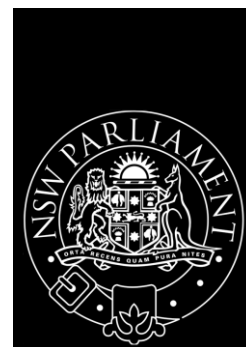


PARLIAMENT OF NEW SOUTH WALES



# Committee on the Independent Commission Against Corruption

Proposed amendments to the Independent Commission  
Against Corruption Act 1988

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## Table of contents

Membership and staff .....	iii
Terms of reference .....	iv
Chair's foreword.....	v
List of recommendations.....	vii
<b>CHAPTER ONE - INTRODUCTION.....</b>	<b>1</b>
Referral .....	1
Conduct of inquiry .....	1
Submissions.....	1
Issues paper.....	1
Public hearings.....	2
<b>CHAPTER TWO - BACKGROUND.....</b>	<b>3</b>
Establishment of the ICAC.....	3
ICAC's functions and powers.....	4
Accountability .....	5
Investigation process and use of powers.....	6
Assembling admissible evidence .....	7
Disciplinary proceedings .....	7
Civil proceedings.....	11
Use of evidence in disciplinary and civil proceedings.....	15
Operation of section 37 of the ICAC Act .....	15
Privilege against self-incrimination.....	16
Relevant statutory provisions in other commissions of inquiry .....	20
<b>CHAPTER THREE - USE OF EVIDENCE IN DISCIPLINARY PROCEEDINGS.....</b>	<b>25</b>
ICAC's arguments in support of proposed amendment.....	25
Public interest.....	25
Precedent.....	27
Inquiry participants' views .....	27
Public interest.....	27
Precedent.....	31
Effectiveness of the ICAC .....	34
Possible ways to address competing concerns.....	36
Committee comment.....	39
<b>CHAPTER FOUR - USE OF EVIDENCE IN CIVIL PROCEEDINGS.....</b>	<b>44</b>
ICAC's arguments in support of proposed amendment.....	44

Table of contents

Inquiry participants' views .....	45
Committee comment .....	57
<b>CHAPTER FIVE - ASSEMBLING ADMISSIBLE EVIDENCE .....</b>	<b>61</b>
ICAC's arguments in support of the proposed amendment .....	61
Inquiry participants' views .....	64
Committee comment .....	69
<b>APPENDIX ONE - ICAC'S AMENDMENT PROPOSALS .....</b>	<b>73</b>
<b>APPENDIX TWO - REFERRAL LETTER .....</b>	<b>78</b>
<b>APPENDIX THREE - LETTER FROM ICAC COMMISSIONER.....</b>	<b>80</b>
<b>APPENDIX FOUR - SECTION 13 OF THE ICAC ACT .....</b>	<b>81</b>
<b>APPENDIX FIVE - SECTION 14 OF THE ICAC ACT .....</b>	<b>83</b>
<b>APPENDIX SIX - SECTION 37 OF THE ICAC ACT.....</b>	<b>84</b>
<b>APPENDIX SEVEN - SCHEMATIC OF DEALING WITH MISCONDUCT .....</b>	<b>85</b>
<b>APPENDIX EIGHT - SUBMISSIONS.....</b>	<b>86</b>
<b>APPENDIX NINE - WITNESSES .....</b>	<b>87</b>
<b>APPENDIX TEN - MINUTES.....</b>	<b>88</b>

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<sup>1</sup> Mr Amery was a member of the Committee from 22 October 2008 until 24 June 2009. He was reappointed to the Committee on 1 June 2010 and elected Chair on 3 June 2010.

## Terms of reference

That the Committee, pursuant to its functions under s 64(1)(b) of the *Independent Commission Against Corruption Act 1988*, inquire into and report to Parliament on:

1. whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in s 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption;
2. whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in s 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption;
3. if either of the amendments referred to in paragraphs 1 or 2 above are made, whether the *Independent Commission Against Corruption Act 1988* should further be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function; and
4. any related matters.

## Chair's foreword

This inquiry has examined whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction on using evidence provided under objection to the ICAC, to permit its use in subsequent disciplinary and civil proceedings. In examining the proposed amendments, the Committee sought to balance competing public interest concerns: on the one hand the public interest in improving the efficiency with which disciplinary and civil proceedings arising from an ICAC investigation are conducted; and on the other, the rights of witnesses in a situation where they are compelled to provide evidence which may be self incriminating.

The Committee received evidence that the removal of the restriction has the potential to assist government agencies in the often resource intensive and time consuming task of investigating and commencing disciplinary and civil matters arising from an ICAC investigation. The ability to use evidence provided under objection to the ICAC would improve the efficiency and timeliness of such proceedings, which in turn supports the public interest in ensuring that those who have admitted to corrupt conduct face disciplinary action and, where applicable, the proceeds of their corrupt conduct are recovered.

While very few people would argue against improving the efficiency with which self confessed corrupt public officials and those that have defrauded the State are dealt with, the Committee recognises that sanctioning the use of evidence provided under objection involves altering the protections afforded witnesses who appear before the ICAC. Such protections are particularly significant given that the well established rights usually available to witnesses under our system of law do not apply in respect of the type of inquisitorial style proceedings conducted by the ICAC.

After careful consideration of the above issues and the views of inquiry participants, the Committee finds that, on balance, the evidence supports the removal of the restriction in respect of disciplinary proceedings, subject to certain safeguards. The Committee, however, is not recommending that the same amendment be made in relation to civil proceedings. I also wish to stress that at no time during the course of the inquiry did the Committee or inquiry participants consider that a similar amendment be made with respect to criminal proceedings.

In coming to this view, the Committee was persuaded by evidence that the public interest is best served by improving the efficiency with which corrupt public sector employees are disciplined. The Committee's decision is also supported by the fact that such an amendment in relation to disciplinary proceedings is not without precedent.

The Committee is mindful of the serious concerns raised by inquiry participants of the impact such an amendment would have on the rights of witnesses. Consequently, the Committee also recommends certain provisions should accompany the amendment. Such provisions will act to guard against any improper use or unintended consequences of the amendment. The amendment will also be subject to a two year review where the effects of the amendment will be thoroughly examined.

Chair's foreword

Another proposal examined by the Committee during the inquiry, was whether the *Independent Commission Against Corruption Act 1988* should be amended to make the assembling of admissible evidence a primary function of the ICAC. After careful consideration of the issues raised the Committee is not recommending any change to the primary functions of the ICAC as the primary functions in their current form adequately reflect the ICAC's main role of investigating and exposing corrupt conduct.

I would like to take this opportunity to thank the former Chair of the Committee, Mr Frank Terenzini who chaired this Committee through the majority of this inquiry. I know I speak on behalf of all Committee members in thanking Mr Terenzini for his leadership of the Committee during this inquiry and his contribution to the broader work of the Committee.

During the course of the inquiry the Committee was greatly assisted by the considered input of inquiry participants. On behalf of the Committee I would like to express our appreciation for the valuable information received which assisted our understanding of the complex and significant public interest issues raised by the terms of reference.

I also wish to extend my thanks to my fellow Committee members for their contributions and the Committee secretariat for their professional support.



Hon Richard Amery MP  
Chair



## List of recommendations

- RECOMMENDATION 1:** The Committee recommends that the *Independent Commission Against Corruption Act 1988* be amended to remove the restriction in section 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption, subject to the further amendment of the *Independent Commission Against Corruption Act 1988* to:
- a. prevent the indirect use of evidence obtained under objection in criminal or civil proceedings. Such a provision could be modelled on section 128(7)(b) of the *Evidence Act 1995*.
  - b. limit the use of evidence obtained under objection to disciplinary proceedings which relate directly to the actions the subject of the ICAC inquiry.
  - c. ensure that a witness appearing before ICAC must be notified that their evidence may be used against them in disciplinary proceedings. ....42
- RECOMMENDATION 1A:** The Committee recommends that in bringing forward legislation to give effect to Recommendation 1, the Premier consult with the Commissioner of the ICAC on the extent of the discretions that the Commissioner should be able to exercise where the restriction in section 37 is removed in respect of disciplinary proceedings, as recommended in 1(b). ....42
- RECOMMENDATION 2:** That the Committee on the Independent Commission Against Corruption conduct a review of the effect and operation of these amendments after they have been in operation for two years. ....43
- RECOMMENDATION 3:** The Committee recommends against amending the *Independent Commission Against Corruption Act 1988* to remove the restriction in section 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption. ....60
- RECOMMENDATION 4:** The Committee recommends against amending the *Independent Commission Against Corruption Act 1988* to make assembling admissible evidence a primary function of the Independent Commission Against Corruption. ....71
- RECOMMENDATION 5:** The Committee recommends that the Premier consider introducing amendments to the *Independent Commission Against Corruption Act 1988* to clarify that the Independent Commission Against Corruption may assemble admissible evidence for the prosecution of a person for criminal offences in connection with corrupt conduct, and furnish any such evidence to the Director of Public Prosecutions, both in the course of its investigations and after investigations have been completed.
- The Committee further recommends that the proposed amendment to the *Independent Commission Against Corruption Act 1988* not permit the use by the Commission of its coercive powers after an investigation is completed. ....72



# Chapter One - Introduction

## Referral

- 1.1 On 14 August 2008, in a letter addressed to the Committee on the Independent Commission Against Corruption (the Committee), the Independent Commission Against Corruption (the ICAC), proposed a number of amendments to the *Independent Commission Against Corruption Act 1988*.<sup>2</sup> One suggested amendment involved removing the restriction on the use, in disciplinary and civil proceedings, of evidence obtained under objection by the Commission.
- 1.2 In its review report on the 2006-2007 Annual Report of the ICAC, the Committee considered the proposed amendment and concluded that any such amendment would require detailed examination and consultation with relevant stakeholders.<sup>3</sup>
- 1.3 Accordingly, the then Premier, the Hon Nathan Rees MP, wrote to the Committee on 27 November 2008<sup>4</sup> requesting it to inquire into and report on:
  - whether the Act should be amended to remove the restriction in s 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in disciplinary proceedings;
  - whether the Act should be amended to remove the restriction in s 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained; and
  - if amendments we made to s 37, should the ICAC Act be amended to make its current function of assembling evidence for criminal proceedings a primary function of the Commission so as to ensure that the ICAC did not use its powers to obtain evidence under compulsion to the detriment of evidence admissible for use in criminal proceedings.

## Conduct of inquiry

### Submissions

- 1.4 On 18 March 2009 the Committee advertised in the Sydney Morning Herald and the Daily Telegraph for submissions. The Committee also wrote to a large number of stakeholders inviting them to make a submission to the inquiry.
- 1.5 The Committee received a total of 20 submissions.<sup>5</sup> A list of submissions is reproduced at Appendix 8. All submissions received can be accessed at the Committee's website: [www.parliament.nsw.gov.au/icac](http://www.parliament.nsw.gov.au/icac)

### Issues paper

- 1.6 On 5 May 2009 the Committee published an Issues Paper on its website. The Issues Paper outline key legislative provisions in the ICAC Act and provide background

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<sup>2</sup> The letter is reproduced at Appendix 1.

<sup>3</sup> Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, October 2008, Report No 3/54, p 24.

<sup>4</sup> The letter is reproduced at Appendix 2.

<sup>5</sup> Includes Supplementary Submission No 5a received from the ICAC.

Introduction

information on the operations of other commissions of inquiry and identify issues for discussion.

## Public hearings

- 1.7 The Committee held two public hearings on 4 and 11 May 2009. The Committee commenced its hearings with representatives from the ICAC including the former Commissioner, the Hon Jerrold Cripps QC. Evidence was also heard from a range of stakeholders and investigative commissions with similar functions and powers to that of the ICAC, including Mr Robert Needham, the then Chairperson of the Queensland Crime and Misconduct Commission, Mr John Pritchard from the Police Integrity Commission, and Mr Phillip Bradley from the NSW Crime Commission. A final public hearing was held with representatives from the ICAC on 11 August 2009.
- 1.8 The Hon Jerrold Cripps QC's term as ICAC Commissioner expired on Friday November 13 2009. The Hon David Ipp AO QC was appointed as the new ICAC Commissioner and commenced his term on Monday November 16 2009. On 2 July 2010 the Committee wrote to Commissioner Ipp seeking his views on the proposed amendments. Commissioner Ipp provided the committee with his views on the proposed amendments by letter dated 8 July 2010 and his views are incorporated in the body of the report.<sup>6</sup>
- 1.9 A list of witnesses who attended the public hearings is reproduced at Appendix 9. Transcripts of the public hearings can be accessed at the Committee's web site: [www.parliament.nsw.gov.au/icac](http://www.parliament.nsw.gov.au/icac)
- 1.10 The Committee wishes to thank the organisations, agencies and individuals who made submissions and gave evidence as part of the inquiry.

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<sup>6</sup> The letter is reproduced at Appendix 3.

## Chapter Two - Background

- 2.1 The proposed amendments to the *Independent Commission Against Corruption Act 1988* (ICAC Act), which are the subject of this inquiry, seek to amend section 37 of the Act to remove the current restriction on the use, in disciplinary proceedings and civil proceedings, either generally or solely in relation to the recovery of assets, of evidence that was obtained under objection by the ICAC. A further proposal is to amend the ICAC Act to make the assembling of admissible evidence a principal function of the ICAC.
- 2.2 This Chapter provides background information on the establishment of the ICAC and its functions and powers, in addition to some of the legislative provisions, legal concepts and issues involved with the proposed amendments.

### Establishment of the ICAC

- 2.3 The ICAC was established in 1989, as a component of the 'Government's program to restore the integrity of public administration and public institutions in this State.'<sup>7</sup> The Commission was set up in response to perceptions of corruption, with the then Premier, the Hon Nick Greiner MP, stating that:

I indicated before our being elected to Government that I was appalled by the sort of reputation this State had acquired around the country, and indeed, overseas. There was a general perception that people in high office in this State were susceptible to impropriety and corruption. In some cases that has been shown to be true.<sup>8</sup>

- 2.4 In his second reading speech, Mr Greiner made the following points:
- The Commission would be a body independent of executive government, 'responsible only to Parliament' with 'independent discretion, and will decide what should be investigated and how it should be investigated.'
  - The Commission's charter would require it to focus in particular on preventing corruption and enhancing the integrity of the public sector; it would not be a crime commission, as it would not investigate crime generally.
  - The function of the Commission would not be purely investigative, it would also involve the important role of educating public sector agencies and employees about corruption: 'the Commission also has a clear charter to play a constructive role in developing sound management practices and making public officials more aware of what it means to hold an office of public trust and more aware of the detrimental effects of corrupt practices.'
  - The Commission would have the 'formidable' coercive powers of a Royal Commission, to aid it in investigating public sector corruption: 'There is an inevitable tension between the rights of individuals who are accused of wrongdoing and the rights of the community at large to fair and honest government. ... corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.'

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<sup>7</sup> The Hon Nick Greiner MP, Second Reading Speech: Independent Commission Against Corruption Bill, Legislative Assembly, 26 May 1988, p 672.

<sup>8</sup> The Hon Nick Greiner MP, Second Reading Speech: Independent Commission Against Corruption Bill, Legislative Assembly, 26 May 1988, p 673.

Background

- It would be part of the Commission's role to make findings about persons involved in its investigations, so that it would 'not to be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion.' There would also be parliamentary oversight of the Commission's activities.<sup>9</sup>

2.5 The ICAC is part of a framework of independent, investigative bodies with coercive powers to enable them to perform their differing functions, including the Police Integrity Commission, the NSW Crime Commission, the NSW Ombudsman and the Health Care Complaints Commission. As Peter Hall QC comments:

Anti-corruption legislation supplements the criminal law and reinforces integrity in public office through the performance of investigative, educational, advisory and corruption prevention functions by permanent anti-corruption bodies.<sup>10</sup>

## ICAC's functions and powers

2.6 The ICAC has principal functions falling within three main categories:

- investigating and publicly exposing corrupt conduct so lessons may be learned and its recurrence minimised;
- actively preventing corruption by giving advice and assistance to build resistance to corruption in the public sector; and
- educating the community and the public sector about corruption and its effects.

2.7 The principal functions of the ICAC can be found in s 13 of the Act and are reproduced in full at Appendix 4.

2.8 Aside from the principal functions specified in s 13 of the ICAC Act, the ICAC has other functions primarily focused around the assembling and provision of admissible forms of evidence to be used in criminal prosecutions. These other functions are contained in s 14 of the Act and are reproduced in full at Appendix 5.

2.9 As noted above, the ICAC has the coercive powers of a royal commission. These powers, outlined below, may be used for the purposes of an investigation:

- require a public authority or official to produce a statement of information (ICAC Act, s.21)
- obtain documents and other things from a person, whether or not a public authority or official (s.22)
- enter premises occupied or used by a public authority or official and inspect documents and other things (s.23)
- override claims of privilege by public officials in obtaining documents and information (s.24)
- conduct public inquiries and compulsory examinations, without the rules of evidence applying (ss.17, 30 and 31)
- summon a person to appear at a compulsory examination or public inquiry to give evidence or produce documents (s.35)

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<sup>9</sup> The Hon Nick Greiner MP, Second Reading Speech: Independent Commission Against Corruption Bill, Legislative Assembly, 26 May 1988, pp 673-5.

<sup>10</sup> Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004, p 106.

- issue a warrant for the arrest of a person failing to attend in answer to a summons (s.36)
  - require a witness to answer any question, or produce any document or other thing, regardless of the possibility that it may incriminate them, or on any other ground of privilege (s.37).
- 2.10 The Commission has additional powers under the ICAC Act and other legislation to:
- issue or apply for a search warrant (s.40)
  - obtain a warrant for a surveillance device<sup>11</sup>
  - apply for a warrant to intercept telephone communications<sup>12</sup>
  - conduct a controlled operation<sup>13</sup>
  - acquire and use an assumed identity.<sup>14</sup>
- 2.11 The nature and role of the ICAC was discussed by Peter Hall QC in *Investigating Corruption and Misconduct in Public Office*:
- The ICAC has been established as an investigative body equipped with the power to make findings and to form opinions on the basis of the results of its investigations in respect of conduct whether or not the findings and opinions relate to corrupt conduct: s 12(3)(a). It is not, however, empowered to determine rights. It exercises no judicial or quasi-judicial function. The Commission has considerable powers for the performance of both its investigative and its reporting functions in the public interest.<sup>15</sup>
- 2.12 With regard to its own role the ICAC has commented:
- The public's right to know is regarded as paramount. It is given priority over some of the safeguards, protections and privileges which are traditionally afforded by the Courts to people charged with criminal offences – in particular the right to silence.<sup>16</sup>

## Accountability

- 2.13 The ICAC Act provides for an accountability structure consisting of the Parliamentary Joint Committee on the ICAC, which has functions including monitoring and reviewing the Commission's exercise of its functions, in addition to the Inspector of the ICAC, with functions including dealing with complaints regarding maladministration and abuse of power by the Commission and auditing its operations to monitor compliance with the laws of the state.<sup>17</sup> ICAC's use of surveillance devices, telecommunications interception and controlled operations is also subject to monitoring and oversight by the NSW Ombudsman to ensure compliance with the relevant legislation.<sup>18</sup>

<sup>11</sup> ICAC Act s 19(2) and *Surveillance Devices Act 2007* (NSW)

<sup>12</sup> *Telecommunications (Interception and Access) Act 1979* (Cth), ss 5, 39

<sup>13</sup> *Law Enforcement (Controlled Operations) Act 1997* (NSW), ss 3, 5

<sup>14</sup> *Law Enforcement and National Security (Assumed Identities) Act 1998* (NSW), ss 3, 4

<sup>15</sup> Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – powers and Procedures*, Lawbook Co, 2004, p 107-108.

<sup>16</sup> ICAC Report: Investigation into North Coast Land Development (July 1990) page xxiv as cited in Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – powers and Procedures*, Lawbook Co, 2004, p 108.

<sup>17</sup> ICAC Act, ss 57B, 64

<sup>18</sup> NSW Ombudsman, *Annual Report 2008-2009*, pp 106-7.

## Investigation process and use of powers

2.14 The Commission investigates those complaints that are assessed as containing information that could constitute corrupt conduct, as defined in the ICAC Act, and which have been assessed as being sufficiently serious by the ICAC's Assessment Panel. A preliminary investigation is then conducted to determine whether the material being investigated should be the subject of a full investigation. According to the Commission, the nature of an investigation and the use of coercive powers will vary depending on the allegations being investigated:

The methodology for investigations varies depending on the nature of the allegations. Some require extensive covert investigation (including electronic and physical surveillance and telephone intercepts), while others can be dealt with through more traditional means such as interviewing witnesses and executing notices to produce or search warrants. Witnesses may also be required to attend compulsory examinations (private hearings) to find out what they know about matters under investigation. Investigating teams include officers from various disciplines, including investigators, financial investigators, intelligence analysts, lawyers and corruption prevention officers.<sup>19</sup>

2.15 During 2008-2009 the Commission held 33 compulsory examinations and 7 public inquiries over 28 days. The following table indicates the Commission's use of its powers over the past three financial years.

**Table 1: ICAC's use of statutory powers<sup>20</sup>**

Power	2008-2009	2007-2008	2006-2007
Summons to appear (s.35)	114	217	116
Arrest warrant (s.36)	0	2	0
Order for prisoner (s.39)	5	3	0
Search warrant (s.40)	33	36	20
Notice to produce a statement (s.21)	13	12	37
Notice to produce a document or thing (s.22)	329	550	383
Notice authorising entry to public premises (s.23)	1	1	6
Surveillance device warrants	14	28	52
Telephone intercept warrants	34	38	33
Controlled operations	6	6	7
Assumed identities	5	3	5

**Note:** There were 3 combined s 21/22 notices, which were counted as both s 21 and s 22 notices.

2.16 At the conclusion of an investigation, a report is published outlining the ICAC's findings of corrupt conduct, and making statements in relation to whether or not it will seek the advice of the Office of the Director of Public Prosecutions (DPP) about possible criminal prosecutions arising from the investigation. The Commission's reports may also contain corruption prevention recommendations for relevant agencies to address, which focus on deficiencies in areas such as agency processes, systems and work practices, based on corruption risks identified during the investigation.

