICAC's extreme powers of compulsion and inquisition (there is, for example, no privilege against self-incrimination before ICAC). If there's a case, the cops can investigate and charge her. It's hard to see how our faith in the integrity of our public institutions would be particularly enhanced by Cunneen being dragged through the ordeal of an ICAC hearing.

However, are you so happy to learn that based on the Cunneen ruling it may turn out ICAC's inquiry into the Eddie Obeid-related company Australian Water Holdings was outside its power? Would we ever have found out about that other than via ICAC's coercive powers? You know we wouldn't.

The case turned on the definition of "corrupt conduct", which triggers ICAC's powers. Apart from such conduct by public officials, the definition also catches any criminal conduct by private citizens (which Cunneen was for the purposes of this case) which "could adversely affect, either directly or indirectly, the exercise of official functions by any public official".

The key question was whether it's necessary that the public official is caused by the criminal conduct to exercise their functions in a corrupt manner (with "improbability", to use the High Court's term), or whether it's enough that the conduct simply has an adverse effect on the actual functioning of the public official.

Translating this into English, the allegation was that Cunneen may have committed a crime by counselling her son's girlfriend to fake chest pains (perverting the course of justice). That could have caused the police to not breath test her, adversely affecting the performance of their duties, in other words. If proved, would that be corrupt conduct, or could Cunneen's actions only constitute corrupt conduct if she had done something to affect the police officer's probity - for example, by offering them a bribe?

The High Court majority took the second view. To get to that conclusion it engaged in some fairly complicated statutory interpretation that I won't go into but that I don't think stacks up at all.

Justice Stephen Gageler dissented in the High Court and explained the practical problem very clearly. As he said, the choice facing the Court was between two extreme consequences. The broader definition of corrupt conduct, pushed by ICAC, would mean that ICAC has power to investigate a massive range of things, such as any occasion when anyone lies



PHOTO: It's hard not to agree that the case of Margaret Cunneen (pictured) looked a bit trivial to be warranting ICAC's extreme powers of compulsion and inquisition. (AAP: Nikki Short, file photo)

to a police officer. But the narrow definition adopted by the majority has the consequence that ICAC can no longer investigate and expose, for example, "state-wide endemic collusion among tenderers in tendering for government contracts".

After another public inquiry ICAC found that Travers Duncan and others had acted corruptly by actively concealing from NSW Government officials the fact that the Obeids held a secret interest in the Mount Penny coal tenement. As that conduct was by private citizens, and the public officials didn't behave badly (they were just caused to do things that were bad by being lied to), it turns out that ICAC's inquiry may have been outside its power.

This is really unfortunate. We know that systemic corruption is almost never exposed except by bodies like ICAC, which are clothed with extraordinary coercive powers and who operate in the daylight. And we also know that an awful lot of conduct that we would not hesitate to call "corruption" involves people and companies doing illegal things that cause public officials to unwittingly perform their roles in ways that harm the public interest.

When this is an isolated case, like Cunneen's, then yes ICAC has better things to do. I agree that it should have left her alone. But there are many cases where such conduct is endemic, wide-scale and utterly corrosive to the public trust. Now that ICAC has been cut down to a much smaller size, it's hard to see how we're going to find out about these cases in the future.

And don't hold your breath about the NSW Parliament giving ICAC back the powers it's just lost. Both sides of politics will be grateful for the favour the High Court has just done them.

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Topics: corruption, law-crime-and-justice, courts-and-trials, government-and-politics, state-parliament

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