2.17 In terms of criminal prosecutions, ICAC assembles admissible evidence as part of its investigation and compiles a brief of evidence for the DPP. The DPP then assesses

<sup>19</sup> ICAC, *Annual Report 2008-2009*, p 42.

<sup>20</sup> ICAC, *Annual Report 2008-2009*, p 46.



the brief and decides whether there is enough admissible evidence to prosecute any affected persons. The DPP may make requisitions to ICAC for further evidence, information, or witness statements if the brief of evidence is deemed to be insufficient. If the DPP decides there is sufficient admissible evidence to proceed with the prosecution, ICAC institutes proceedings based on the DPP's advice on matters such as the charges to lay. The DPP then takes over prosecution of the matter in court.<sup>21</sup>

## Assembling admissible evidence

- 2.18 As noted at paragraph 2.8, assembling admissible evidence is not included among the Commission's principal functions, instead being an 'other function'. Types of admissible evidence that the ICAC can assemble include documentary evidence, telephone interception evidence and evidence from Commission officers or other witnesses. Material gathered by the Commission through the lawful use of overt and covert methods, such as search warrants, surveillance devices, telephone intercepts and conducting controlled operations may be admissible in legal proceedings, provided it is accompanied by a signed evidentiary certificate outlining relevant facts, as provided for in the relevant legislation, and complies with the rules of evidence.<sup>22</sup>
- 2.19 As the Committee has noted, material that the Commission obtains through compulsion, such as by issuing a notice to produce, or a summons to appear at a public inquiry or private examination, is not admissible in disciplinary or criminal proceedings against the person producing the material or giving evidence under objection. However, such material may be admissible in proceedings against other persons and in proceedings for offences under the ICAC Act.

## Disciplinary proceedings

### Definitions

- 2.20 The ICAC Act does not provide a definition of disciplinary proceedings. Section 2A of the ICAC Act specifies that the ICAC has jurisdiction over "public officials", defined as:
- ... an individual having public official functions or acting in a public official capacity, and includes any of the following:
- (a) the Governor (whether or not acting with the advice of the Executive Council),
  - (b) a person appointed to an office by the Governor,
  - (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
  - (d) a member of the Legislative Council or of the Legislative Assembly,
  - (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
  - (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),

<sup>21</sup> Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, pp 1-2 and Bruce McClintock SC, *Independent review of the Independent Commission Against Corruption Act 1988*, Final report, January 2005, pp 35-7.

<sup>22</sup> *Surveillance Devices Act 2007* (NSW), s 50, *Law Enforcement (Controlled Operations) Act 1997* (NSW), ss 26, 27, *Telecommunications (Interception and Access) Act 1979* (Cth), ss 74, 75A, 143, 145, 185C, ICAC Act, Division 4 and *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), Division 4 Part 5

Background

- (g) an officer or temporary employee of the Public Service or the Teaching Service,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,
- (j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of "public authority" is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (k) a member of the Police Force,
- (k1) an accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,
- (l) the holder of an office declared by the regulations to be an office within this definition,
- (m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.<sup>23</sup>

2.21 The *Public Sector Employment and Management Act 2002* (PSEM Act) provides a definition of what constitutes disciplinary action. Part 2.7 of the PSEM Act concerns the management of conduct and performance of officers in the public service. Section 6 of the PSEM Act defines the public service as the divisions of the Government Service specified in Part 1 of Schedule 1 of the PSEM Act. Section 42(1) defines disciplinary action, in relation to an officer, as:

- dismissal from the Public Service
- directing the officer to resign, or to be allowed to resign, from the Public Service within a specified time
- if the officer is on probation – annulment of the officer’s appointment
- except in the case of a senior executive officer – reduction of the officer’s salary or demotion to a lower position in the Public Service
- the imposition of a fine
- a caution or reprimand.

2.22 In terms of officers resigning or retiring before disciplinary action is taken, s 53 of the PSEM Act provides that:

- (1) An allegation that an officer has engaged in misconduct may be dealt with under this Part, and disciplinary action may be taken with respect to the officer, even though the officer has retired or resigned.
- (2) The taking of disciplinary action (other than a fine) with respect to the former officer does not affect the former officer’s retirement or resignation or the benefits, rights and liabilities arising from the retirement or resignation.

...

2.23 Section 44 of the PSEM Act provides for the issuing of guidelines as to how disciplinary proceedings under the Act should be conducted. Such guidelines must be consistent with the rules of procedural fairness.<sup>24</sup> An officer who has been punished due to misconduct has the right to appeal such a decision to the Industrial

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<sup>23</sup> ICAC Act s 3

<sup>24</sup> PSEM Act s 45

Relations Commission.<sup>25</sup>

- 2.24 The NSW Public Service Personnel Handbook contains the procedural guidelines for dealing with misconduct as a disciplinary matter. According to the guidelines, the disciplinary process may consist of the following four stages:
1. Initial Determination of an appropriate course of action regarding an allegation of Misconduct
  2. Investigation
  3. Initial decision and
  4. Implementation of final decision.<sup>26</sup>
- 2.25 The investigation stage of the process ‘enables the issues to be fully explored before any final decision is made in relation to the allegation/s. It also includes continuation of an internal investigation where external authorities have completed any relevant investigation.’<sup>27</sup>
- 2.26 The guidelines state that an investigation into alleged misconduct shall include, where relevant:
- A review of documentary material
  - Inspection of the workplace or site of incident
  - Interviewing all relevant persons, including the officer, connected with the allegation or incident
  - Taking statements from the officer or other relevant person.<sup>28</sup>
- 2.27 The procedural guidelines include a schematic showing the process of dealing with misconduct, which is reproduced at Appendix 7.

### Disciplinary outcomes from ICAC investigations

- 2.28 In terms of ICAC recommending disciplinary action, s 74(2) of the Act states that reports tabled under s 74 of the Act (for example, matters referred by Parliament or matters for which a public inquiry has been conducted):
- ... must include, in respect of each “affected” person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:
- (a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,
  - (b) the taking of action against the person for a specified disciplinary offence,
  - (c) the taking of action against the person as a public official on specified grounds, with

<sup>25</sup> *Industrial Relations Act 1996* s 98. Section 97 of the *Industrial Relations Act 1996* specifies what are appealable decisions. On 1 July 2010 the *Government and Related Employees Appeal Tribunal Act 1980* was repealed and provisions dealing with promotional and disciplinary appeals were placed in Part 7 of the *Industrial Relations Act 1996*. The Industrial Relations Commission has developed a Practice Note which details the practice and procedures concerning disciplinary appeals see

<[http://www.lawlink.nsw.gov.au/lawlink/irc/ll\\_irc.nsf/pages/IRC\\_procedures\\_legislation\\_pracnote\\_23](http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_procedures_legislation_pracnote_23)>

<sup>26</sup> NSW Government, Department of Premier and Cabinet, *Personnel Handbook*, Appendix 9-1, p 16, <[http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0019/739/Chapter\\_9.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0019/739/Chapter_9.pdf)>, accessed 7 June 2010

<sup>27</sup> NSW Government, Department of Premier and Cabinet, *Personnel Handbook*, Appendix 9-1, p 18, <[http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0019/739/Chapter\\_9.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0019/739/Chapter_9.pdf)>, accessed 7 June 2010

<sup>28</sup> NSW Government, Department of Premier and Cabinet, *Personnel Handbook*, Appendix 9-1, p 18, <[http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0019/739/Chapter\\_9.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0019/739/Chapter_9.pdf)>, accessed 7 June 2010

Background

a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

2.29 It is relevant to note that the Commission does not make statements in relation to disciplinary action if an agency has dismissed an employee or the employee has resigned prior to the Commission’s investigation being finalised:

... the number of referrals for disciplinary action or termination of employment by the Commission is consistently low as agencies often act to dismiss employees or take other disciplinary action before the ICAC report is released. Officers under investigation also often choose to resign prior to the investigation being finalised. In these circumstances, the Commission is not required to express an opinion about whether consideration should be given to disciplinary action.<sup>29</sup>

2.30 Disciplinary outcomes from matters closed by the ICAC for the last three financial years are indicated in the table below.

**Table 2: Disciplinary outcomes for matters closed by ICAC 2006-2009<sup>30</sup>**

Disciplinary action taken	2008-2009	2007-2008	2006-2007
Counselling	40	35	6
Dismissal	39	25	6
Other	64	66	11
Resignation	25	20	10

2.31 The case study below provides an example of disciplinary proceedings arising from an ICAC investigation.

**Case study 1: disciplinary action<sup>31</sup>**

In 2006 the ICAC concluded an investigation into the cover-up of an alleged assault on an inmate at Parramatta Correctional Centre. It found that the Acting Deputy Governor of the Centre, Jeffrey Strange, had tampered with a video tape<sup>32</sup> deleting evidence that he had hit an inmate during an attempt to restrain him. ICAC found that Mr Strange had engaged in corrupt conduct by tampering with the video tape of the incident to delete a segment that showed him slapping or hitting the inmate, and by encouraging the corrective services officer who video taped the incident to lie to Departmental investigators. ICAC noted that Mr Strange’s conduct involved the dishonest exercise of his official functions and could also have adversely affected the exercise of official functions by those investigating a complaint made by the inmate.

In its report, ICAC recommended that the Director of Public Prosecutions consider prosecuting Mr Strange for various offences and made a statement that it was of the opinion that the Department should consider taking disciplinary

<sup>29</sup> ICAC, *Annual Report 2008-2009*, p 48.

<sup>30</sup> Matters closed are totals for s 10 complaints from the public, s 11 reports from public sector agencies and protected disclosures: ICAC, *Annual Report 2006-2007*, p 29, ICAC, *Annual Report 2007-2008*, p 32, ICAC, *Annual Report 2008-2009*, p 34.

<sup>31</sup> ICAC, *Annual Report 2007-2008*, p 146, *Annual Report 2008-2009*, pp 139, 145 and *Report on cover-up of an assault on an inmate at Parramatta Correctional Centre*, June 2006.

<sup>32</sup> Incidents involving use of force on inmates are video-recorded, when possible, to protect against false allegations and monitor the conduct of correctional officers and inmates: ICAC, *Report on cover-up of an assault on an inmate at Parramatta Correctional Centre*, June 2006, p 10.

action against Mr Strange for engaging in misconduct, contrary to section 43(1)(b) of the PSEM Act.

The Department had suspended Mr Strange pending the outcome of the ICAC investigation. He was then suspended without pay awaiting the outcome of prosecution proceedings. In October 2008, Mr Strange was found guilty of offences under s.80(c) the ICAC Act (wilfully making a false statement) and placed on a two-year good behaviour bond. He was dismissed by the Department in January 2009, and appealed to the Industrial Relations Commission (IRC). In May 2009, the IRC made consent orders, which provided for Mr Strange to be reinstated on condition that he went on leave immediately and applied for medical retirement as soon as possible.

## Civil proceedings

### Definitions

2.32 The ICAC Act does not provide a definition of civil proceedings. The *Civil Procedure Act 2005* (NSW) defines civil proceedings as any proceedings other than criminal proceedings.<sup>33</sup> The types of relief that can be claimed in civil proceedings include:

- a claim for possession of land
- a claim for delivery of goods
- a claim for the recovery of damages or other money
- a claim for a declaration of right
- a claim for the determination of any question or matter that may be determined by the court
- any other claim (whether legal, equitable or otherwise) that is justiciable in the court.

2.33 Some participants in the inquiry noted that various types of civil proceedings may result from evidence given during an ICAC investigation. According to the Queensland Crime and Misconduct Commission, although 'most investigations are primarily aimed at conduct which is criminal or disciplinary in nature the fact is that much of what is both criminal and disciplinary may also give rise to civil liability.'<sup>34</sup> The following types of proceedings were identified by participants:

- '... proceedings for the recovery of funds or assets that were corruptly obtained.'<sup>35</sup>
- '... fraud by employees on public institutions. One can also envisage possible civil suit by third parties arising from some financial disadvantage they have suffered, say as a tender, arising from the conduct of the person giving evidence in the hearing.'<sup>36</sup>
- '... actions in contract, breaches of trusts by agents and employees, claims for restitution and such like, with the form of action necessarily varying according to the particular misconduct. It can be anticipated that it would be open for a number of simultaneous claims arising on different legal grounds to be brought even in

<sup>33</sup> *Civil Procedure Act 2005* (NSW), s 3

<sup>34</sup> Crime and Misconduct Commission (Qld), *Submission 3*, p 1.

<sup>35</sup> Inspector of the ICAC, *Submission 6*, p 3.

<sup>36</sup> Crime and Misconduct Commission (Qld), *Submission 3*, p 1.

Background

respect of the one person, some of which may be difficult to class as strictly recovery action, such as requiring a public official, as an employee, to account for money paid by way of bribe or secret commission.<sup>37</sup>

- ‘Civil actions by other parties to a matter where legal professional privilege is exposed (as the only exception in the Act in respect of legal professional privilege is communications passing between a legal practitioner and a person for the purpose of providing or receiving legal advice in relation to the appearance or the anticipated appearance at ICAC).<sup>38</sup>
- ‘... litigation unrelated to the officer's employment (for example evidence of facts given under compulsion to the ICAC which could be of use to a third party in unrelated civil litigation against the officer, such as divorce proceedings).<sup>39</sup>

### Criminal Assets Recovery Act

2.34 Under section 53(1) of the ICAC Act, the ICAC may, before or after investigating a matter, refer the matter to any person or body it considers appropriate in the circumstances. One such body the ICAC may refer matters to is the NSW Crime Commission. The NSW Crime Commission administers the *Criminal Assets Recovery Act 1990* (NSW) (the CAR Act). According to the ICAC's 2008-2009 Annual Report, the Commission referred four pending matters to the NSW Crime Commission, resulting in assets restraint or forfeiture orders made to a value of \$2,634,000.<sup>40</sup> As a result of its investigations, the Commission has referred matters relating to 24 persons to the NSW Crime Commission during the previous five years.<sup>41</sup>

2.35 The CAR Act provides a system for confiscation, without the requirement of a conviction, of the proceeds of crime related activity. Under the CAR Act, the NSW Crime Commission and the Police Integrity Commission<sup>42</sup> may take action to recover the proceeds of serious crime related activities. The Act currently permits the Supreme Court to order the forfeiture of property if it finds, on the balance of probabilities that the person has any time in the past six years engaged in serious criminal activity.<sup>43</sup> Proceedings under the CAR Act are considered civil proceedings.<sup>44</sup>

2.36 Serious criminal activity for the purposes of the CAR Act is anything done by a person that was at the time a serious criminal offence.<sup>45</sup> The CAR Act was originally enacted as the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW) and limited to serious drug-related activity. In 1997 the Act was renamed the CAR Act and broadened<sup>46</sup> to include certain serious criminal offences punishable by five years imprisonment or more, including, fraud, theft, bribery and corruption offences.<sup>47</sup> In

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<sup>37</sup> Police Integrity Commission, *Submission 4*, p 5.

<sup>38</sup> Law Society of NSW, *Submission 8*, p 3.

<sup>39</sup> Department of Premier and Cabinet, *Submission 17*, pp 5-6.

<sup>40</sup> ICAC, *Annual Report 2008-2009*, p 38.

<sup>41</sup> Tabled document, 11 August 2009, *ICAC request for additional recurrent funding*, p 8.

<sup>42</sup> Section 19 of the PIC Act specifies that the CAR Act applies to the PIC in the same way as it applies to the NSW Crime Commission. The PIC may only exercise a function under the CAR Act after consultation with the NSW Crime Commission.

<sup>43</sup> CAR Act, s 3

<sup>44</sup> CAR Act, s 5(1)

<sup>45</sup> CAR Act, s 6(1)

<sup>46</sup> Drug Trafficking (Civil Proceedings) Amendment Bill

<sup>47</sup> CAR Act, s 6(2)(d). Common offences against the *Crimes Act 1900* that the ICAC recommends for prosecution include: s 178A (fraudulent misappropriation) maximum penalty 7 years; s 178BA (obtain money by

the Second Reading Speech to the amending Bill, the Hon Jeff Shaw MLC, then Attorney General, stated:

The addition of these types of offences to the Act will enable both the Police Integrity Commission and the Crime Commission to pursue persons who have engaged in serious criminal activity involving bribery, corruption and other serious offences.

The ill-gotten gains made by these persons will become liable to forfeiture.<sup>48</sup>

- 2.37 The CAR Act contains provisions for information gathering powers, under which authorised officers may apply for production orders, search warrants and monitoring orders 'to allow property, documents and information to be obtained, so that property and the sources of that property can be located and identified.'<sup>49</sup>
- 2.38 Authorised officers may apply to the Supreme Court, ex parte, for a production order against a person, if they have reasonable grounds for suspecting that the person has possession or control of property-tracking document/s. The CAR Act provides that a person is not excused from complying with such an order on the grounds that producing the document:
- might tend to incriminate them or make them liable to a forfeiture or penalty, or
  - would be in breach of an obligation (whether imposed by an enactment or otherwise) not to disclose the existence or contents of the document, or
  - would disclose information that is the subject of legal professional privilege.<sup>50</sup>
- 2.39 If a person objects to a production order, the production of the document or any document or thing obtained as a consequence, is not admissible against them in any criminal proceedings, except in proceedings for certain offences under the CAR Act.<sup>51</sup>
- 2.40 On 22 June 2010, the Minister for Police, the Hon Michael Daley MP introduced the Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010. As explained in the Agreement in Principle speech the Bill:
- ... provides the Supreme Court with the capacity to make an unexplained wealth order in those cases in which there is reasonable suspicion that a person has engaged in serious crime-related activity and that person cannot lawfully account for the sources of their wealth. However, the court has the discretion to not make the order or to reduce the amount payable if it considers that it is in the public interest to do so.<sup>52</sup>
- 2.41 The Minister went on to state:
- Because the criminal marketplace adapts and changes to comprise not just traditional vices, like drug importation and supply, but other high-profit crimes like money laundering, motor vehicle theft, car rebirthing, fraud and Internet crime, the law needs to be able to punish in a way that is the most limiting, the most hurtful and the most effective – the seizure of criminally obtained wealth. The bill provides for this by amending the Criminal Assets Recovery Act 1990 so that the New South Wales Crime

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deception) maximum penalty 5 years; s 178BB (obtain money by false or misleading statement) maximum penalty 5 years.

<sup>48</sup> The Hon J W Shaw MLC, Attorney General and Minister for Industrial Relations, 'Second Reading Speech: Drug Trafficking (Civil Proceedings) Amendment Bill, Legislative Assembly, 27 June 1997 at p11269

<sup>49</sup> NSW Crime Commission, *Annual Report 2008-2009*, p 12.

<sup>50</sup> CAR Act, ss 33, 35

<sup>51</sup> CAR Act, s 35(2). Documents and material obtained through a production order is admissible in proceedings for offences under s 37 - failure to comply with production order.

<sup>52</sup> The Hon Michael Daley MP, Minister for Police and Minister for Finance, Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010, Legislative Assembly, Tuesday 22 June 2010, p 24496.

Background

Commission can apply to the court for such an order when it has reasonable suspicions that the person is involved in serious criminal activity or when it holds reasonable suspicions that the person's wealth is derived from the serious criminal activity of another person or persons. The court must be satisfied on the balance of probabilities that the wealth is not, or was not, illegally acquired property.<sup>53</sup>

2.42 The Bill contains a number changes to the CAR Act to facilitate the introduction of the unexplained wealth orders including that the NSW Crime Commission will now be able to pursue unexplained wealth accumulated over an unlimited period of time. Previously the Commission was restricted to targeting assets linked to criminal activity in the past six years. It also allows for a confiscation order where the court finds that there is a *reasonable suspicion* that a person has been engaged in serious crime related activity, which differs from the current requirement for the court to find that a person has engaged in such conduct on the *balance of probabilities*.

2.43 At the time of writing the Bill was before the Legislative Council.

2.44 In evidence before the Committee, the Commissioner of the NSW Crime Commission, Mr Phillip Bradley, advised the Committee on the operation of the CAR Act as it relates to the recovery of funds or assets that were obtained by corrupt conduct:

The Act is designed to recover the proceeds of crime from persons who have received them through criminal activity. That can be done without the need to record a conviction, so it is a civil action based on the civil standard of proof, which is the balance of probabilities. There are a number of orders that can be obtained under the Act. The main relief is in the form of a proceeds assessment order, which is, loosely stated, the profits of crime. The other is an assets forfeiture order, which is the recovery of specific assets that cannot be demonstrated by the defendant to be lawfully obtained. There are also lots of ancillary or enabling provisions, restraining orders being one, which are similar to *mareva* injunctions; examination orders, which are similar to bankruptcy; and other orders that can be obtained under the Act to facilitate the process.

As to the applicability to corruption-type matters, the Act specifically defines offences involving bribery and corruption as being caught by the Act. Therefore, the Act obviously addresses the types of offences that might be discovered by ICAC. The definition is in section 6, "serious crime related activity", which refers to offences punishable by imprisonment for five or more years. It involves various things including bribery and corruption, where people have committed such offences and an assessment can be made as to whether proceedings should be commenced in the Supreme Court by the Crime Commission to recover the proceeds of crime by one of two methods that I mentioned earlier.<sup>54</sup>

2.45 The case studies below illustrate assets restraint and forfeiture proceedings arising from ICAC investigations.

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<sup>53</sup> The Hon Michael Daley MP, Minister for Police and Minister for Finance, Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010, Legislative Assembly, Tuesday 22 June 2010, p 24496.

<sup>54</sup> Mr Phillip Bradley, Commissioner, NSW Crime Commission, *Transcript of evidence*, 11 May 2010, p 48



**Case study 2: assets restraint and forfeiture proceedings<sup>55</sup>**

During its recent investigation into tendering and payments in relation to NSW Fire Brigades capital works projects, the ICAC referred the receipt of corrupt proceeds to the NSW Crime Commission. The ICAC had found that Mr Clive Taylor and Mr Christian Sanhueza engaged in corrupt conduct in their work as project managers for the NSW Fire Brigades, obtaining at least \$1,010,00 and \$1,399,922 respectively through their manipulation of the tendering process for building projects. The NSW Crime Commission obtained restraining orders against Mr Sanhueza and Mr Taylor. Mr Sanhueza has since forfeited \$950,000 and two television sets. On 20 November 2008 the Supreme Court made an assets forfeiture order under s 22 of the CAR Act that the interest in specified property (a farm at Merriwa, two flatscreen televisions and a laptop computer) of Mr Taylor be forfeited to and vest in the Crown.

Following the ICAC's recent investigations into bribery and fraud at RailCorp, eight people were referred to the NSW Crime Commission for consideration of action under the CAR Act. An assets forfeiture order and proceeds assessment order for the amount of \$584,000 has been made in respect of one individual.

**Use of evidence in disciplinary and civil proceedings****Operation of section 37 of the ICAC Act**

- 2.46 As mentioned above, one of ICAC's principal functions is to investigate corrupt conduct involving or affecting public authorities or public officials.<sup>56</sup> As a means of performing this function, the ICAC has the power to conduct examinations and public inquiries presided over by either the Commissioner or the Deputy Commissioner.<sup>57</sup>
- 2.47 Section 37 of the ICAC Act operates to require a witness appearing before the ICAC at either a compulsory examination or public inquiry to answer any relevant question or produce any document or thing.<sup>58</sup> The witness is not excused from answering any question or producing any document or thing on the basis that it may incriminate or tend to incriminate them.<sup>59</sup> Provided the witness objects to answering a question or producing a document or thing,<sup>60</sup> the answer or document is not admissible in evidence against the witness in any criminal, civil or disciplinary proceedings.<sup>61</sup> However, the evidence is admissible against the witness in proceedings for offences against the ICAC Act and for contempt under the Act.<sup>62</sup>
- 2.48 Essentially the provisions of s 37 operate to abrogate the privilege against self-incrimination. To compensate for the abrogation of the privilege, the legislation

<sup>55</sup> ICAC, *Investigation into tendering and payments in relation to NSW Fire Brigades capital works projects*, December 2008, p 6 and ICAC, *Annual Report 2008-2009*, p 46; ICAC, *Annual Report 2007-2008*, October 2008, p 49

<sup>56</sup> ICAC Act, s 13 (1)(a). See s 8 of the ICAC Act for the definition of corrupt conduct.

<sup>57</sup> ICAC Act, ss 30 and 31

<sup>58</sup> ICAC Act, s 37(1). Section 37 of the ICAC Act is reproduced at Appendix 6.

<sup>59</sup> A witness is also not excused from answering any question or producing any document or thing on any other ground of privilege, duty of secrecy, other restriction on disclosure, or any other ground: s 37(2) of the ICAC Act.

<sup>60</sup> ICAC Act, s 37(4)(b)

<sup>61</sup> ICAC Act, s 37(3)

<sup>62</sup> ICAC Act, s 37(4)(a). See Part 9 of the ICAC Act for offences under the Act and Part 10 for contempt under the Act.

## Background

restricts the use of any evidence obtained under compulsion against the witness in any criminal, civil or disciplinary proceedings. Such a restriction is said to confer "use immunity."<sup>63</sup>

## Privilege against self-incrimination

### History

2.49 Considered a firmly established rule of the common law,<sup>64</sup> the privilege against self-incrimination entitles a person not to answer questions or produce material that may tend to incriminate them.<sup>65</sup> It has been described in a number of cases as a:

- "fundamental ... bulwark of liberty"<sup>66</sup>
- "basic and substantive common law right"<sup>67</sup>
- "human right, based on the desire to protect personal freedom and human dignity."<sup>68</sup>

2.50 It is traditionally accepted that the privilege against self-incrimination developed in the seventeenth century as a reaction to the procedures of the ecclesiastical courts and the Court of the Star Chamber.<sup>69</sup> These courts administered the ex officio oath, which operated to compel a person to testify on pain of excommunication or physical punishment, to their own guilt.<sup>70</sup> It was after these courts were abolished and the administration of the ex officio oath forbidden, that the privilege against self-incrimination began to achieve recognition in common law trials and by the second half of the seventeenth century the privilege was well established.<sup>71</sup>

2.51 The privilege today is found in most statements of human rights, including the International Covenant on Civil and Political Rights,<sup>72</sup> as well as the United States Constitution.<sup>73</sup>

### Scope

2.52 The Australian Law Reform Commission has stated that:

Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges:

- a privilege against self-incrimination in criminal matters;
- a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court of an administrative

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<sup>63</sup> Use immunity is further discussed at paragraphs 2.63 - 2.64.

<sup>64</sup> *Sorby v Commonwealth* (1983) 152 CLR 281 at 290 per Gibbs CJ.

<sup>65</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

<sup>66</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ.

<sup>67</sup> *Reid v Howard* (1995) 184 CLR 1 at 11 per Toohey, Gaudron, McHugh, and Gummow JJ.

<sup>68</sup> *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150 per Murphy J.

<sup>69</sup> *Sorby v Commonwealth* (1983) 152 CLR 281 at 317 per Brennan J.

<sup>70</sup> *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J.

<sup>71</sup> *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J.

<sup>72</sup> Article 14(3)(g) states that in the determination of any criminal charge no one shall be compelled to testify against himself or to confess guilt.

<sup>73</sup> The principle is embodied in the Fifth Amendment to the United States Constitution, which in part states that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

authority, but excluding private civil proceedings for damages); and

- a privilege against self-exposure to the forfeiture of an existing right.<sup>74</sup>

2.53 As noted above, the concept of the privilege against self-incrimination encompasses a privilege against self-exposure to a civil or administrative penalty. Civil penalties are imposed applying civil rather than criminal court processes and are designed to punish or discipline a person rather than to compensate an aggrieved party. They are distinct from civil proceedings seeking damages. The Queensland Law Reform Commission provides a summary of the nature of civil penalty proceedings:

Legislative regulatory schemes often create obligations, contravention of which are not a criminal offence but results in action by a government agency for the imposition of a penalty. Although the process generally follows the procedures in civil actions, the object of the proceeding is not, as in such actions, to obtain compensation for a private wrong. Rather, its purpose is to allow the state to enforce a public interest.<sup>75</sup>

## Rationale

2.54 It has been observed that it is ‘not easy to assert confidently that the privilege serves one particular policy or purpose.’<sup>76</sup> In *Environment Protection Authority v Caltex Refining Co Pty Limited*, Mason CJ and Toohey J at 501 comment:

Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt ...

In one important sense, the modern rationale for the privilege against self-incrimination is substantially the same as the historical justification – protection of the individual from being confronted by the “cruel trilemma” of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment). Naturally, methods of punishment are now different: modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined – the privilege is now seen to be one of many internationally recognised human rights.

2.55 The Queensland Law Reform Commission (QLRC) in its 2004 Report, *The Abrogation of the Privilege Against Self-incrimination*, compiled a number of additional rationales for the privilege.<sup>77</sup> They include:

- **To prevent the abuse of power:** In discussing this topic the QLRC acknowledged observations that this rationale is difficult to justify given the procedural and evidentiary safeguards that exist in contemporary criminal trials. However, the Commission noted that the application of the privilege is not restricted to court proceedings and is applicable to a number of investigatory situations where the use of coercive powers is sanctioned.<sup>78</sup> Ultimately the Commission considered that the “abuse of power” explanation is based upon the

<sup>74</sup> Australian Law Reform Commission, *Civil and Administrative Penalties in Australian Federal Regulation*, Report no 95, October 2002, (ALRC 95) at [18.2].

<sup>75</sup> Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No. 59, December 2004, (QLRC 59) at p 12.

<sup>76</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 335 per Mason ACJ, Wilson and Dawson JJ; Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – powers and Procedures*, Lawbook Co, 2004, p 594.

<sup>77</sup> QLRC 59 at p 23-31. In its report the QLRC divide the rationales up into two categories: systemic and individual. Systemic being those that relate to the administration of the criminal justice system and individual being those that refer to human rights and dignity.

<sup>78</sup> QLRC 59 at p 23.

Background

imbalance that exists between a State and its citizens.<sup>79</sup> As illustrated by the Australian Law Reform Commission:

Because of its resources, the State has a considerable advantage in putting its case against most citizens. Most people dealing with the State are at a substantial organisational, monetary and knowledge disadvantage. In addition, there is considerable potential for internal corruption and misuse of powers if they are not strictly regulated and controlled.<sup>80</sup>

- **To protect human dignity and privacy:** This rationale supports the argument that the privilege should be regarded as a human right rather than simply a rule of evidence. The rationale suggests the privilege acts as a shield against the ‘indignity and invasion of privacy which occurs in compulsory self-incrimination.’<sup>81</sup>
- **To protect the accusatorial system of justice:** One of the fundamental principles of the accusatorial system of justice is that the prosecution bears the onus of proof. This rationale suggests that the presumption of innocence underlies the privilege against self-incrimination. Gibbs CJ in *Sorby v Commonwealth* comments at 294:

It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.
- **To protect the quality of evidence:** The basis for this rationale is that someone who is compelled to give self-incriminating evidence is more likely to lie than expose himself or herself to criminal prosecution. This may result in unreliable evidence placed before the court or jury, which could potentially act to undermine the credibility in the trial system.

## Abrogation

2.56 Whilst considered a firmly established rule of the common law, the privilege against self-incrimination is not considered immutable and may be modified by statute. In *Sorby v Commonwealth*,<sup>82</sup> Gibbs CJ at 298 stated:

The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action.

2.57 The courts will interpret legislation as having abrogated the privilege only if the intention is clearly apparent in the legislation itself. In the absence of express words of abrogation, the question as to whether the privilege has been abrogated will be determined by assessing the “language and character of the provision and the purpose which it is designed to achieve.”<sup>83</sup>

2.58 The privilege is often abrogated where the legislature considers there to be competing interests. As expressed in *Environment Protection Authority v Caltex Refining Co Pty Ltd*:

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<sup>79</sup> QLRC 59 at p 24.

<sup>80</sup> Australian Law Reform Commission, *Evidence*, Report No 26 Volume 1, July 1985, (ALRC 26) at p 487 as cited in QLRC 59 at p 24.

<sup>81</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 281 per McHugh J at 346 as cited in QLRC 59 at p30.

<sup>82</sup> (1983) 152 CLR 281

<sup>83</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 281 at 289-290 per Gibbs CJ.

The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.<sup>84</sup>

2.59 The above statement has potency when considering the functions of anti-corruption commissions such as the ICAC. Central to the success of commissions set up to investigate and expose corrupt behaviour is the power to compel testimony and produce documents.<sup>85</sup>

2.60 Some fear that due to the concealed nature of corrupt conduct, without abrogating the privilege against self-incrimination, anti-corruption commissions would be ineffective:

The rationale for this power lies in the nature of corruption as insidious and uniquely difficult to detect and that traditional investigative powers and techniques were seen to have failed to deal with it.<sup>86</sup>

2.61 The Hon Nick Greiner MP, the then Premier, expressed similar reasoning in the Second Reading Speech to the ICAC Bill:

... corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.<sup>87</sup>

2.62 Where the privilege against self-incrimination has been abrogated by statute, it is common that restrictions are placed on the use of any evidence obtained under compulsion. Such restrictions preserve some protection for an individual and are said to confer “use immunity” or “derivative use immunity”.

### Use and derivative use immunity

2.63 Use immunity prevents evidence obtained under compulsion from being admitted as evidence in subsequent proceedings. It usually takes the form of a provision, which states that the evidence cannot subsequently be used in any criminal, civil and disciplinary proceedings against the person. Derivative use immunity extends use immunity to prevent any other evidence obtained as a result of inquiries based upon the compelled evidence from being admitted as evidence.<sup>88</sup>

2.64 Subsections 37(3) and (4) of the ICAC Act confer use immunity upon any evidence obtained under compulsion at an ICAC hearing. In their submission to the inquiry Civil Liberties Australia illustrate how the use immunity contained within the ICAC Act operates:

For example, suppose person X is summonsed to provide information to the Commission. As a result of questioning, person X provides a particular document. Acting on information contained in this document, the Commission obtains further documents which contain information which implicates X in corruption. At person X's trial the initial document person X produces would be inadmissible, but the subsequent

<sup>84</sup> (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J.

<sup>85</sup> Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004, p 596.

<sup>86</sup> ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, November 1994 at p 32.

<sup>87</sup> The Hon Nick Greiner MP, Second Reading Speech: Independent Commission Against Corruption Bill, Legislative Assembly, 26 May 1988 at p 672.

<sup>88</sup> Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – powers and Procedures*, Lawbook Co, 2004, p 598.

## Background

documents and the information they contain would not be.<sup>89</sup>

## Relevant statutory provisions in other commissions of inquiry

2.65 In the following section, the Committee outlines legislation relating to other commissions of inquiry both in NSW and other Australian jurisdictions, in particular focussing on those provisions relevant to the privilege against self-incrimination and its abrogation, in addition to the function of assembling admissible evidence.

### Self-incrimination

2.66 The privilege against self-incrimination has been abrogated in a number of commissions of inquiry with similar functions to the ICAC.

#### *Corruption and crime commissions*

2.67 There are two other commissions of inquiry within Australia which have as one of their functions the investigation of corrupt conduct:

- Crime and Misconduct Commission (Qld)
- Corruption and Crime Commission (WA)

2.68 It is important to note that different legislative frameworks applicable across jurisdictions do not permit direct comparisons between the statutory provisions that operate in respect of the ICAC, the Crime and Misconduct Commission (CMC) and the Corruption and Crime Commission (CCC). The CMC, on which the CCC is modelled, is an amalgamation of a body analogous to the ICAC, the former Criminal Justice Commission, and the Queensland Crime Commission. Consequently, unlike the ICAC, which only has jurisdiction over public sector misconduct, the CMC and the CCC exercise jurisdiction over organised crime and public sector misconduct.

2.69 Despite the additional jurisdiction, the powers and processes used by the CMC and the CCC to discharge their misconduct function are similar to those of the ICAC. Table 3 that follows details the abrogating and protective provisions of the CMC and the CCC:

**Table 3: Abrogating and protective provisions of the CMC and CCC**

Agency and legislation	Is the privilege against self-incrimination abrogated?	Evidence admissible in disciplinary proceedings?	Evidence admissible in civil proceedings?
Crime and Misconduct Commission (Qld) <i>Crime and Misconduct Act 2001</i>	<b>Yes</b> - a witness appearing before the CMC must answer a question put to them by the presiding officer. The witness is unable to remain silent or refuse to answer on the grounds of self-incrimination: s 192(1) and (2)	<b>No</b> - provided the witness claims self-incrimination privilege, any answer, document, thing or statement given is not admissible in any civil, criminal or administrative proceedings: s 197.	<b>No</b> - provided the witness claims self-incrimination privilege, any answer, document, thing or statement given is not admissible in any civil, criminal or administrative proceedings: s 197.
Corruption and Crime Commission (WA) <i>Corruption and</i>	<b>Yes</b> – the CCC has the power to obtain a statement of information; documents or things; and to require attendance at an examination: ss 94, 95 and	<b>Yes</b> - Evidence is allowed to be used in disciplinary proceedings: s 145(1)(b)(iii) s 3(1) disciplinary action means any disciplinary action under any	<b>No</b> - a statement made by a witness in answer to a question that the CCC requires is not admissible as evidence in any civil or criminal proceedings:

<sup>89</sup> Civil Liberties Australia, *Submission 12*, p 2.

Agency and legislation	Is the privilege against self-incrimination abrogated?	Evidence admissible in disciplinary proceedings?	Evidence admissible in civil proceedings?
<i>Crime Commission Act 2003</i>	96 Failure to comply without reasonable excuse is considered contempt of the Commission: ss 158, 159 and 160 Self-incrimination is specifically excluded as a reasonable excuse: s 157(a)	law or contract and includes — (a) action under section 8 of the Police Act 1892; and (b) the taking of action against a person, with a view to dismissing, dispensing with the services of or otherwise terminating the services of that person;  A witness may be asked about any answer given to a question asked by the Commission under s 21 of the <i>Evidence Act 1906</i> (WA): s 145(2) <sup>90</sup>	s 145

### *Police integrity commissions*

2.70 In addition to commissions of inquiry investigating corruption and crime, there are a number of commissions of inquiry within Australia that have specific and limited jurisdiction over police officers. All of the commissions of inquiry investigating police officers allow evidence to be used in disciplinary proceedings. One commission, the Australian Law Enforcement Integrity Commission, also allows evidence to be used in confiscation proceedings. Confiscation proceedings are defined under the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) as proceedings:

- conducted under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*; or
- a corresponding law within the meaning of either of those Acts.

2.71 Confiscation proceedings under the LEIC Act do not include a criminal prosecution for an offence under either of the above two proceeds of crime Acts or a corresponding law.

2.72 Table 4 that follows details the abrogating and protective provisions of the commissions of inquiry that investigate police officers:

**Table 4: Abrogating and protective provisions of police integrity commissions**

Agency and legislation	Is the privilege against self-incrimination abrogated?	Evidence admissible in disciplinary proceedings?	Evidence admissible in civil proceedings?
Police Integrity Commission (NSW) <i>Police</i>	<b>Yes</b> - a witness summoned to attend before the PIC is not entitled to refuse to answer any question relevant to an	<b>Yes</b> – evidence is allowed to be used in (see section 40(3): <ul style="list-style-type: none"> <li>• deciding whether to make an order under section 173 or 181D of the <i>Police Act 1990</i></li> <li>• in any proceedings under</li> </ul>	<b>No</b> - An answer made, or document or other thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section)

<sup>90</sup> Section 21 of the *Evidence Act 1906* (WA) provides that every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.

## Background

Agency and legislation	Is the privilege against self-incrimination abrogated?	Evidence admissible in disciplinary proceedings?	Evidence admissible in civil proceedings?
<p><i>Integrity Commission Act 1996</i> (NSW)</p>	<p>investigation or produce any document or other thing: s 40(1)</p>	<p>Division 1A or 1C of Part 9 of the <i>Police Act</i></p> <ul style="list-style-type: none"> <li>• an order under section 183A of the <i>Police Act</i></li> <li>• or any proceedings for the purposes of Division 2A of Part 9 of the <i>Police Act</i> with respect to an order under section 183A of the <i>Police Act</i></li> <li>• in any <i>disciplinary proceedings</i> (including for the purposes of taking disciplinary action under Part 2.7 of the <i>Public Sector Employment and Management Act 2002</i></li> </ul> <p>Disciplinary proceedings are defined under the PIC Act as proceedings for a disciplinary offence: s 4</p> <p>Disciplinary offence is defined under the PIC Act as any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law: s 4</p>	<p>admissible in evidence against the person in any civil or criminal proceedings: s 40(3)</p>
<p>Office of Police Integrity (Vic)</p> <p><i>Police Integrity Act 2008</i> (Vic)</p>	<p><b>Yes</b> – A person is not excused from answering a question or giving information at an examination, or from producing a document or other thing on the ground that it might incriminate the person or make the person liable to a penalty: s 96(1)</p>	<p><b>Yes</b> - The answer, information, document or thing is not admissible in evidence against the person before any court or person acting judicially, except in proceedings for-</p> <p>(b) a breach of discipline by a member of Victoria Police: s 96(3)(b)</p>	<p><b>No</b> - The answer, information, document or thing is not admissible in evidence against the person before any court or person acting judicially, except in proceedings for-</p> <p>(a) perjury or giving false information; or</p> <p>(b) a breach of discipline by a member of Victoria Police; or</p> <p>(c) failure to comply with a direction under section 47; or</p> <p>(d) an offence referred to in section 68(3); or</p> <p>(e) contempt of the Director under Division 6: s 96(3)</p>
<p>Australian Law Enforcement Integrity Commission (Cth)</p> <p><i>Law Enforcement Integrity Commissioner Act 2006</i></p>	<p><b>Yes</b> – a person is not excused from answering a question or producing a document or thing when summoned to attend a hearing on the ground that it would tend to incriminate the person: s 96(1)</p>	<p><b>Yes</b> - Neither the answer given or the document or thing produced is admissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty, other than:</p> <ul style="list-style-type: none"> <li>• disciplinary proceedings against the person if the person is a staff member of a law enforcement agency: s 96(4)</li> </ul>	<p><b>Yes</b> (limited) - Neither the answer given or the document or thing produced is admissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty, other than:</p> <ul style="list-style-type: none"> <li>• <b>confiscation proceedings</b></li> </ul> <p>Confiscation proceedings are defined under the LEIC Act as</p>



Agency and legislation	Is the privilege against self-incrimination abrogated?	Evidence admissible in disciplinary proceedings?	Evidence admissible in civil proceedings?
(Cth)		Disciplinary proceedings are defined under the LEIC Act as: <ul style="list-style-type: none"> <li>• a proceeding of a disciplinary nature under a law of the Commonwealth or of a State or Territory; and</li> <li>• action taken under Subdivision D of Division 5 of Part V of the Australian Federal Police Act 1979: s 5 of the LEIC Act</li> </ul>	a proceeding under: <ul style="list-style-type: none"> <li>• the <i>Proceeds of Crime Act 1987</i> or the <i>Proceeds of Crime Act 2002</i>; or</li> <li>• a corresponding law within the meaning of either of those Acts;</li> </ul> It does not include a criminal prosecution for an offence under either of those Acts or a corresponding law: s 5 of the LEIC Act

### Other commissions

- 2.73 The NSW Health Care Complaints Commission (HCCC) has functions including receiving and assessing complaints relating to health services and health service providers, investigating and assessing whether any complaint is serious and should be prosecuted, and prosecuting serious complaints.<sup>91</sup> Sections 21A and 34A of the Act state that, in assessing or investigating complaints, the HCCC may require a person to provide it with information and documents, and appear before it and give oral or written evidence. Persons are not excused from complying with a requirement under sections 21A and 34A on the grounds that the information, answer or document they provide may incriminate them or render them liable to a penalty.<sup>92</sup>
- 2.74 Section 37A of the *Health Care Complaints Act 1993* provides that any *information or answer* given by a person, in compliance with sections 21A or 34 of the Act, is not admissible as evidence against them in civil or criminal proceedings, if an objection is made. Such evidence is admissible in disciplinary proceedings or proceedings for offences under the Act. On the other hand, a *document* produced in compliance with sections 21A or 34A of the Act 'is not inadmissible in evidence against the person in any proceedings on the ground that the document might incriminate the person.'<sup>93</sup>

### Assembling admissible evidence

- 2.75 Other commissions of inquiry operating in Australian jurisdictions generally have functions in relation to assembling admissible evidence relevant to performing their misconduct roles. The extent to which assembling admissible evidence is included in the principal functions of these commissions is indicated in the following table. It is important to note that the nature of the roles performed by the commissions is diverse, with some undertaking roles in relation to areas such as crime and witness protection, in addition to public sector misconduct. These differences mean that it is difficult to make direct comparisons between the commissions.
- 2.76 As the table indicates, although assembling and furnishing admissible evidence for prosecution is one of the primary ways Queensland's CMC and Western Australia's Corruption and Crime Commission can fulfil their misconduct functions, the relevant legislation does not distinguish between principal and secondary functions.

<sup>91</sup> *Health Care Complaints Act 1993* (NSW), s 3.

<sup>92</sup> *Health Care Complaints Act 1993* (NSW), ss 21A, 34A, 37A.

<sup>93</sup> *Health Care Complaints Act 1993* (NSW), s 37A(2)-(3).

**Table 5: Principal and secondary functions of other commissions of inquiry**

Agency and legislation	Is assembling admissible evidence a principal function?	Is assembling admissible evidence a secondary function?
Police Integrity Commission (PIC) <i>Police Integrity Commission Act 1996</i>	<b>No</b> – principal functions are to prevent police misconduct and detect or investigate, or manage or oversee other agencies in the detection or investigation of police misconduct, s 13	<b>Yes</b> – secondary functions regarding evidence and information collected include assembling evidence that may be admissible in the prosecution of a person for a criminal offence and furnishing any such evidence to the DPP, and assembling evidence that may be admissible in the prosecution of a person (other than a police officer) for a disciplinary offence and furnishing any such evidence to the appropriate authority in the State, s 15(1)(a) and(c)
NSW Crime Commission <i>New South Wales Crime Commission Act 1985</i>	<b>Yes</b> - functions include investigating matters relating to a relevant criminal activity (referred to the Commission by the Management Committee for investigation) and assembling evidence that would be admissible in the prosecution of a person for a relevant offence arising out of such matters and furnishing any evidence to the DPP, s 6(1)(b)	No secondary functions
Crime and Misconduct Commission (Qld) <i>Crime and Misconduct Act 2001</i>	The CMC's misconduct function is to raise standards of integrity and conduct in units of public administration and to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, s 33 The CMC performs its misconduct functions by undertaking various activities including, when conducting or monitoring investigations, gathering evidence for or ensuring evidence is gathered for (i) the prosecution of persons for offences; or (ii) disciplinary proceedings against persons, s 35(1)(h)	
Corruption and Crime Commission (WA) <i>Corruption and Crime Commission Act 2003</i>	The misconduct function of the CCC includes assembling evidence obtained in the course of exercising the misconduct function and: <ul style="list-style-type: none"> <li>• furnishing to an independent agency or another authority, evidence that may be admissible in the prosecution of a person for a criminal offence or may otherwise be relevant to the functions of the agency or authority; and</li> <li>• furnishing to the Attorney General or a suitable authority of another state, territory, the Commonwealth or another country, evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the jurisdiction concerned or which may otherwise be relevant to that jurisdiction, s 18(2)(h).</li> </ul>	

Note: The table only refers to the misconduct functions of the CMC and CCC.

## Chapter Three - Use of evidence in disciplinary proceedings

- 3.1 The Committee has been asked to inquire into whether the *Independent Commission Against Corruption Act 1988* (the ICAC Act) should be amended to remove the restriction in section 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the ICAC.

### ICAC's arguments in support of proposed amendment

#### Public interest

- 3.2 In their submission to the inquiry the ICAC contended, 'there is a strong public interest argument in allowing the admission of compulsorily given evidence in [disciplinary and civil] proceedings.'<sup>94</sup>
- 3.3 With reference to disciplinary proceedings there are a number of elements to the ICAC's public interest argument. The first such element refers to the potential for improved efficiency and timeliness in the conduct of proceedings. The ICAC submitted:
- As the law currently stands, if an admission of corrupt conduct or misconduct is given under objection it cannot be used against the public official in any disciplinary proceedings. The need for public sector agencies conducting disciplinary proceedings to gather other evidence can be resource intensive as well as time consuming.<sup>95</sup>
- 3.4 In evidence before the Committee, the Solicitor to the Commission, Mr Roy Waldon, expanded on the above:
- ... Some departments have difficulty progressing the disciplinary aspect because very often the only evidence might be evidence that has been given in our public inquiries. Sometimes there might be some additional evidence, but the departments still have to go out and find the requisite evidence in order to commence the disciplinary proceedings and then bring them to fruition, so it is not just a case of looking at what has happened in our public inquiries. The department is having to go out and actively conduct a disciplinary process, which sometimes might take quite a while and quite a lot of resources, and sometimes where the people have not resigned beforehand they are stood down on full pay and the process can take months before reaching fruition. So it is a question of the resources that the public sector is putting into this.<sup>96</sup>
- 3.5 The above argument was reinforced by the former Commissioner, the Hon Jerrold Cripps when, in response to a question as to whether departments would have other evidence available for them to use in disciplinary proceedings, he commented:
- Yes, it is possible they do. You might get a telephone intercept, for example. That can be used. But the simplest way of getting a finding of disciplinary misconduct is the frank admission of the person who has done it.<sup>97</sup>

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<sup>94</sup> Independent Commission Against Corruption, *Submission 5*, p 2.

<sup>95</sup> Independent Commission Against Corruption, *Submission 5*, p 2.

<sup>96</sup> Mr Roy Waldon, Solicitor to the Commission, Independent Commission Against Corruption, *Transcript of evidence*, 4 May 2009, p 2.

<sup>97</sup> The Hon Jerrold Cripps QC, Commissioner (former), Independent Commission Against Corruption, *Transcript of evidence*, 4 May 2009, p 7.

Use of evidence in disciplinary proceedings

3.6 Another element of the ICAC's public interest argument is that at times there may not be other evidence available to use in disciplinary proceedings. The ICAC highlighted the consequences of this in their submission:

In some cases where there is insufficient evidence to immediately proceed with disciplinary proceedings a public authority may suspend an official pending the outcome of a criminal prosecution... This however usually means that the public official continues to receive payment of salary. As prosecutions may take years to conclude and may not ultimately result in a conviction this can, at the very least, result in long delays in the finalisation of disciplinary action.<sup>98</sup>

3.7 The ICAC submit that the above situation may ultimately result in 'a self-confessed corrupt public official remaining in public employment (and continuing to receive remuneration) and undermine attempts by the relevant public authority to prevent further corruption.'<sup>99</sup>

3.8 Another unwanted result of there being insufficient other evidence available is that public officials may resign before proceedings can commence:

... The main problem I get from my perception is that people realise that they can, if necessary, resign with all their entitlements before anything else happens to them. I think that has to be stopped and one way it could be stopped is for them to know that, even if they do resign, these admissions can be used against them.<sup>100</sup>

3.9 In their Supplementary Submission the ICAC expand on the above:

In some cases public sector agencies may decide to allow a public official to resign rather than to embark upon a disciplinary process. The Commission notes that two of the public officials involved in its recent RailCorp inquiry were allowed to resign.<sup>101</sup>

3.10 The above concern was also raised by the ICAC in their 2008-2009 Annual Report: Information available to the Commission suggests a revolving door for corrupt individuals. Public sector employees have been allowed to resign against the background of misconduct allegations only to be re-employed by another agency with adverse results. Some individuals have been employed despite proper recording of adverse employment histories or other discoverable adverse information due to poor or non-existent employment screening during the recruitment process. Local and state government departments and agencies are often faced with decisions about whether to accept a resignation during any misconduct investigation given the financial cost attached to their completion and the risk of disciplinary action being overturned on review.<sup>102</sup>

3.11 The ICAC argued that:

As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct under objection should not be able to avoid disciplinary action simply because there is a lack of other evidence of their conduct.<sup>103</sup>

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<sup>98</sup> Independent Commission Against Corruption, *Submission 5*, p 2.

<sup>99</sup> Independent Commission Against Corruption, *Submission 5*, p 2.

<sup>100</sup> Mr Cripps, *Transcript of evidence*, 4 May 2009, p 2.

<sup>101</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, p 3.

<sup>102</sup> Independent Commission Against Corruption, *Annual Report 2008 – 2009*, p 62

<sup>103</sup> Independent Commission Against Corruption, *Submission 5*, p 2.

## Precedent

- 3.12 Another argument that the ICAC raised in support of the proposed amendment is that the use of evidence obtained under objection in disciplinary proceedings is not without precedent.<sup>104</sup> In their submission the ICAC state:

Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the ICAC Act. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Commonwealth Law Enforcement Integrity Commissioner Act 2006* also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.<sup>105</sup>

- 3.13 In evidence before the Committee, the former Commissioner reinforced the above by drawing the Committee's attention to the inclusion of administrative officers of the NSW Police under section 40(3) of the PIC Act. Mr Cripps commented:

... The evidence can be used in the Police Integrity Commission and in the Health Care Complaints Commission. A few years ago the Act was amended as far as the Police Integrity Commission was concerned. Originally it was said there were aspects of the Police Commissioner's powers, such as no confidence in an officer and things like that, where this evidence could be used. The legislation was then amended and it was said that it also applied to anyone who gave evidence at the Police Integrity Commission who was a public servant and not a police officer.<sup>106</sup>

- 3.14 In their submission the ICAC submitted that if the Committee supported the proposed amendments to section 37, then consideration should also be given to amending section 26 of the ICAC Act. Section 26 applies to requirements under sections 21 and 22 of the ICAC Act for a public authority or public official to produce a statement of information (s 21) and any document or other thing (s 22). Section 26(2) provides that if a statement, document or thing tends to incriminate the person and the person objects at the time of production then that evidence cannot be used against them in any subsequent proceedings. The ICAC submitted that in the event that section 37 is amended then similar amendments should be made to this section.<sup>107</sup>
- 3.15 In a letter dated 8 July 2010 the current Commissioner of the ICAC, the Hon David Ipp AO QC advised the Committee that he supported the proposed amendment to remove the restriction in section 37 of the Act prohibiting the use in disciplinary proceedings of evidence given under objection.<sup>108</sup>

## Inquiry participants' views

### Public interest

- 3.16 In their submission to the inquiry the Queensland Crime and Misconduct Commission (CMC) noted that whilst there are currently no plans to seek amendments to the *Crime and Misconduct Act 2001* (Qld) similar to those proposed for the ICAC Act, the Commission 'sees some sense in lifting the restriction on the

<sup>104</sup> See paragraphs 2.66 – 2.74 for a discussion on the legislative provisions of other investigative commissions. Independent Commission Against Corruption, *Submission 5*, p 2.

<sup>106</sup> Mr Cripps, *Transcript of evidence*, 4 May 2009, p 3.

<sup>107</sup> Independent Commission Against Corruption, *Submission 5*, p 3

<sup>108</sup> Letter from ICAC Commissioner, the Hon David Ipp AO QC, dated 8 July 2010

Use of evidence in disciplinary proceedings

use of evidence with respect to disciplinary proceedings.<sup>109</sup> In evidence before the Committee, the former Chairperson of the CMC, Mr Robert Needham, commented:

... To me it is quite incongruous that a public servant could admit before the Commission totally improper action and that evidence cannot be used against him or her in disciplinary proceedings.<sup>110</sup>

3.17 Mr Needham also recognised that the proposed amendment could result in a more efficient use of resources. When asked if the directed interview procedure, which is the procedure Queensland adopts in relation to police officers, could be a process NSW could benefit from, Mr Needham responded:

It would be an alternative way of achieving the same result but it would be a less efficient way. It would require a greater use of resources. Instead of just being able to use the answers that were given in the morning at the hearing, you would have to sit down and do a further interview in the afternoon to get exactly the same answers. It would seem to be an inefficient way to do it. A much more efficient way is to let us have one hearing, one answer, and use those answers.<sup>111</sup>

3.18 The Inspector of the ICAC, Mr Harvey Cooper AM, stated that the public interest lies in implementing the proposed amendment. While he acknowledged there are arguments to the contrary, he stated in evidence before the Committee:

... if there is a finding that that individual has so abused the trust put in him as an employee that he has been guilty of corruption as defined in the Act then the public interest requires that such a person should cease to be employed in a government agency.<sup>112</sup>

3.19 In his submission the Inspector considered that the dismissal of a corrupt employee is not a form of punishment but rather a way of protecting the employing agency from the employee's improper conduct.<sup>113</sup> The Inspector argued that the potential amendment could go one step further. He suggested an amendment that would have the effect of:

... making any finding of fact of corrupt conduct against a person by the Independent Commission Against Corruption *prima facie* evidence of the truth of that finding. The onus would then shift to the person to rebut that presumption.<sup>114</sup>

3.20 Mr Bruce McClintock SC<sup>115</sup> was also in agreement with some of the views of the Inspector of the ICAC. In his submission to the inquiry Mr McClintock acknowledged the finely balanced issues involved but ultimately concluded that the public interest lies in removing the prohibition on the use of such evidence in disciplinary proceedings. He submitted:

On the one hand, one has the fact that the evidence has been obtained under compulsion and is a long standing and fundamental principle of Australian law that no person should be compelled to give evidence against himself. That is the reason for the present structure of s 37 of the ICAC Act. On the other hand, there is the fact that if the

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<sup>109</sup> Crime and Misconduct Commission, *Submission 3*, p 1

<sup>110</sup> Mr Robert Needham, Chairperson (former), Crime and Misconduct Commission, *Transcript of evidence*, 11 May 2009, p 21

<sup>111</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 17

<sup>112</sup> Mr Harvey Cooper AM, Inspector of the ICAC, *Transcript of evidence*, 4 May 2009, p 14

<sup>113</sup> Office of the Inspector of the ICAC, *Submission 6*, p 1

<sup>114</sup> Office of the Inspector of the ICAC, *Submission 6*, p 2

<sup>115</sup> Mr McClintock was commissioned by the NSW Government in November 2004 to conduct an independent review of the ICAC. The review was published in January 2005 and can be accessed at:

<[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0020/11369/icac.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0020/11369/icac.pdf)>

witness has made an admission of misconduct which could lead properly to disciplinary proceedings being taken against him or her, it seems artificial that such an admission should not be taken into account by whichever entity is charged with the disciplinary proceedings.

On balance, I favour removing the prohibition on the use of such evidence in disciplinary proceedings.<sup>116</sup>

- 3.21 In evidence before the Committee Mr McClintock reiterated his position by stating: I have absolutely no doubt that public interest outweighs those private interests. As I said, it would be a different matter if it were a crime. If it were for civil disciplinary matters I have no doubt that it outweighs it. Bear in mind that all that is happening is that evidence that has been gathered can be used. It does not even mean it is conclusive.<sup>117</sup>
- 3.22 The Commissioner of the NSW Crime Commission, Mr Phillip Bradley commented: I think there is a lot of precedent for public employees being subjected to proceedings that do not give them the same privileges as criminal interrogation and proceedings. I think there is a good reason for that. If they are employed by the public and they do the wrong thing it should be possible to use some directive powers to find out what they have done and to move them on for reasons that have been stated many times—so that they can be distinguished from ordinary members of the public who have committed crimes about which there are a lot of rules.<sup>118</sup>
- 3.23 The NSW Fire Brigades also expressed support for the proposed amendment, citing similar public interest reasons to that of the ICAC. They comment in their submission: If the firefighter's own evidence of their misconduct is admissible, it may prevent the need for the officer conducting the inquiry to obtain further evidence or documents from other firefighters. This would bring greater efficiency to the inquiry process. It may also be possible for the inquiry to make a finding of misconduct, which could not otherwise be found.<sup>119</sup>
- 3.24 Mr Alan Robertson SC commented on the competing considerations that the proposed amendment generates: As to paragraphs 1 and 2, the use in disciplinary proceedings or use in civil proceedings generally, it seems to me that involves at the end of the day a value judgment on which, no doubt, different people have different views. Fairness, on the one hand, that is the fairness, or lack of it, in saying to someone, "You must answer this question even though you object to it", and then it can be used in disciplinary proceedings or civil proceedings, that sort of fairness. Fairness on the other hand, that is the efficiency factor, or the public importance of rooting out corruption and the benefits of corruption when people have benefited, such as taking whatever money or money's worth in a corrupt way in the course of their employment. Those seem to me to be the competing considerations. There is the personal fairness aspect and the public authority, efficiency aspect.<sup>120</sup>
- 3.25 The Law Society of New South Wales argued against any amendment to allow evidence obtained under objection to be used in disciplinary proceedings. The Law Society commented that any such amendment has the potential to unfairly expose a

<sup>116</sup> Mr Bruce McClintock SC, Barrister, *Submission 10*, pp 1-2

<sup>117</sup> Mr Bruce McClintock SC, Barrister, *Transcript of evidence*, 4 May 2009, p 42

<sup>118</sup> Mr Phillip Bradley, Commissioner, NSW Crime Commission, *Transcript of evidence*, 11 May 2009, p 49

<sup>119</sup> NSW Fire Brigades, *Submission 14*, p 5

<sup>120</sup> Mr Alan Robertson SC, Barrister, *Transcript of evidence*, 11 May 2009, p 34

Use of evidence in disciplinary proceedings

witness to litigation for assisting with an inquiry. They expressed serious concern that if amendments were made to allow evidence to be used in disciplinary proceedings then it will soon follow that evidence will be admissible in criminal proceedings.<sup>121</sup>

3.26 Appearing before the Committee on behalf of the Law Society's Criminal Law Committee, Mr Peter McGhee commented:

A member of the public, or any of us, could one day be called before the Commission and you would want to know that you had rights. They are so important to get to the truth. There will always be a few that get away, but they may be caught in criminal proceedings when evidence comes out via the Evidence Act, after cross-examination and a thorough review of all witnesses. That is when a decision should be made and it is the only time a decision should be made that affects a person's livelihood and their ability to provide for and support their family.<sup>122</sup>

3.27 In answers to questions on notice, Mr McGhee also contended that existing legislative avenues are adequate in terms of ensuring that corrupt public officials are disciplined in a way that maintains procedural fairness:

No one wants to see a corrupt public servant hide behind the shield of the objection and obstructing the recovery of money or assets fraudulently obtained from the State. However legislatively removing the shield would impact adversely on procedural fairness in the way ICAC conducts its investigations.

The Public Sector Employment and Management Act 2002, the Criminal Assets Recovery Act 1990 and or the Confiscation of Proceeds of Crimes Act 1989 in addition to the exhaustive and extensive information gathering powers under the ICAC Act, would weed out and effectively discipline a corrupt public servant whilst preserving procedural fairness in the inquiry.<sup>123</sup>

3.28 Mr Don McKenzie also argued against the proposed amendment on the grounds that any such amendment may upset a delicate balance that the current legislation has achieved. Mr McKenzie submitted that the public have gradually come to accept the ICAC's powers over its last twenty years in operation<sup>124</sup> and any such amendment along the lines suggested 'would not show appropriate recognition for the community's concern at people being compelled to give evidence adverse to their own legal interests.'<sup>125</sup>

3.29 The NSW Police Association also expressed concern that the proposed amendment may have a detrimental effect. In their submission they comment:

The normal rules of evidence do not apply in the Commission's public hearings and counsel representing a witness are allowed to examine or cross-examine only with the leave of the Commissioner. In other words, for the most part, the evidence adduced by coercion remains untested. The Commission hearings do not provide the opportunity for the complete processes of the criminal law to take place, as it is not a criminal court.

The risk of the Commission becoming a defacto industrial forum could be very real – untested evidence adduced through coercion will be used by employers to discipline or remove employees who will then have to prove to the Industrial Relations Commission that such an action was harsh, unjust or unfair.<sup>126</sup>

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<sup>121</sup> Law Society of New South Wales, *Submission 8*, p 3

<sup>122</sup> Mr Peter McGhee, Criminal Law Committee, Law Society of New South Wales, *Transcript of evidence*, 11 May 2009, p 60

<sup>123</sup> Law Society of NSW, Answers to questions taken on notice at 11 May 2009 public hearing, p 2

<sup>124</sup> Mr Don McKenzie, *Submission 11*, p 4

<sup>125</sup> Mr Don McKenzie, *Submission 11*, p 2

<sup>126</sup> NSW Police Association, *Submission 15*, p 2



- 3.30 The Australian Commission for Law Enforcement Integrity did not support or oppose the proposed amendment to the ICAC Act, however in their submission, the Commission elaborated on their experiences as an investigative agency:

ACLEI's experience is that it is of practical value for an integrity agency to have a framework that includes a range of options concerning how evidence can be used.

For instance, not all coercive hearings yield admissions of guilt to criminal acts. Where only less-serious misconduct is self-disclosed by a witness, disciplinary action offers an option for accountability that may be more proportionate and efficient, and better matched to the circumstances, than are criminal proceedings.<sup>127</sup>

## Precedent

- 3.31 As mentioned in the ICAC submission, the proposed amendment to allow the use of evidence obtained under objection in disciplinary proceedings is not without precedent. The ICAC refer to provisions within the *Police Integrity Commission Act 1996* (NSW) (PIC Act) that allow compelled evidence to be used in certain disciplinary proceedings.<sup>128</sup>

- 3.32 The Inspector of the Police Integrity Commission submitted that:

If comparable amendments were made to section 37(3) of the ICAC Act, it would follow that this would have the effect of bringing the Act into line with the relevant provisions of the Police Integrity Commission Act.<sup>129</sup>

- 3.33 In their submission the Police Integrity Commission commented that 'it may be of some assistance for the Committee to consider the legislative history leading to the provision of an exception in s 40(3) for managerial action under the *Police Act 1990* and disciplinary proceedings elsewhere.'<sup>130</sup> In summary, the PIC illustrate that the legislation was borne out of the experience of the Wood Royal Commission coupled with the special position of public trust occupied by NSW Police Officers. In evidence before the Committee, the Commissioner of the PIC, Mr John Pritchard commented on the appropriateness of subjecting all public officials to the same industrial procedures applicable to police officers. Mr Pritchard acknowledged that section 40(3) of the PIC Act now allows evidence obtained under objection to be used in disciplinary proceedings under Part 2.7 of the *Public Sector Employment and Management Act 2002*. This has the effect of bringing administrative officers within the NSW Police Force within the jurisdiction of the Police Integrity Commission:

If you approach it on that ground alone—and going back to our submission, we set out what appeared to be the rationale or policy reason behind some of the debates in Parliament explaining why this provision was there, which suggested that police officers do occupy a certain higher position of trust. I suppose it is not just that aspect but they have certain extra powers that no other members of the public sector in many respects have, and that casts a greater obligation to behave more appropriately and perhaps at a higher level. But we would have to concede there may be a small chink in that armour with the extension of section 40(3), with the amendment last year to include disciplinary action under the Public Sector Employment and Management Act.

There is a slight erosion in that policy factor that may have been behind the provision in the first place. It would now appear with administrative officers of the police force, now that the Police Integrity Commission has jurisdiction over those officers, that evidence

<sup>127</sup> Australian Commission for Law Enforcement Integrity, *Submission 13*, p 5

<sup>128</sup> See paragraphs 2.70 - 2.72 for a discussion of section 40(3) *Police Integrity Commission Act 1996*

<sup>129</sup> Inspector of the PIC, *Submission 2*, p 1

<sup>130</sup> Police Integrity Commission, *Submission 4*, p 2

Use of evidence in disciplinary proceedings

they give in hearings, coerced evidence, can be used in taking action under that Act. If you accept that, as I said, that seems to chip away a little at the rationale behind treating police differently. The public sector is not an homogenous body. It is made up of varying sorts of officers with different powers.<sup>131</sup>

3.34 In evidence before the Committee, the NSW Police Force outlined the disciplinary processes that may follow a PIC hearing:

There are a couple of frameworks. One is in particular, once we get that information from PIC, from its hearings, that is exchanged in a couple of ways. It will either be directly from PIC or by our counsel who represents in relation to public hearings in particular. Then we make a decision whether or not that information or evidence as such may be able to be used by the Commissioner under section 181D to lose confidence in the officer directly or we have a reinvestigation under part 8A of the Police Act to reinvestigate the matter to consider whether or not there are sustained findings for disciplinary action.<sup>132</sup>

3.35 It is important to note that internal NSW Police Force investigations may also involve directed interviews:

... when we reinvestigate the matter under part 8A, when it comes back to us, we have the power to direct interviews as well, and they must answer truthfully. ... untruthfulness is at the core of integrity and the Commissioner has a strong viewpoint on that: untruthfulness is generally a higher test, if you like, as far as dismissal.<sup>133</sup>

3.36 Assistant Commissioner Loy emphasised that evidence obtained by the PIC under coercion is generally used as a basis for further investigation of alleged misconduct by the NSW Police Force, and is not relied on as sufficient evidence of guilt:

... we also take into account corroborative evidence of other witnesses in the matter. The evidence of the officer under the coercive powers, that alone is why we would then reinvestigate the matter to ensure that the evidence is adduced or guilt or sustained findings. I think it is problematic just to accept the evidence on face value.<sup>134</sup>

3.37 It was also noted that, although evidence obtained during PIC public hearings is available to the Police Force Professional Standards Command and therefore enables the immediate preparation of a submission to the Commissioner for his consideration, private hearings necessitate a different process:

Where hearings are held in private ... the New South Wales Police Force is not aware of those matters and those matters are then disseminated to the Professional Standards Command. With those matters sometimes we have to go in and actually do some further investigative work because under the legislative framework the Commissioner of Police is carefully required to give an officer notice under the Act, and under that the notice must contain the grounds under which the Commissioner is considering losing confidence and the evidence must also be available.<sup>135</sup>

3.38 The NSW Police Force made the following points regarding the use of evidence given before the PIC under objection in subsequent disciplinary proceedings and its application to the public sector in general:

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<sup>131</sup> Mr John Pritchard, Commissioner, Police Integrity Commission, *Transcript of evidence*, Monday 4 May 2009, p 24

<sup>132</sup> Acting Assistant Commissioner Jeffrey Loy, Professional Standards Command, NSW Police Force, *Transcript of evidence*, 11 May 2009, p 1

<sup>133</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 3

<sup>134</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 2

<sup>135</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, pp 2-3

- In contrast to the NSW Police Force, public sector agencies may not have the investigative skills or resources to conduct investigations of misconduct, and this may also impact on 'checking mechanisms' to ensure the fairness of the disciplinary process.<sup>136</sup>
  - Although police officers are all subject to the disciplinary processes provided for in the Police Act, not all staff engaged by public sector agencies are subject to the Public Sector Employment and Management Act.<sup>137</sup>
  - There is a high rate of review in the Industrial Relations Commission of Commissioner's loss of confidence decisions: '... last year 24 were removed and 22 were reviewed. Our expectation is that the police officers will have their matters reviewed in the Industrial Relations Commission, so obviously as we get more experience in that jurisdiction it will assist us to make sure our case is as robust as possible.'<sup>138</sup>
- 3.39 Assistant Commissioner Loy stated that the PIC Act 'works effectively for the New South Wales Police Force as the unique law enforcement role of police officers means that it is important to be able to commence internal discipline proceedings as soon as possible if admissions about misconduct are detected.'<sup>139</sup>
- 3.40 The Police Association also provided the Committee with information on the loss of confidence disciplinary process, with Mr Greg Chilvers, the Director of the Association's Research and Resource Centre, noting that officers who lose the Commissioner's confidence are deemed to have resigned for the purpose of their entitlements:
- Under the Police Act, if the person is removed for the loss of the Commissioner's confidence and that is successfully prosecuted in the Industrial Relations Commission, the removal is deemed to be a resignation. ... The person does not lose his or her entitlements, long service leave, sick leave, annual leave or entitlements under various superannuation Acts.<sup>140</sup>
- 3.41 In answers to questions on notice, the Association provided the following details relating to disciplinary action taken by the NSW Police force:
- According to the 2007/2008 Annual Report of the NSW Police Force, there were 28 removals/dismissals in the relevant year, taking the total number of removals ... to 203 ... of the 203 removals since 1996 there have now been 24 removals that have gone to final judgment on the merits. Of those 24 removals, a total of 9 officers returned to duty (noting a further five were reinstated solely to permit medical discharge applications to proceed) and the Commissioner has been successful in defending his removal of 10 officers.<sup>141</sup> [footnotes omitted]
- 3.42 The Police Association of NSW expressed its view on the appropriateness of subjecting all public officials to the same industrial procedures applicable to police officers. Mr Chilvers told the Committee that the extraordinary powers granted to police mean that they are subject to a higher level of accountability and responsibility than the rest of the public sector:

<sup>136</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 2

<sup>137</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 5. See paragraphs 2.21 – 2.27 for a discussion on disciplinary procedures under the *Public Sector Employment Management Act*.

<sup>138</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 8

<sup>139</sup> Acting Assistant Commissioner Loy, *Transcript of evidence*, 11 May 2009, p 1

<sup>140</sup> Mr Gregory Chilvers, Director, Research and Resource Centre, Police Association of NSW, *Transcript of evidence*, 11 May 2009, p 23

<sup>141</sup> Police Association of NSW, Answers to questions taken on notice at 11 May 2009 public hearing, p 2

Use of evidence in disciplinary proceedings

It appears that in this process the ICAC is saying, "The Police Integrity Commissioner already has this power. Why can we not have it?" I suggest that, in a number of instances, there is a different context in policing to the rest of the public sector. First, I do not think you can place the general public sector at the same level as the office of constable for a police officer and the accountabilities that are attached to that. The general public sector does not have the power to take away a person's freedom and/or in certain circumstances his or her life and have that justified at law.<sup>142</sup>

3.43 Mr Chilvers expressed reservations about the quality of evidence obtained under objection before a body with royal commission powers:

Admissions and all sorts of things can be made in circumstances that I would suggest would not stand up even without that sort of scrutiny in any jurisdiction, let me say. ... There are all sorts of problems with the sorts of evidence and admissions made in those sorts of circumstances. That has already been seen to a certain degree where our own Police Integrity Commission is making findings that are untested, that deny the person the subject of the findings natural justice. We have got to be very careful about that. There is a temptation to speed things up, if you like, to take the fast track, and by throwing away a person's rights to natural justice I think there are very, very significant public interest issues there ...<sup>143</sup>

3.44 The Police Association emphasised the importance of considering the purpose of the legislation, noting that in the context of the NSW Police Force, the focus is on removing officers who have been found to act corruptly:

What are you trying to achieve? You are trying to get rid of the corruption, you are trying to get rid of the corrupt officer. Certainly in terms of policing, we just want to get them out of the job, and I think that is reasonable.<sup>144</sup>

## Effectiveness of the ICAC

3.45 In their submission the ICAC acknowledged that one argument against removing the protection that section 37 provides to witnesses is that without any protection witnesses may not tell the truth. The ICAC submitted that this has not been their experience. They comment:

Generally, most witnesses deny any involvement in wrongdoing (despite being reminded of the criminal consequences of giving false or misleading evidence) and only make admissions when presented with clear and compelling evidence of their conduct. The existence of the protections under section 37 of the ICAC Act does not appear to have any relevance to a decision by a witness whether or not to give truthful evidence to the Commission.<sup>145</sup>

3.46 In response to a question about whether the proposal to remove the protection contained within section 37 would have an impact on a witness's willingness to come forward, the former Commissioner stated:

I have expressed my view fairly forcefully on this subject. There was an assumption when this legislation was introduced that it would have the effect of making people at least more willing to disclose their sources of corrupt conduct and how badly they behaved if they knew they were totally immune from any civil, criminal or disciplinary proceedings. It is an example of theorising about the way people behave only to find

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<sup>142</sup> Mr Chilvers, *Transcript of evidence*, 11 May 2009, p 23

<sup>143</sup> Mr Chilvers, *Transcript of evidence*, 11 May 2009, p 24

<sup>144</sup> Mr Chilvers, *Transcript of evidence*, 11 May 2009, p 30

<sup>145</sup> Independent Commission Against Corruption, *Submission 5*, p 3

that they do not, and that seems to make people theorise even more powerfully about the way people will behave. They do not behave like that at all.

I have been at the Commission for four and a half years and I have been involved in most of the inquiries. I find that people will tell me what they think the Commission knows – no more, no less. It has nothing to do with these sections.<sup>146</sup>

- 3.47 The Law Society of NSW submitted an opposing view to that of the Commissioner. They argued that the proposed amendment has the potential to unfairly alter the rights of witnesses and may discourage witnesses from coming forward or from volunteering information.<sup>147</sup> In answers provided to questions taken on notice, Mr Peter McGhee, who appeared before the Committee on behalf of the NSW Law Society commented:

A witness may prefer the risk of contempt proceedings for saying he is "unable to remember" against the outcome of giving evidence which will be marshalled against him in a disciplinary action.

It may inhibit witnesses from being honest or cooperative. Rooting out systemic corruption is a principal object of ICAC then there is little justification for making that task any more difficult than it already is, to fast track the method of dismissal to deal with the discipline of public servants.<sup>148</sup>

- 3.48 This view was shared by Mr Don McKenzie who argued that the proposed amendments might impact upon the operational effectiveness of the ICAC. He stated in his submission:

Witnesses will no longer be cocooned in a blanket protection that ensures that their truthful evidence will not make their legal circumstances worse. They will need to be looking more carefully over their shoulder trying to assess the adverse legal ramifications of their compelled evidence.<sup>149</sup>

- 3.49 The NSW Bar Association also presented an argument along similar lines. While the Bar Association stated that an exception might be justified in professional disciplinary cases, the Association considered that removing the immunity provided in section 37 may inhibit witnesses from being truthful and cooperative and thus undermine the ICAC's effectiveness at uncovering systemic corruption.<sup>150</sup> Mr Stephen Odgers SC appeared before the Committee on behalf of the Bar Association and elaborated on the Association's position. Mr Odgers stated that there were differing views within the Bar Association, however on balance the view of the Association is that the amendment should not be supported. He stated:

The primary goal of ICAC is to find the truth, find the facts. Anything which might discourage a witness from telling the truth would tend to conflict with that primary goal. If a witness knows that what he or she says can be used against them in civil or disciplinary proceedings, that provides a disincentive to telling the truth if they have something to hide. I appreciate that they are compulsorily required to answer questions, and I am not suggesting that they will necessarily refuse to answer questions, but there is of course the greater danger that they will attempt to obfuscate the truth or ameliorate their position to protect themselves. It is just simply a basic proposition that if they are facing significant harm to themselves, they are not fully protected as

<sup>146</sup> Mr Cripps, *Transcript of evidence*, 4 May 2009, p 5

<sup>147</sup> The Law Society of New South Wales, *Submission 8*, p 3

<sup>148</sup> Mr Peter McGhee on behalf of the Law Society of NSW, Answers to questions taken on notice at 11 May 2009 public hearing, p 1

<sup>149</sup> Mr Don McKenzie, *Submission 11*, p 6

<sup>150</sup> NSW Bar Association, *Submission 16*, p 2

Use of evidence in disciplinary proceedings

currently is the position, then there is the danger that they will not give truthful evidence.<sup>151</sup>

3.50 The Commissioner of the NSW Crime Commission, Mr Phillip Bradley shared the views expressed by the former ICAC Commissioner on this issue. He stated in evidence:

It is difficult to get criminals to tell the truth about crimes that they have committed, but I notice that there are people who have put forward the argument that if the answers are not going to be used against them, they are more likely to be truthful. I just do not think you could run that argument. My experience is that the thing that causes people to tell the truth is the consequences of not doing so, which in our case is five years in jail.<sup>152</sup>

3.51 Mr Needham from the Crime and Misconduct Commission illustrated to the Committee his experience on this issue:

I read what Mr Cripps said on that and I basically agree with him except to one extent. I agree with what he says, in that those witnesses really only tell you what they think you know. Now that does not mean to say that you only get admissions of things that you can otherwise prove, because the ideal, of course, when you are cross examining any witness who you think is lying is always to get that witness to the stage that he or she does not know how much you know. You might only know this much, but you suspect they are involved in that much. But if you get them to a stage where they do not know how much it is you know, they know they can be up for perjury if they lie, and you can get admissions over and above matters that you can otherwise prove. You might then be able to go off, and using that admission, find proof independently of it, but you will often get admissions of matters that you could not otherwise prove. But again it gets back to the matter that you will only get those admissions if they believe you have the material on them. I do not think the fact that it will put them in for a disciplinary charge would make one iota of difference.<sup>153</sup>

## Possible ways to address competing concerns

3.52 Civil Liberties Australia in their submission commented that they had no in-principle objection to the proposed amendment in relation to disciplinary proceedings, provided that derivative use immunity would apply in any subsequent criminal or civil proceedings.<sup>154</sup> In forming this view, CLA noted that administrative and disciplinary proceedings 'do not usually attract the application of the privilege against self-incrimination, unless information produced in such proceedings may later be tendered in criminal or civil proceedings.'<sup>155</sup>

3.53 Mr Stephen Odgers SC raised a similar point regarding the subsequent use of evidence. Mr Odgers expressed concern that, if the proposed amendments were adopted, evidence obtained under objection might *indirectly* make its way into criminal proceedings. Mr Odgers explained the process as follows:

- A person is questioned at ICAC and compelled to provide evidence which incriminates them
- The person's evidence is tendered either by the employing agency in a disciplinary proceeding or by the plaintiff in civil proceedings as evidence against the person

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<sup>151</sup> Mr Stephen Odgers SC, Barrister, NSW Bar Association, *Transcript of evidence*, 4 May 2009, p 47

<sup>152</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 55

<sup>153</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 16

<sup>154</sup> Civil Liberties Australia, *Submission 12*, p 5

<sup>155</sup> Civil Liberties Australia, *Submission 12*, p 5

- If the person is resisting the civil claim or resisting the disciplinary proceedings then they will undoubtedly need to provide evidence qualifying or explaining the incriminating evidence they provided at the ICAC
- If in these civil or disciplinary proceedings the person cannot claim any privilege with respect to their evidence then their evidence at those proceedings could be used in subsequent criminal proceedings. The final result being that any evidence about admissions at ICAC or admissions during the disciplinary or civil proceedings could be used against them in criminal proceedings.<sup>156</sup>

3.54 Mr Odgers did qualify that the above would only be a problem if a person could not claim any privilege with respect to their evidence at the civil or disciplinary proceedings. He acknowledged that in most cases people probably could; however he did indicate that the Medical Tribunal is an example of a proceeding where you cannot claim privilege against self-incrimination. Mr Odgers ultimately concluded that:

I am concerned that this is not something that you can confidently say would not happen. Therefore, because it is a legitimate concern, if we are going to go down the path of making this kind of evidence admissible in these kinds of proceedings, we really need to make certain that it does not have a flow-on effect to criminal proceedings.<sup>157</sup>

3.55 To address this concern Mr Odgers was of the view that if the proposed amendments were made to the ICAC Act consideration should also be given to adding a provision similar or identical to section 128(7)(b) of the *Evidence Act 1995*. Such a provision would confer an 'indirect use immunity - that is, not only what you say cannot be used in evidence against you but anything that is obtained indirectly in consequence of you having given evidence cannot be used against you.'<sup>158</sup> Section 128(7)(b) provides:

**128 Privilege in respect of self-incrimination in other proceedings**

(7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

3.56 Mr Peter McGhee, representing the Law Society of NSW, also expressed concern at the potential for indirect use of evidence obtained by the ICAC under objection in subsequent proceedings:

If that happened and a narrow use of the information was permitted the problem would be that once it was in the forum of another jurisdiction it could be used in different contexts, such as statements and affidavits from other persons, after that information was revealed and looked at. If it is given to the Commission confidentially and in an honest and truthful way, that information can be revealed if it is used in another forum even if it is just for disciplinary proceedings. It can then be used against a person in

<sup>156</sup> Mr Odgers, *Transcript of evidence*, 4 May 2009, p 49-50

<sup>157</sup> Mr Odgers, *Transcript of evidence*, 4 May 2009, p 50

<sup>158</sup> Mr Odgers, *Transcript of evidence*, 4 May 2009, p 48. See paragraphs 2.63 – 2.64 for a discussion on use and indirect use immunity.

Use of evidence in disciplinary proceedings

another way in other proceedings. It opens doors that will put the person in a position where disciplinary action leads to civil actions for damages.<sup>159</sup>

3.57 In their submission to the inquiry the Department of Premier and Cabinet (DPC) stated that there are 'significant arguments for and against removing the restriction on the use of compulsory obtained evidence in disciplinary proceedings.'<sup>160</sup> The DPC submit that removing the restriction 'would provide significant benefits for agencies in terms of their ability to manage and discipline staff, and in deterring corrupt behaviour.'<sup>161</sup> They also argue that the proposed amendment would reduce the financial cost to the State of having to re-investigate the matter. On this point the DPC submitted that one Government agency had advised them of an instance where disciplinary action commenced by the agency was unsuccessful because the evidence at an ICAC hearing was not admissible.<sup>162</sup>

3.58 However, the DPC recognised that the proposed amendment would undermine the privilege against self-incrimination, which is a 'well established principle of due process in the accusatorial system of justice' and 'give significant advantage to the employer when conducting disciplinary proceedings.'<sup>163</sup> The DPC ultimately submitted that these 'competing public policy priorities need to be balanced.'<sup>164</sup> The DPC suggested that:

In considering this amendment, it may be appropriate to consider whether any of the concerns outlined above in relation to the privilege against self incrimination could be addressed by adopting additional safeguards such as:

- limiting the use of evidence obtained under compulsion to disciplinary proceedings relating to the actions which are the subject of the inquiry, and
- ensuring that the person must be notified that their disclosures may be used against them in disciplinary proceedings.<sup>165</sup>

3.59 Mr Alan Robertson SC also suggested that the proposed amendment, as it is drafted, appears to encompass all disciplinary proceedings. Mr Robertson stated that 'there may be scope for narrowing the idea to disciplinary proceedings arising out of the corrupt activity.'<sup>166</sup>

3.60 In their submission the Public Interest Advocacy Centre (PIAC) also suggested a possible compromise position with respect to disciplinary proceedings. PIAC submitted:

Comparison with legislation in the other Australian jurisdictions referred to in this submission does suggest, however, that there is potential for an amendment which provides that, despite section 37, evidence gathered under objection is admissible for the purpose of disciplinary proceedings under specific statutes dealing with public sector misconduct, while remaining inadmissible in any other criminal, civil or administrative proceedings.<sup>167</sup>

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<sup>159</sup> Mr McGhee, *Transcript of evidence*, 11 May 2009, p 60

<sup>160</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 1

<sup>161</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 1

<sup>162</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 2

<sup>163</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 2

<sup>164</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 3

<sup>165</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 3

<sup>166</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 34

<sup>167</sup> Public Interest Advocacy Centre, *Submission 18*, p 7



3.61 In evidence before the Committee Ms Natasha Case expanded on the PIAC's position:

Our starting point is that we oppose the proposed changes. However, in light of the fact that, for example, the Police Integrity Commission Act allows certain evidence to be used in certain disciplinary proceedings and that is the case in several jurisdictions in Australia, there may be some justification for extending the use of section 37 evidence to similar types of disciplinary proceedings.<sup>168</sup>

3.62 Mr Alan Robertson SC suggested that if the proposed amendment was made to the ICAC Act to make compelled evidence available in disciplinary proceedings then consideration may need to be given to amending other related legislation such as the legislation under which disciplinary proceedings may be brought and appealed. As Mr Robertson explained:

... although the Committee is focussing on amendments to the Independent Commission Against Corruption Act, it may be necessary to look as well, in due course, at the legislation under which, for example, disciplinary proceedings may be brought, or, indeed termination of employment proceedings. I do not have anything in particular in mind, but it could well be that some attention needs to be given to that legislation to make sure that there is no conflict or potential conflict between amending the Independent Commission Against Corruption Act the manner in which we are discussing and, for example, in the Government and Related Employees Tribunal Act, if that is the Act that is still in force for public sector employees dealing with some disciplinary matters.<sup>169</sup>

### Committee comment

3.63 The proposed amendment to section 37 of the ICAC Act involves a fundamental policy shift in relation to the safeguards afforded witnesses and other affected parties involved in the inquisitorial type of proceedings conducted by the ICAC. As recognised by a number of inquiry participants, the proposed amendment requires the Committee to balance competing public interest concerns: on the one hand, the public interest in improving efficiency of disciplinary action taken in respect of corrupt public sector employees; and on the other, the rights of witnesses in a situation where they are compelled to provide evidence which may be self-incriminating.

3.64 On balance, the Committee considers that the public interest lies in amending the ICAC Act to remove the restriction in section 37 which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the ICAC, subject to the safeguards outlined below. In forming this view, the Committee was persuaded by arguments put by the ICAC and other participants that there is a strong public interest in improving the efficiency and timeliness with which disciplinary proceedings can be brought against someone who has publicly admitted to corrupt conduct.

3.65 The Committee notes the evidence from ICAC and others that government departments and agencies often face difficulties in bringing and investigating disciplinary proceedings where the evidence obtained under objection at an ICAC hearing is unable to be used. For instance, ICAC argued that in some cases there may be insufficient other evidence to commence disciplinary proceedings. The Commission contended that the operation of section 37 might result in agencies

<sup>168</sup> Ms Natasha Case, Senior Solicitor, Public Interest Advocacy Centre, *Transcript of evidence*, 11 May 2009, p 42

<sup>169</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 34

Use of evidence in disciplinary proceedings

having to re-investigate a matter, which can be resource intensive and time-consuming. ICAC also submitted that delay in commencing proceedings could allow public officials to resign, with full entitlements, before disciplinary proceedings commence.

- 3.66 An important factor influencing the Committee's decision to recommend the amendment is the broad level of support amongst inquiry participants, including: the Inspector of the ICAC; the NSW Department of Premier and Cabinet; Mr Bruce McClintock SC; the Queensland Crime and Misconduct Commission; Western Australian Corruption and Crime Commission; and the NSW Fire Brigades. The Committee also notes the support given to the proposed amendment by the current Commissioner of the ICAC, the Hon David Ipp AO QC.
- 3.67 The Committee also notes that the use of evidence obtained under objection in disciplinary proceedings is not without precedent. While not directly comparable, given their different roles and jurisdictions, the legislative frameworks of other investigative type bodies permit evidence obtained under objection to be used in disciplinary proceedings. For instance, under section 40(3) of the *Police Integrity Commission Act 1996*, evidence obtained under objection at a PIC hearing can be used in a number of specified disciplinary proceedings, including those involving administrative officers of the NSW Police Force. The Corruption and Crime Commission (Western Australia), the Office of Police Integrity (Victoria), and the Australian Law Enforcement Integrity Commission (Commonwealth) also permit the use of evidence obtained under objection in subsequent disciplinary proceedings.
- 3.68 In making its recommendation the Committee acknowledges that some inquiry participants expressed reservations about the proposed amendment. One such concern was that the evidence obtained under objection, once relied upon at a disciplinary hearing, might indirectly be admitted to other proceedings, most notably, criminal proceedings. Mr Stephen Odgers SC, representing the NSW Bar Association, submitted that if the proposed amendment was adopted then consideration should be given to further amending the ICAC Act to include a provision similar or identical to s128 (7)(b) of the *Evidence Act 1995*. Such a provision would have the effect of ensuring that the evidence obtained under objection at an ICAC hearing would not have a flow on effect to other proceedings.
- 3.69 The NSW Department of Premier and Cabinet suggested similar additional safeguards, such as:
- limiting the use of evidence obtained under compulsion to disciplinary proceedings relating to the actions which are the subject of the inquiry, and
  - ensuring that the person must be notified that their disclosures may be used against them in disciplinary proceedings.<sup>170</sup>
- 3.70 Given the serious concerns expressed by a number of inquiry participants about the potential impact of the proposed amendments, particularly in relation to the use of evidence at criminal proceedings, the Committee considers that these additional safeguards are warranted. The Committee is also of the view that the additional safeguards proposed will assist in meeting the public interest concerns raised by the ICAC in support of the amendment, without unduly trespassing on individual rights.

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<sup>170</sup> NSW Department of Premier and Cabinet, *Submission 17*, p 3

- 3.71 A number of inquiry participants also considered that the proposed amendment could have the effect of discouraging witnesses from being truthful and cooperative and thus undermine the ICAC's effectiveness. The Committee, however, received evidence from a number of investigative bodies that stated, in practice, this is not a factor that influences the behaviour of witnesses. The Committee has no way of gauging the accuracy of either of these viewpoints.
- 3.72 Given the potential impact of the amendment to section 37 on the rights of individuals and the concerns raised by some inquiry participants, the Committee considers that any change to the legislation should be followed by a two-year review of the operation of the amendment. Such a review could consider many of the issues outlined above, such as, the operation of the proposed safeguards and the impact on the truthfulness of witnesses. Other issues the Committee may wish to consider as part of the review could include:
- Whether the objectives of the amendment are being met, for example, whether disciplinary action is proceeding in an efficient and timely manner.
  - Whether there has been an improvement in the number of successful disciplinary actions resulting from ICAC investigations, including whether there has been a reduction in the number of resignations prior to disciplinary action.
  - The impact of the amendment on due process and individual rights.
  - The effect of the amendment on ICAC's corruption investigation and prevention functions.
- 3.73 The Committee also notes the experiences of the NSW Police Force in their use of evidence obtained under objection at PIC hearings pursuant to section 40(3) of the PIC Act. In light of this evidence<sup>171</sup> the Committee may wish to consider as part of its review the following issues:
- The need for agencies to conduct internal investigations to corroborate evidence obtained under objection before the ICAC, and whether these internal investigations are expedited by having such evidence at their disposal.
  - The review process for disciplinary action arising out of ICAC investigations, in particular, the number of appeals to the Industrial Relations Commission and whether the appeals are upheld, and if so on what grounds.
- 3.74 During the course of the inquiry, some participants raised issues that the Committee considers the Premier may wish to consider when developing any amendments to the ICAC Act. The ICAC submitted that if proposed amendments were made to section 37 of the ICAC Act then similar amendments should be made to section 26 of the Act. Section 26 applies to requirements under sections 21 and 22 of the ICAC Act for a public authority or public official to produce a statement of information (s 21) and any document or other thing (s 22). Section 26(2) provides that if a statement, document or thing tends to incriminate the person and the person objects at the time of production then that evidence cannot be used against them in any subsequent proceedings.
- 3.75 The Committee is not in a position to make findings or recommendations relating to this issue, as it did not receive any further evidence on this matter from inquiry participants. The Committee notes that the corresponding section of the *Police*

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<sup>171</sup> See paragraphs 3.33 – 3.43.

Use of evidence in disciplinary proceedings

*Integrity Commission Act 1996* (section 28) does not reflect the changes sought by the ICAC.

- 3.76 Another issue raised by inquiry participants was the possible need to make consequential amendments to related legislation, for example, legislation under which disciplinary proceedings may be brought and appealed.
- 3.77 At the conclusion of the inquiry the Committee considered the proposal that the ICAC Act should be amended to make express provision for the Commissioner to make a direction that evidence given under objection to the Commission, which would be admissible in disciplinary proceedings relating to the conduct investigated, *not* be used in such proceedings. This was not an issue on which the Committee had taken evidence during the inquiry or that the Committee had examined in any detail. Nevertheless, the Committee is of the view that there is some merit in considering the discretions available to the Commissioner of the ICAC should the amendments proposed in Recommendation 1 proceed. Consequently, the Committee proposes that in bringing forward legislation to give effect to Recommendation 1, the Premier consult with the Commissioner of the ICAC on the extent of the discretions that the Commissioner should be able to exercise where the restriction in section 37 is removed in respect of disciplinary proceedings, and in what circumstances such decisions may be made. The exercise of such discretion is a matter that requires further clarification and advice from the Commissioner.
- 3.78 In making this recommendation, the Committee presumes that one option available to the Commissioner when reporting on an investigation would be to recommend that disciplinary action *not* be taken against a public official. The Committee notes that the operation of the proposed amendment to the ICAC Act in respect of disciplinary proceedings has been recommended for review in two years time. The exercise of discretions by the Commissioner in respect of the new provisions is one area that may be examined in detail at that stage, if considered necessary.

**RECOMMENDATION 1:** The Committee recommends that the *Independent Commission Against Corruption Act 1988* be amended to remove the restriction in section 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption, subject to the further amendment of the *Independent Commission Against Corruption Act 1988* to:

- a. prevent the indirect use of evidence obtained under objection in criminal or civil proceedings. Such a provision could be modelled on section 128(7)(b) of the *Evidence Act 1995*.
- b. limit the use of evidence obtained under objection to disciplinary proceedings which relate directly to the actions the subject of the ICAC inquiry.
- c. ensure that a witness appearing before ICAC must be notified that their evidence may be used against them in disciplinary proceedings.

**RECOMMENDATION 1A:** The Committee recommends that in bringing forward legislation to give effect to Recommendation 1, the Premier consult with the Commissioner of the ICAC on the extent of the discretions that the Commissioner should be able to exercise where the restriction in section 37 is removed in respect of disciplinary proceedings, as recommended in 1(b).

**RECOMMENDATION 2:** That the Committee on the Independent Commission Against Corruption conduct a review of the effect and operation of these amendments after they have been in operation for two years.

## Chapter Four - Use of evidence in civil proceedings

- 4.1 The Committee has been asked to inquire into whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in s 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

### ICAC's arguments in support of proposed amendment

- 4.2 As previously mentioned in paragraph 3.2 the ICAC submitted that, 'there is a strong public interest argument in allowing the admission of compulsorily given evidence in [disciplinary and civil] proceedings.'<sup>172</sup>
- 4.3 The ICAC argued that 'where employees, contractors or others have admitted defrauding public sector agencies their admissions, including any relevant documents they have produced, should, in the public interest, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.'<sup>173</sup>
- 4.4 In their submission the ICAC make reference to their investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto). Operation Monto established that contracts totalling almost \$19 million were improperly allocated by RailCorp employees. The investigation also established that RailCorp employees received at least \$2.5 million of corrupt payments. The ICAC submitted that any evidence about these corrupt practices that was given under objection at an ICAC hearing would not be available for RailCorp to use in proceedings to recover the monies.
- 4.5 In evidence before the Committee the ICAC further submitted that the ability to use evidence obtained under objection should not be limited to proceedings under existing asset recovery legislation. The ICAC argued that there are other types of civil recovery proceedings that, depending on the circumstances, may be more appropriate. The Deputy Commissioner stated:

**Ms HAMILTON:** There are other aspects of civil recovery that would not necessarily come within the ambit of the asset recovery legislation. For example, the department might have a clear admission that somebody has been stealing and they want to take civil action to recover something other than assets. The assets might have dissipated and they might simply want to sue and get the judgment and perhaps take somebody's wages. The Commission was putting forward a general right where there have been admissions that public funds have been stolen or corruptly obtained those admissions are admissible in an appropriate civil proceeding, which might be an asset recovery proceeding, but might also be just an ordinary civil proceeding to recover the money.

**CHAIR:** You are talking about a situation where somebody has got away with \$1 million as a result of corrupt conduct and the money has gone, but the department would then initiate civil proceedings against that person for damages for compensation.

**Ms HAMILTON:** Whatever they can get. There would be a civil judgment and then they might get assets in the future or they might be able to garnishee their wages. We would have to think about whether it is too narrow to limit it to confiscation of assets. There

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<sup>172</sup> Independent Commission Against Corruption, *Submission 5*, p 2

<sup>173</sup> Independent Commission Against Corruption, *Submission 5*, p 2

may be other ways that money could be recovered from a wrongdoer through a civil suit. The Commission's view is that that should not necessarily be closed off.<sup>174</sup>

- 4.6 The Solicitor to the Commission, Mr Roy Waldon, also advised the Committee on situations which could give rise to civil proceedings other than those relating to the recovery of public funds or assets:

There are occasions when a public sector organisation will have a contract with a service provider. There may be evidence during the course of that public inquiry that that service provider has engaged in corrupt conduct. It should be open to that public sector agency to take action to have the contract voided and that may necessarily result in some sort of civil action. If they cannot use the evidence that has been derived as a result of the admissions made in that inquiry it may be difficult for them to find the evidence otherwise in order to take successful action to void the contract.<sup>175</sup>

- 4.7 In their supplementary submission the ICAC further submitted that one of the principal reasons for recommending evidence be available in civil proceedings is that it improves the efficiency and timeliness with which such proceedings are conducted.<sup>176</sup> They also stated that it would prevent people from retaining the proceeds of corruption:

An additional concern is that any delay or inability to take effective civil action to recover corrupt payments or rescind a contract may not only adversely affect the operations of the relevant public authority but allow those who have engaged in corrupt conduct to retain some of the fruits of their corruption.<sup>177</sup>

- 4.8 In a letter dated 8 July 2010 the current Commissioner of the ICAC, the Hon David Ipp AO QC advised the Committee that he supported the proposed amendment to remove the restriction in section 37 of the Act prohibiting the use in civil proceedings of evidence given under objection.<sup>178</sup>

### **Inquiry participants' views**

- 4.9 The Queensland Crime and Misconduct Commission (CMC) expressed reservations about the utility of removing the restriction on the use of evidence in civil proceedings. The CMC submitted that using evidence obtained under objection may be contrary to the primary aim of ICAC proceedings – to discover the truth. The CMC reflected that witnesses may conceal the truth if they were aware that their evidence could expose them to financial loss:

The reservation is derived from the concern that if evidence could be used for civil proceedings it might be inimical to what is considered as the primary purpose of such hearings, and that is to ascertain the truth. Where a witness would be exposed to significant financial detriment they may be more likely to hide the truth for fear of financial ruin or at least financial distress.<sup>179</sup>

- 4.10 In evidence before the Committee the then Chairperson of the CMC, Mr Robert Needham commented that consideration should be given to the purpose for which the amendment is being sought. If the purpose of the amendment is to allow the use of evidence in proceedings involving the recovery of funds or assets corruptly

<sup>174</sup> Ms Hamilton, *Transcript of evidence*, 4 May 2009, p 5

<sup>175</sup> Mr Waldon, *Transcript of evidence*, 4 May 2009, p 5

<sup>176</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, p 2

<sup>177</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, p 3

<sup>178</sup> Letter from ICAC Commissioner, the Hon David Ipp AO QC, dated 8 July 2010

<sup>179</sup> Crime and Misconduct Commission, *Submission 3*, p 1

obtained, then existing proceeds of crime legislation could be used and the restriction against the use of evidence removed for those particular proceedings. If, however, the purpose of the amendment were to ensure that evidence could be used in more general civil proceedings, for example, to recover not just proceeds but entitlements, then the amendment would need to apply more broadly. Mr Needham stated he could find no reason as to why evidence should not be able to be used in those types of proceedings as well.<sup>180</sup>

4.11 Under the CAR Act, both the NSW Crime Commission and the Police Integrity Commission (PIC) may take action to recover the proceeds of serious crime related activities. The provisions of the CAR Act are discussed in detail in Chapter 2 of this report.

4.12 The PIC acknowledged that, as a matter of broad public policy, the recovery of public money or assets fraudulently obtained is an issue of significant public interest. However, the PIC submitted that removing the protection afforded to evidence obtained under objection from all civil proceedings would have a substantial effect on the balance struck by s 37(3) of the ICAC Act:

In the PIC's view, to remove the protection afforded to evidence given under compulsion from all civil proceedings would significantly affect - if not undo – the careful balance struck by s 37(3) of the ICAC Act between abrogation of the well established privileges otherwise available by right and the necessity of being able to expose corrupt conduct not able to be investigated by traditional means.<sup>181</sup>

4.13 The PIC also observed that it was unclear whether the proposed amendment arose out of evidentiary difficulties occurring in relation to civil claims for recovery. According to the PIC, during its investigations the usual practice is for significant evidence from alternative sources to be amassed prior to a witness being examined:

... it has rarely been the case that witnesses are examined without there being significant evidence obtained from other sources pointing to misconduct by a witness such as would support any recovery action arising from its investigations.<sup>182</sup>

4.14 The PIC suggested that limiting the removal of the restriction on the use of evidence to civil proceedings of a certain description, such as 'civil proceedings taken by [a] public sector agency to recover the monies it lost as a result of the fraud' would be less objectionable.<sup>183</sup>

4.15 In suggesting the above, the PIC acknowledged that the range of civil actions that could emanate from an ICAC investigation may not be easy to classify, in particular, what actions would be encompassed by recovery actions. The PIC also submitted that such actions may be impractical due to the costs involved:

Civil proceedings arising from an ICAC investigation may involve actions in contract, breaches of trusts by agents and employees, claims for restitution and such like, with the form of action necessarily varying according to the particular misconduct.

It can be anticipated that it would be open for a number of simultaneous claims arising on different legal grounds to be brought even in respect of the one person, some of which may be difficult to class as strictly recovery action, such as requiring a public official, as an employee, to account for money paid by way of bribe or secret

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<sup>180</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 13

<sup>181</sup> Police Integrity Commission, *Submission 4*, p 4

<sup>182</sup> Police Integrity Commission, *Submission 4*, p 4

<sup>183</sup> Police Integrity Commission, *Submission 4*, p 5



commission. One practical consideration that arises is that legal costs involved in bringing such proceedings could well be prohibitive.<sup>184</sup>

- 4.16 The PIC suggest that, if the fundamental policy objective of the amendment is the recovery of corruptly obtained funds and assets, making evidence obtained under objection by the ICAC admissible in such proceedings would only partially address issues such as the degree to which corrupt benefits are recoverable through civil action:
- ... the Committee may wish to consider what forms of civil action may be available, or the extent to which corrupt benefits are in fact open to recovery under established civil actions. For example, while many of the matters examined in the recent ICAC Operation Monto involve straightforward cases of theft and false claims, many others may not be so susceptible of effective resolution within the established civil actions, such as in relation to contracts corruptly directed to associated companies in circumstances where the corrupt public official is authorised to approve the contract.<sup>185</sup>
- 4.17 The PIC submitted that the Committee may find it useful to consider the procedures in relation to recovery action arising from PIC investigations:
- Recovery action in respect of police misconduct or criminal activity investigated by the PIC is taken under either the *Criminal Assets Recovery Act 1990* (see s 19 of the PIC Act) or the *Confiscation of Proceeds of Crime Act 1989*. The touchstone in both cases is criminal conduct, with the key difference being that the former are civil proceedings whilst the latter occur within the context of criminal proceedings.<sup>186</sup>
- 4.18 In evidence before the Committee, the PIC Commissioner, Mr John Pritchard, elaborated on the PIC's procedures. He commented that the experience of the PIC is that undertaking recovery proceedings under existing proceeds of crime legislation has been appropriate and adequate. The PIC Commissioner advised that proceedings have not been disadvantaged due to the PIC not being able to use evidence obtained under objection, as the CAR Act has extensive information gathering powers, including the power to examine a defendant without the privilege against self incrimination. Mr Pritchard commented:
- Mr PRITCHARD:** At the moment, the Police Integrity Commission can take proceeds of crime action, confiscation proceedings, and the experience of the Commission to the extent that it has commenced those proceedings, and there are not many, has not been that it has been hampered in undertaking those proceedings because it has been unable to use evidence from its own hearings. As we indicated in our submission, those pieces of legislation provide quite an extensive armoury of powers in order to examine witnesses in any event, which can be used as part of those proceedings.
- CHAIR:** So you are happy with how that operates? You are happy with that.
- Mr PRITCHARD:** Yes. It has never occurred to us to seek, I suppose, the same amendment to the Act that the Independent Commission Against Corruption may now be seeking because we felt frustrated or some proceedings were stymied because we were unable to use evidence.<sup>187</sup>
- 4.19 Mr Pritchard further commented that proceedings under existing proceeds of crime legislation have the added advantage of being easily classified and managed:

<sup>184</sup> Police Integrity Commission, *Submission 4*, p 5

<sup>185</sup> Police Integrity Commission, *Submission 4*, p 5

<sup>186</sup> Police Integrity Commission, *Submission 4*, p 5

<sup>187</sup> Mr Pritchard, *Transcript of evidence*, 4 May 2009, p 25

Use of evidence in civil proceedings

**CHAIR:** In this case, what has been proposed is that evidence of admissions can be used by an employer or anyone else for civil actions – for a whole variety of reasons that civil actions entail – for the recovery of assets or money gained from corrupt conduct.

**Mr PRITCHARD:** Yes.

**CHAIR:** That is general and then proceeds outside the Independent Commission Against Corruption operation for employers – for example, even if the money has gone, to garnishee their wages or do all sorts of things, and injunctions. Can you offer a view as to the efficacy of the Criminal Assets Recovery Act to properly deal with these issues of recovering assets and money other than going through all that other process?

**Mr PRITCHARD:** I can only see from the Police Integrity Commission's experience, where it has been used to seek what is regarded as proceeds of criminal activity, it has been more than appropriate. As we said in the submission, at least that is a category of proceeding that is easy to classify and define, whereas with civil proceedings, contract, tort or whatever you want to call it, it is not difficult to see how one could be difficult and move more slowly and slowly. The proceeds of crime actions are quite –

**CHAIR:** Manageable?

**Mr PRITCHARD:** Yes, manageable; indeed. They are very neat, very tidy and very compartmentalised.<sup>188</sup>

- 4.20 The PIC suggested that due to the established nature of proceedings under the CAR Act and the coercive powers available under that Act, 'it might be more appropriate to consider permitting the ICAC to commence proceedings under that Act in preference to amendment of s 37(3) of the ICAC Act.'<sup>189</sup>
- 4.21 The NSW Crime Commission, which is responsible for administering the CAR Act, submitted that 'corrupt conduct is usually entered into for profit and the CAR Act is a useful mechanism for recovering the illicit proceeds of such conduct.'<sup>190</sup>
- 4.22 In their submission, the Crime Commission note the need for the ICAC to examine witnesses as to the source of assets and funds gained from corrupt conduct. The Crime Commission submitted that, from their perspective as a plaintiff in prosecutions under the CAR Act, having to re-examine witnesses on the same matters is inefficient.<sup>191</sup>
- 4.23 During his appearance before the Committee, the Commissioner of the Crime Commission, Mr Phillip Bradley, elaborated on this point:
- ... I think if the ICAC and the Crime Commission have an optimal relationship – and it must be near that – then there is no great disadvantage through the evidence gathered by the ICAC not being admissible in the CAR proceedings. What I am saying is that under the present arrangements, you have to do it twice. They do it, and then we do it, and in fact we ask the same people the same questions and take up the court's time whereas, if we tender the transcript which is one way of doing it, it would just save time.<sup>192</sup>

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<sup>188</sup> Mr Pritchard, *Transcript of evidence*, 4 May 2009, p 26

<sup>189</sup> Police Integrity Commission, *Submission 4*, p 5

<sup>190</sup> NSW Crime Commission, *Submission 9*, p 1

<sup>191</sup> NSW Crime Commission, *Submission 9*, p 1

<sup>192</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 54

4.24 Mr Bradley focussed on the utility of the proposed amendment in terms of improving the efficiency of the process, rather than the strength of the evidence available to the Crime Commission:

**Mr JONATHAN O'DEA:** Mr Bradley, obviously if the proposed reforms went through, it would make it easier to recover money following the ICAC findings of corruption against certain individuals.

**Mr BRADLEY:** It would make it more efficient probably, or quicker, but I do not know that it would be much easier.

**Mr JONATHAN O'DEA:** Potentially there would be more evidence that was more readily admissible?

**Mr BRADLEY:** Potentially, but I think what I tend to focus on is that all of the material covered or gathered by the ICAC in the course of its hearings could be regathered, if that is inadmissible, in an admissible form before the Supreme Court. To that extent, there probably would not be any more or any less evidence. If we use the second process, probably there would be more evidence. I really just thought that if you merge the processes, it would be more efficient.<sup>193</sup>

4.25 While noting the potential for the proposed amendment to improve efficiency, Mr Bradley told the Committee that there have been no instances of assets recovery proceedings that were referred by ICAC being hindered by a lack of admissible evidence:

**Mr JONATHAN O'DEA:** Can you put forward any examples where perhaps money has escaped because of an inability or a problem with capturing the evidence that you might otherwise have known was there?

**Mr BRADLEY:** In the case of the ICAC, it has not happened. ...<sup>194</sup>

4.26 When commenting about the current relationship between the ICAC and the NSW Crime Commission, the Crime Commissioner noted the importance of the agencies working together to prevent assets being concealed:

... I think as people become more conscious of the fact that after ICAC they have got the Crime Commission to worry about, those who have received corrupt payments, they will then be thinking about concealing assets. I think that as the relationship between us and ICAC builds, which it has undoubtedly done over the last couple of years and should continue to do, we will be in there earlier and in a better position to decide when to commence proceedings. That is obviously a big issue. People, especially organised criminals, are very attuned to what we do and they do try to conceal and dissipate assets as soon as they think they are coming to attention, often before they come to attention.<sup>195</sup>

4.27 Mr Bradley also illustrated the factors involved in the timing of assets seizure proceedings and the importance of planning and collaboration between the agencies involved:

**Mr JONATHAN O'DEA:** When do you start proceedings in relation to ICAC investigations or findings? Do you wait until the end of the ICAC investigations for them to make a finding before you start your recovery?

**Mr BRADLEY:** No. The way it should always happen, in my view, is that the agency responsible for restraining the property, which is the most important step in terms of

<sup>193</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 53

<sup>194</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 54

<sup>195</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 51

Use of evidence in civil proceedings

securing the interests of the public against future recovery, should, in consultation with the investigation agency, be evaluating the evidence as you go along. For example, if the ICAC were about to have a hearing involving a witness whom it wanted to accuse of corrupt activity or interrogate about corrupt activity and we were to serve a summons with a supporting affidavit on that person setting out the ICAC's case a fortnight before, it might not suit the ICAC's interests. You need to weigh those things up. It is possible for us to commence a short time before the arrest because that reduces to zero the time between notification through the arrest process and the opportunity to disperse assets. But that is just a process of collaboration that I think we all should engage it.  
...<sup>196</sup>

- 4.28 The Crime Commissioner outlined to the Committee the difference between assets recovery proceedings referred by the ICAC and those referred by the NSW Police Force, particularly in terms of the Crime Commission's involvement at an early stage in matters referred by the police. He observed that, although the process currently operates well, there is potential for improvement to ensure more timely and co-operative involvement by the Crime Commission in ICAC matters:

**CHAIR:** In your view does what we are talking about operate well? Are you happy with the way in which it operates to recover the proceeds of crime and corruption?

...

**Mr BRADLEY:** Essentially, yes. The second limb of your questions was about the relationship between the ICAC and us in doing the work. There has not been that much work. However, of late there have been quite a few cases. The RailCorp people, the Fire Brigades people and the Wollongong people were referred to us. The ICAC differs from other agencies in that the matters are usually fairly well developed in the areas of investigation and public disclosure before we get them. The development of a criminal brief for prosecution of people often is some way off, whereas most of the referrals that we get are from the police.

We are either in them in some capacity or other, so we are well informed about the matters as they proceed and we are in a good position to know when to commence proceedings, or, alternatively, someone has been arrested by the police and found to be in possession of unexplained assets and we commence very promptly after that event. In those cases you have a degree of confidence about the provability of a case. If a person is charged with, say, drug trafficking and he or she is found in possession of a kilo of heroin and a pile of money, and he or she has a house that cannot be accounted for from lawful sources, there is a fairly high degree of confidence about whether we are likely to be able to succeed in proving our case to the civil standard and what might flow from that.

That is not always the case. The ICAC is not specifically involved in the development of criminal briefs of evidence, although obviously that does work. It gathers evidence and that comes to the third or fourth matter in your terms of reference. I think it is just a matter of us tweaking the relationship a bit so that we get in a bit earlier and develop what we think needs to be developed in order to launch the action at the appropriate time.<sup>197</sup>

- 4.29 As discussed at paragraph 2.34, the ICAC can refer matters to the Crime Commission for prosecution under the CAR Act. During his appearance before the Committee, the NSW Crime Commissioner was also asked whether, in his view, providing the ICAC with the power to commence its own prosecutions under the CAR Act was appropriate and/or a viable alternative to amending section 37 of the ICAC

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<sup>196</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 55

<sup>197</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 49

Act, as suggested by the PIC. Mr Bradley told the Committee that it was unlikely to be cost-effective and efficient for ICAC to devote significant resources to commence such proceedings:

I do not have a particular view about ICAC doing their own, as it were, except that it would probably be more efficient to do it in my organisation, which commences 150 cases a year and finishes 150 cases a year. It is a big litigation load and a couple more do not make a lot of difference to us. I would say it is done efficiently. If you had to set up a new arm of ICAC to do what we currently do it would be costly and one of the factors obviously to be taken into account in setting up things and commencing individual cases is whether there is a cost benefit in terms of the public interest. If ICAC did a very small number of matters, which the flow of work to us suggests would be the case, to have a specialised branch of ICAC – it would need to be something along those lines – as we do, dealing with those sorts of cases would probably produce a negative effect in terms of revenue. Obviously that is not the only consideration but it is a big one.<sup>198</sup>

4.30 Mr Bradley also stated that, as the Crime Commission has expertise and success in recovering money, 'if there were a relatively small number of matters that the ICAC processed it would take some argument to justify setting up a branch that specialised in that area when there was already an agency that did it.'<sup>199</sup>

4.31 The DPC commented that it is important to distinguish between the use of evidence obtained under compulsion in civil proceedings relating to the recovery of corruptly obtained public funds and assets and other types of civil proceedings.<sup>200</sup> The DPC stated that the NSW Government's view is that the arguments in support of the amendment only extend to civil proceedings for the recovery of public funds and assets, as opposed to civil proceedings generally. The DPC commented that it is difficult to see why compulsorily obtained evidence should be available in proceedings unrelated to the officer's employment (such as divorce proceedings).<sup>201</sup>

4.32 The DPC outlined the following arguments in support of the amendment:

- officials who have admitted before the ICAC to engaging in corrupt conduct should not be able to retain the proceeds of corrupt behaviour because the evidence of their admission is inadmissible against them
- the State should be able to use all appropriate means to recover public money which has been defrauded from it
- such an amendment would be an important deterrent to corrupt behaviour.<sup>202</sup>

4.33 The DPC recognised that the amendment raises issues in relation to the privilege against self-incrimination. In response to such concerns, the DPC submitted that courts that hear civil proceedings have discretion to refuse to admit unfair evidence:

While a court may not find evidence to be unfair solely on the basis that the evidence was compulsorily acquired, particularly in circumstances where that is sanctioned by the ICAC Act, it would remain open to a court to do so, where the court considers that it would be unfair to use the evidence having regard to the circumstances in which the admission was made.<sup>203</sup>

<sup>198</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 48

<sup>199</sup> Mr Bradley, *Transcript of evidence*, 11 May 2009, p 50

<sup>200</sup> Department of Premier and Cabinet, *Submission 17*, pp 3-4

<sup>201</sup> Department of Premier and Cabinet, *Submission 17*, p 4

<sup>202</sup> Department of Premier and Cabinet, *Submission 17*, p 4

<sup>203</sup> Department of Premier and Cabinet, *Submission 17*, p 4

Use of evidence in civil proceedings

- 4.34 The DPC acknowledged that the *Criminal Assets Recovery Act 1990* enables the NSW Crime Commission to use evidence obtained under compulsion in confiscation proceedings and that it is open to NSW government agencies to work with the Crime Commission to take over eligible matters and pursue recovery proceedings under the CAR Act. However, the DPC submitted that, in order to not distract the Crime Commission from its important work in pursuing major criminal activity, 'enabling agencies to rely on admissions made under compulsion to ICAC in recovery proceedings may be a more efficient approach.'<sup>204</sup>
- 4.35 Some inquiry participants also supported the amendment on the basis that it is limited to proceedings relating to the recovery of assets and funds corruptly obtained. The ICAC Inspector expressed support for an amendment that would 'permit the use in civil proceedings for the recovery of funds or assets that were corruptly obtained.'<sup>205</sup>
- 4.36 The Commissioner of the Western Australian Corruption and Crime Commission considered that, subject to one possible exception, the public interest is best served by maintaining the privilege with respect to civil proceedings. The one possible exception being 'proceeds of crime (including unexplained wealth) applications.'<sup>206</sup> The Corruption and Crime Commissioner observed:
- Various jurisdictions already have legislation providing for the compulsory examination of persons with respect to property seized as proceeds of crime, and to which there is no privilege against self-incrimination. In Western Australia, such examinations may be conducted before a judge of the Supreme Court under section 58 of the *Criminal Property Confiscation Act 2000* (WA). There would seem to be no reason in logic or principle why the evidence given by a witness before a Commission of Inquiry such as the CCC or ICAC, should not be able to be used in the same way as that obtained similarly under proceeds of crime legislation.<sup>207</sup>
- 4.37 In their submission the Australian Commission for Law Enforcement Integrity (ACLEI) provided details of the legislative provisions governing the use of information and evidence obtained by the ACLEI using its coercive powers. Under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) there is no restriction on using evidence obtained under objection in a number of specified proceedings, one of which includes confiscation proceedings, for example, proceedings under the *Proceeds of Crime Act 2002* (Cth). The ACLEI submitted that, 'the prospect that proceeds of crime could be restrained or confiscated ... satisfies a community expectation that wrongdoers should be held accountable for their misconduct and not be permitted to benefit from it.'<sup>208</sup>
- 4.38 The NSW Fire Brigades restricted their comments on the proposal to proceedings involving the recovery of funds or assets that were corruptly obtained, as these proceedings were the most relevant to them. The NSW Fire Brigades submitted that the recovery of assets corruptly obtained would be governed by the *Criminal Assets Recovery Act 1990* (NSW). The proposed amendment would be of use in cases where the ICAC did not make findings that particular assets were corruptly obtained. The NSW Fire Brigades state further:

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<sup>204</sup> Department of Premier and Cabinet, *Submission 17*, p 4

<sup>205</sup> Inspector of the ICAC, *Submission 6*, p 3

<sup>206</sup> Corruption and Crime Commission, *Submission 7*, p 2

<sup>207</sup> Corruption and Crime Commission, *Submission 7*, p 2

<sup>208</sup> Australian Commission for Law Enforcement Integrity, *Submission 13*, p 4

Although not found to be corruptly obtained by the Commission, these assets may still have been obtained as a result of serious crime related activities. Therefore it may be necessary to rely on a witness' evidence to the Commission regarding these assets, to obtain orders under the Criminal Assets Recovery Act.<sup>209</sup>

4.39 Mr Bruce McClintock SC supported the amendment, arguing that it is in the public interest to allow the use of compelled evidence in civil proceedings, particularly in light of the public funds that are spent on gathering such evidence.<sup>210</sup> Mr McClintock considered that any amendment should not be limited to civil proceedings regarding the recovery of public funds and assets:

I do not think it is merely a matter of clawing back ill-gotten gains obtained by corruption. It is a matter of dealing with people. For example, civil proceedings come out of Independent Commission Against Corruption investigations. There was litigation after the Oasis inquiry.<sup>211</sup>

4.40 As was the case for the proposed amendment to allow evidence to be used in disciplinary proceedings, Mr Alan Robertson SC was of the view that there may be scope for targeting the amendment to civil proceedings arising out of the corrupt activity. Mr Robertson told the Committee of the possible consequences of an unlimited removal of the protection in relation to civil proceedings:

... For example, in an ordinary civil case if it happened to be that the corrupt person was a party, but unrelated to their gains, at the moment if the immunity is taken away entirely, someone could say in an unrelated proceeding, "Well, you admitted before the ICAC that you had taken bribes, and, therefore, you are a person of no credit and, therefore, your evidence should be discounted." There may be scope for targeting a little in that way.<sup>212</sup>

4.41 In terms of some of the broader questions that arise with regard to the proposed amendments, Mr Robertson made the following points:

- The proposal involves a value judgment – balancing fairness on the one hand regarding the way in which you obtain evidence, against the efficiency and public importance in rooting out corruption and retrieving ill-gotten gains.<sup>213</sup>
- Would the capacity to use the evidence in disciplinary and civil proceedings have an effect on corruption, or will it 'just satisfy public morality'?<sup>214</sup>

4.42 Mr Robertson questioned whether the public interest to be gained from making the proposed amendment outweighs the unfairness to individuals who are compelled to give self-incriminating evidence, and advocated taking a cautious approach in weighing up these competing interests:

One of the things one needs to think about is that if that material was admissible according to ordinary rules, what extra mileage would you get from being able to say, "Now I'm going to tender that page of the transcript where you said, 'Yes, it was me. I did it. I've got \$100,000 that I shouldn't have'." When one is balancing the two aspects that I mentioned before—the fairness on one side and the efficiency/morality idea on the other—one has to focus on how much better off are you going to be as the person seeking to use this material in a civil case if you have all the other material. Perhaps it will not matter that much.

<sup>209</sup> NSW Fire Brigades, *Submission 14*, p 7

<sup>210</sup> Mr McClintock SC, *Transcript of evidence*, 4 May 2009, pp 41-2

<sup>211</sup> Mr McClintock SC, *Transcript of evidence*, 4 May 2009, p 42

<sup>212</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 34

<sup>213</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 34

<sup>214</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 35

... I think it comes down to a personal evaluation of the utility, on the one hand, and the fairness on the other hand. Personally, I think that unless you are going to achieve something quite substantial in a morality aspect, given the idea of somebody in one inquiry being told, "You have to answer this question, even though you object, and when you answer it, it will have potential consequences in terms of your employment and in terms of making civil claims against you", I would err on the side of caution. Obviously, there are different views about that. ...<sup>215</sup>

4.43 Mr Robertson used similar reasoning in terms of identifying and weighing up the potential benefits to be gained in terms of corruption deterrence:

If you start with the principle of fairness that I have described, that is whether a person should be compelled over objection to give evidence to their disadvantage, you then ask what are the values that that involves. To put it a little more crudely, is this a case where the means do justify the end? You have to have a clear idea of the extent of the corruption and how it can be dealt with. We are not talking directly about prevention of corruption at this end; we are talking about the other end where a person has got some money through their corrupt conduct.

I guess the question is: Should the means that we have been discussing—that is, being able to use that person's evidence over objection, which he or she has unwillingly given—be used against him or her? In this context does that justify taking a step that in the ordinary case might be seen to be unfair?<sup>216</sup>

4.44 Some inquiry participants did not support the amendment. The Law Society of NSW submitted that 'if compulsorily obtained evidence provided under objection was to become accessible in civil or disciplinary proceedings generally, this may place a witness in a situation where they are potentially unfairly exposed to litigation for assisting with an inquiry.'<sup>217</sup>

4.45 In evidence before the Committee Mr Peter McGhee, appearing on behalf of the Law Society's Criminal Law Committee, expressed the view that the proposed amendment may result in witnesses being dishonest in order to avoid exposure to civil proceedings:

That is something that we would always tell a witness when appearing before ICAC: "Don't wilfully forget. Don't mislead this Commission. Be honest. But know this, if you are honest there is a benefit—to get to the truth." And that is what the aim of this Commission should be; it is the vastly most important aspect of this Commission. You may well find that there are situations in which someone chooses to take that course because some civil recourse is exposed to them. That is, losing their livelihood, their family. Would they prefer to cop a three-month sentence or a good behaviour bond, or even a five-year sentence in certain circumstances.<sup>218</sup>

4.46 Mr McGhee commented that adequate avenues already exist to recover proceeds of corrupt conduct. He argued that the relatively few instances of assets not being recovered are outweighed by the significance of losing the protection that is currently afforded by section 37 of the Act:

Where a civil servant is placed in that position, or with the more difficult task of a contractor who has been caught through the process, there are very able Acts that enable recovery in those circumstances. Where that is not so, where those few injustices occur in our State, the countervailing considerations of losing that right are of

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<sup>215</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 35

<sup>216</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, pp 35-6

<sup>217</sup> The Law Society of New South Wales, *Submission 8*, p 3

<sup>218</sup> Mr McGhee, *Transcript of evidence*, 11 May 2009, p 58



an infinite superior magnitude. I would respectfully ask that this honourable Committee not endorse the proposal in relation to proposal 2.<sup>219</sup>

- 4.47 Mr McGhee also expressed concern at the possible consequences of allowing compelled evidence to be used in civil proceedings, noting that witnesses who are not directly affected by the investigation may also be exposed to such proceedings as a result of their evidence:

I think there could be recourse in civil jurisdictions against not only civil servants but also people associated with them. Even having a specific narrow change that affects only employed civil servants creates risks for others of their associates who are called before the Commission. I think that putting a blinker on what can be brought forward by way of changes to section 37 would create injustice for people who are not associated directly with the action but have been called before ICAC and issues have arisen during their evidence that exposes them to proceedings in another court and another jurisdiction. How do we know that the evidence in private hearings will not end up one day in another jurisdiction and expose a person not only to civil recourse but also risks to their safety? ...<sup>220</sup>

- 4.48 Mr Don McKenzie stated that the proposed amendments 'have the potential to upset an existing balance that has operated successfully in support of corruption exposure ...'.<sup>221</sup> He submitted that the proposed amendment 'arguably puts a witness in a worse position, as they could be compelled to give evidence that can expose them to civil penalty'. Mr McKenzie considered the amendment would make witnesses' circumstances more complicated, by requiring them to obtain more detailed legal advice to appreciate the legal implications of their evidence.<sup>222</sup>

- 4.49 The NSW Bar Association commented in their submission that 'although there may be superficial attraction for the removal of the 'use' immunity, on closer examination the proposal is replete with dangers and difficulties.'<sup>223</sup> The Bar Association submitted that the immunity is a fundamental civil right, and that weakening it may affect the ICAC's ability to perform its functions:

... diluting the immunity would potentially defeat the central purpose of ICAC investigations because it would inhibit witnesses from being honest and cooperative. If rooting out systemic corruption is a principal object of the ICAC, then there is little justification for making that task any more difficult than it already is.<sup>224</sup>

- 4.50 In evidence before the Committee, Mr Odgers elaborated on the Bar Association's position. Mr Odgers stated that, although there were differing views within the Bar Association and arguments both ways, on balance, the Association did not support the proposed amendments. He emphasised that, in the Association's view, the amendment would discourage witnesses from telling the truth: 'The primary goal of ICAC is to find the truth, find the facts. Anything which might discourage a witness from telling the truth would tend to conflict with that primary goal.'<sup>225</sup>

- 4.51 The Bar Association also considered that the ICAC 'should not be used as a mechanism for assisting people in private civil actions.'<sup>226</sup>

<sup>219</sup> Mr McGhee, *Transcript of evidence*, 11 May 2009, p 59

<sup>220</sup> Mr McGhee, *Transcript of evidence*, 11 May 2009, p 60

<sup>221</sup> Mr Don McKenzie, *Submission 11*, p 6

<sup>222</sup> Mr Don McKenzie, *Submission 11*, p 6

<sup>223</sup> NSW Bar Association, *Submission 16*, p 2

<sup>224</sup> NSW Bar Association, *Submission 16*, p 2

<sup>225</sup> Mr Odgers SC, *Transcript of evidence*, 4 May 2009, p 48

<sup>226</sup> Mr Odgers SC, *Transcript of evidence*, 4 May 2009, p 49

Use of evidence in civil proceedings

- 4.52 The Committee discusses the Bar Association's view on the potential indirect use of evidence obtained under objection in detail in Chapter 3 of this report.
- 4.53 The Public Interest Advocacy Centre (PIAC) indicated in their submission that 'any proposal to repeal section 37 of the ICAC Act would strip away a layer of checks, balances and protections that have generally been applied where the privilege has been modified or abrogated by statute.'<sup>227</sup>
- 4.54 Although the PIAC suggested a possible compromise with respect to disciplinary proceedings, this compromise position did not extend to civil proceedings. In evidence before the Committee, Ms Natasha Case, Senior Solicitor for the PIAC, summarised PIAC's position on the proposed amendments:
- First, the current form of section 37 achieves a balance between individual rights and the public interest in maintaining public service integrity. Second, we have expressed our concern about the creeping nature of breaches of fundamental rights. Third, ICAC's view that it should be granted a prosecutorial role in the identification and prevention of corruption is a matter of some concern to PIAC. Finally, while PIAC opposes any winding back to section 37, it might be possible to justify a winding back in regard to disciplinary proceedings by reference to comparable legislation in other Australian jurisdictions.<sup>228</sup>
- 4.55 The PIAC also brought to the attention of the Committee the International Covenant on Civil and Political Rights (ICCPR), in particular Article 14(3)(g) which contains the privilege against self-incrimination. Ms Case, in evidence before the Committee, elaborated on the role that the ICCPR should have in assisting with the development of legislation:
- Article 14 could usefully be described as an archetypical individual right; it is pitting the individual against the powers of the State, so there is not that balancing of individual rights against each other. However, in our view, the Committee is involved in a balancing exercise in this inquiry and the approach taken in relation to human rights at an international level is to balance those rights by reference to the principles of necessity and proportionality. Our view is that that is the approach that the Committee should adopt in this instance as well. The difference, of course, is that in this case the Committee is balancing the public interest in maintaining integrity in the public service against individual rights.<sup>229</sup>
- 4.56 Ms Case told the Committee that there was insufficient empirical evidence to demonstrate the necessity of the proposed amendment:
- Ordinarily, when demonstrating the necessity of justifying a breach of a human right, one would expect some empirical evidence illustrating the extent of the problem that the breach of the right is said to remedy. In this case PIAC would have expected some evidence, for example, of the number of people who confessed to criminal activity under the protection of section 37 who are not dismissed from their employment or who are not prosecuted for their crimes, or, if they have confessed for example to stealing under section 37, the proceeds of that crime have not been successfully recovered against them.<sup>230</sup>
- 4.57 The PIAC also expressed concern about the 'gradual erosion' of the privilege against self-incrimination, stating that it was 'not convinced that the proposed change is necessary, proportionate – or even reflects a correct appreciation of the present law

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<sup>227</sup> Public Interest Advocacy Centre, *Submission 18*, p 6

<sup>228</sup> Ms Case, *Transcript of evidence*, 11 May 2009, p 42

<sup>229</sup> Ms Case, *Transcript of evidence*, 11 May 2009, pp 42-43

<sup>230</sup> Ms Case, *Transcript of evidence*, 11 May 2009, pp 42-43

– so far as it appears to be based upon a belief that section 37 of the ICAC Act prevents legal action being taken to recover public funds where an individual has admitted fraud.<sup>231</sup>

- 4.58 Civil Liberties Australia (CLA) echoed the above view, emphasising the importance of the privilege against self-incrimination in protecting the rights of the individual against the state: ‘the State’s prime responsibility is to prove any legal case against an individual without compulsion on the individual to self-incriminate – this is one of the longest standing and most basic tenets of our common law system.’<sup>232</sup>
- 4.59 In their submission, CLA indicated that while Australia has signed and ratified the ICCPR, the Commonwealth Parliament has not given legislative effect to that convention. Therefore, Commonwealth, State and Territory governments are not bound to draft legislation in accordance with its terms.<sup>233</sup> However, the CLA submit that there is a moral obligation and it is ‘incumbent upon the NSW Parliament to develop proposed legislation in accordance with the terms of the ICCPR’. To this end the CLA submitted that:

... where the Parliament proposes to enact provisions which are inconsistent with the ICCPR and the common law, it should provide a detailed and compelling explanation as to why it has decided to pursue a legal policy outcome which is not in accordance with Australia’s international human rights undertakings. CLA submits that it would not be appropriate for the Parliament to justify amendments of the Act which are inconsistent with Article 14 of the ICCPR with vague and imprecise assertions that it would be in the ‘public interest’ or ‘in the interests of law enforcement’.<sup>234</sup>

## Committee comment

- 4.60 As previously noted, the removal of the restriction in section 37 in relation to the use of compelled evidence obtained by the ICAC in subsequent civil proceedings involves a fundamental policy shift in relation to the safeguards afforded witnesses and other affected parties involved in the inquisitorial type of proceedings conducted by the ICAC. In considering the amendment, the Committee has weighed up the competing public interest concerns of ensuring that officials who have admitted to engaging in corrupt conduct are not able to retain the proceeds of corrupt behaviour because evidence of their admission is not admissible, against the rights of witnesses in a situation where they are compelled to provide evidence that may be self-incriminating.
- 4.61 Having weighed up these competing interests, the Committee does not support removing the restriction in section 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, of compulsorily obtained evidence provided under objection to the ICAC.
- 4.62 In forming this recommendation, the Committee notes the lack of evidence from ICAC or other inquiry participants of specific examples of a direct link between section 37 and the failure of civil proceedings. The Committee is persuaded by the view expressed by witnesses including Mr Alan Robertson SC and the Public Interest Advocacy Centre (PIAC), that consideration of such a significant amendment should

<sup>231</sup> Public Interest Advocacy Centre, *Submission 18*, p 6

<sup>232</sup> Civil Liberties Australia, *Submission 12*, p 1

<sup>233</sup> Civil Liberties Australia, *Submission 12*, p 1

<sup>234</sup> Civil Liberties Australia, *Submission 12*, p 1

Use of evidence in civil proceedings

consist of a considered balancing of the demonstrated need for change, against the issue of individual witnesses' rights.

- 4.63 The PIAC and Civil Liberties Australia argued against the amendment on the basis that the privilege against self-incrimination is an important civil right that is enshrined in international covenants and Australian and common law. They argued that amending section 37 to allow the use of coerced evidence in civil proceedings would undermine the balance that is struck between the public interest and the rights of individuals. Given the long-established nature of the privilege and the potential ramifications for individual's rights, the Committee considers that a conservative approach to the proposed amendment is warranted.
- 4.64 The Committee was influenced by the views of inquiry participants, who expressed clear reservations that the amendment could alter the nature of hearings. They argued that the primary objective of ICAC hearings is to discover the truth and expose corruption, rather than obtain evidence for the recovery of assets and subsequent civil proceedings.
- 4.65 Some inquiry participants expressed concern at the possible indirect use of coerced evidence in unrelated proceedings, while others noted that it is difficult to identify the range of proceedings that could be affected by the amendment. This is another reason why the Committee considers that the proposed amendment warrants a cautious approach.
- 4.66 The ICAC contended that it may be difficult for agencies to commence civil proceedings without evidence obtained under objection during ICAC hearings. The Committee notes that the ICAC did not provide any specific instances where agencies have been hindered in taking civil action as a result of its investigations.
- 4.67 In contrast to the proposed amendment with respect to disciplinary proceedings, there is little precedent for making evidence given under objection available in civil proceedings. The Australian Commission for Law Enforcement Integrity permits the use of such evidence in confiscation proceedings. No other investigatory body permits the use of evidence obtained under objection in either civil proceedings generally or proceedings to recover corruptly obtained assets. The Committee, therefore, did not find sufficient examples to inform its consideration of the potential effectiveness of the proposed provision and its ramifications, as well as assessing how it would operate in the context of ICAC investigations.
- 4.68 The weight of evidence against the proposal to remove the restriction in section 37 in relation to the use of evidence in civil proceedings in general was also taken into account by the Committee: participants including the DPC, PIC, and the West Australian Corruption and Crime Commission all expressed reservations about an amendment to remove the protection for all civil proceedings. The whole of government response from the Department of Premier and Cabinet stated that the proposed amendment should only enable the use of evidence in civil proceedings for assets recovery, and evidence should not be used in proceedings that are unrelated to a public officer's employment.
- 4.69 As noted above, the Committee was also required to consider the proposed amendment in terms of removing the restriction on the use of evidence obtained under objection in specific classes of civil proceedings, such as proceedings involving the recovery of funds or assets that were corruptly obtained.

- 4.70 The Police Integrity Commissioner advised the Committee that, in the case of the PIC, recovery proceedings have not been disadvantaged due to the PIC not being able to use evidence obtained under objection, as the Criminal Assets Recovery Act has extensive information gathering powers, including the power to examine a defendant without the privilege against self-incrimination.
- 4.71 The NSW Crime Commission, which undertakes actions under the CAR Act on referral from ICAC, expressed the view that the current assets recovery system is working well, and that there have been no cases of a lack of admissible evidence to support assets recovery proceedings for ICAC matters.
- 4.72 During the past five years, ICAC investigations have resulted in 24 persons being referred to the Crime Commission. The Committee notes that during 2008-2009 the ICAC referred matters to the NSW Crime Commission, which resulted in assets restraint or forfeiture orders to the value of \$2,634,000. The ICAC states in its most recent Annual Report that it intends to focus in the year ahead on identifying matters for referral to the NSW Crime Commission, for consideration of action to forfeit illegally obtained assets.<sup>235</sup> There does not appear to be any difficulty with initiating recovery proceedings under the current legislative provisions. The Committee intends to monitor this issue on an on-going basis, as part of its regular examination of ICAC annual reports.
- 4.73 The Committee acknowledges the Crime Commissioner's evidence that the proposed amendment may improve the efficiency of current processes by reducing the need for evidence in admissible form to be obtained using the CAR Act, in cases where similar evidence has been obtained under objection by the ICAC. However, during the inquiry the Crime Commissioner also told the Committee that the current process is effective. In the absence of any evidence to indicate that inefficiencies have resulted in delays and the failure of proceedings, the Committee is not persuaded that such a significant amendment to the ICAC Act is necessary.
- 4.74 The Committee notes that the ICAC has a protocol to advise the NSW Crime Commission of any property, identified during an investigation, which may be subject to confiscation.<sup>236</sup> The Crime Commissioner noted that, as the relationship between the ICAC and the Crime Commission develops and assets seizure proceedings increase, there may be a need for the agencies to work together on cases at an earlier stage to improve efficiency and prevent assets from being dissipated. In the Committee's view, improved liaison and co-operation between the agencies may help to streamline the efficiency of the assets recovery process. The Committee will monitor the progress of this area during its regular annual report reviews of the ICAC.
- 4.75 During the course of the inquiry, the PIC suggested that the ICAC be able to commence proceedings under the CAR Act, in preference to an amendment of section 37. However, the Committee notes the evidence from the NSW Crime Commission, that it is more efficient for the Crime Commission to continue to commence proceedings. Given the specialist experience and expertise of the Crime Commission in this area, and the cost to the ICAC of setting up a specialist unit to take on this role, the Committee considers that the current arrangements should

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<sup>235</sup> ICAC, *Annual Report 2008-2009*, p 49 and ICAC, 'Request for additional recurrent funding': see Committee on the ICAC, *Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption*, report 9/54, May 2010, p 124

<sup>236</sup> ICAC, 'Request for additional recurrent funding': see Committee on the ICAC, *Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption*, report 9/54, May 2010, p 124

Use of evidence in civil proceedings

continue. It is also relevant to note that the Committee did not receive evidence from the ICAC in response to this suggestion and that ICAC has not sought a role in initiating assets recovery proceedings.

- 4.76 Given the strength of the above arguments, the Committee considers that a conservative approach to the proposed amendment is warranted. The Committee is taking this approach having considered the implications of the proposed amendment, the lack of evidence demonstrating a need for the amendment, and the lack of evidence of a comparable precedent where the privilege against self-incrimination is abrogated and coerced evidence is permitted to be used in civil proceedings.
- 4.77 In accordance with the terms of reference for the inquiry, the Committee looked at both the option of amending section 37 of the ICAC Act to remove the restriction on the use of evidence in civil proceedings in general, or only in civil proceedings involving the recovery of funds or assets that were corruptly obtained. The Committee does not support the removal of the protections under section 37 for either civil proceedings generally, or for specific classes of civil proceedings.

**RECOMMENDATION 3:** The Committee recommends against amending the *Independent Commission Against Corruption Act 1988* to remove the restriction in section 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

## Chapter Five - Assembling admissible evidence

- 5.1 The Committee has been asked to inquire into whether, if either of the amendments to section 37 of the *Independent Commission Against Corruption Act 1988* (referred to in Chapters 1 and 2 of this Report) are made, the ICAC Act should be further amended to make the ICAC's current function of assembling evidence for criminal proceedings a primary function.
- 5.2 In the letter referring the Inquiry to the Committee, the then Premier, the Hon Nathan Rees MP, elaborated on the reasons behind making the above proposed amendment conditional on the proposed amendments to section 37 of the ICAC Act. Mr Rees commented:
- If amendments of the kind referred to in paragraphs 1 or 2 above are made, there would be a risk that the Commission would use its powers to obtain evidence under compulsion to a greater extent, which may be to the detriment of obtaining admissible evidence for possible criminal proceedings. It is for this reason that advice would be appreciated on whether the Act should also be amended as proposed in paragraph 3 to make the Commission's current function of assembling evidence for criminal proceedings a primary function.<sup>237</sup>

### ICAC's arguments in support of the proposed amendment

- 5.3 When appearing before the Committee, the former Commissioner asserted that he considered there to be no connection between this proposed amendment and the proposed amendments to section 37 of the ICAC Act. The former Commissioner also stated that, in his view, ICAC's ability to gather evidence once an investigation has concluded requires clarification:
- First of all – and I think I have made this clear to the Chair independently – I do not see ground 3 having any connection with grounds 1 and 2. You may recall that grounds 1 and 2 refer to the removal of the immunity given under section 37 in civil and disciplinary proceedings of admissions made in the course of compulsory examinations or public inquiries.
- As to the third matter, you may recall that my original proposal was simply that there be added to section 14 a requirement that what the Commission was authorised to do was to collect evidence as, in effect, directed by the Director of Public Prosecutions [DPP]. I had a concern, you may recall, when I spoke to this Committee earlier that it must be doubted whether we had the power to go out and collect evidence after we had finished an investigation and were finished with a matter. I took the view that if the Parliament wanted us to do that – and it appeared that the Parliament did want us to do that because the questions from this Committee have frequently related to what is the result of our finding of corruption – could they make it clear that we had the power to do it.<sup>238</sup>
- 5.4 In their submission to the inquiry the ICAC stated, 'that it should be clear from the ICAC Act that the Commission is able to continue to obtain and assemble evidence that may be admissible in a criminal prosecution even though the Commission has completed its investigation into whether or not corrupt conduct has occurred.'<sup>239</sup>

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<sup>237</sup> Letter from the Hon Nathan Rees MP, the then Premier, referring inquiry to Committee, dated 27 November 2008, reproduced at Appendix 2.

<sup>238</sup> Mr Cripps, *Transcript of evidence*, 4 May 2009, p 1

<sup>239</sup> Independent Commission Against Corruption, *Submission 5*, p 4

Assembling admissible evidence

- 5.5 The ICAC proposed that a way of achieving this would be to make its current function of assembling admissible evidence specified in s 14(1)(a) of the Act one of the principal functions specified in section 13 of the Act. Additionally the ICAC submitted that the wording of the function should be amended to make it clear that the ICAC's functions include obtaining admissible evidence in addition to assembling admissible evidence.<sup>240</sup>
- 5.6 The Commission stated in support of the amendment that it is sometimes necessary for it to obtain admissible evidence after an investigation has concluded:
- Although evidence will be gathered during the course of an investigation by the Commission not all evidence will be in a form admissible in a criminal court. In some cases the full extent of possible criminal conduct may not be established until the end of the Commission's investigation. It is often necessary to obtain additional admissible evidence after the conclusion of an investigation.<sup>241</sup>
- 5.7 In support of their proposal, the ICAC submit that if any prosecution action is to be considered and/or commenced by the DPP, the ICAC must collect the necessary admissible evidence. The ICAC stated that obtaining admissible evidence takes up substantial resources both during and after an investigation.<sup>242</sup> The ICAC submitted:
- Given the importance of ensuring the DPP has the necessary admissible evidence to properly consider whether prosecution action is warranted, the importance of ensuring that any prosecution action is supported by the appropriate admissible evidence, and the level of resources which the Commission needs to devote to this function, the obtaining of admissible evidence for prosecuting purposes should be recognised as one of its principal functions.<sup>243</sup>
- 5.8 The ICAC also argued that the amendment would merely serve to clarify the current provisions of the Act, and would not represent a significant change to the Commission's operations: 'Such an amendment would merely recognise what is already the case and not result in any changes to the way in which the Commission operates.'<sup>244</sup>
- 5.9 The former Commissioner had raised the issue of ambiguities concerning the ICAC's secondary function of assembling admissible evidence on previous occasions. On 11 September 2007, while being examined on the ICAC's Annual Report for 2005/2006, and on 8 July 2009, while being examined on the ICAC's Annual Report for 2006/2007, the former Commissioner argued there was a need for greater clarity in relation to the ICAC's role in gathering admissible evidence for criminal prosecutions. Some of the main points the former Commissioner raised at those hearings included:
- The High Court have reminded us that the ICAC is not a law enforcement body, however, the secondary function of assembling admissible evidence has been interpreted as requiring the ICAC to act in the same way as the police act when matters are referred to the DPP by the police.<sup>245</sup>
  - As neither the police nor the DPP will investigate or gather any admissible evidence required for criminal prosecutions in connection with corrupt conduct,

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<sup>240</sup> Independent Commission Against Corruption, *Submission 5*, p 4

<sup>241</sup> Independent Commission Against Corruption, *Submission 5*, p 4

<sup>242</sup> Independent Commission Against Corruption, *Submission 5*, p 4

<sup>243</sup> Independent Commission Against Corruption, *Submission 5*, p 5

<sup>244</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, p 3

<sup>245</sup> Mr Cripps, *Transcript of evidence*, 9 July 2008, p 2. Please see ICAC Committee, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, Report No 3/54, October 2008.



the ICAC has taken a pragmatic approach and considered that if the ICAC does not undertake this role, then no one will.<sup>246</sup>

- The ICAC commented that it is not just budgetary constraints which they consider prevents them from fulfilling the role they have been asked to perform. The ICAC question the legal justification for them undertaking these activities when the Parliament has endeavoured to ensure that the ICAC is not a crime authority.<sup>247</sup>

5.10 During questioning on the proposed amendment as part of the current inquiry the former Commissioner was asked about the use of ICAC's coercive powers after an investigation is finished and whether he considered the ICAC should be permitted to use those powers to assist in gathering admissible evidence. The former Commissioner acknowledged that it would be an egregious breach if the ICAC used its coercive powers after an investigation concluded and noted that it was not how the ICAC currently operated. In response to a question from Mr Greg Smith SC MP, the former Commissioner and Deputy Commissioner commented further on this point:

**Mr GREG SMITH:** Sometimes witnesses do not want to cooperate because either they do not want to dob in their mate or they are scared. That is why you have this power of compulsion to get them to cooperate because otherwise your organisation would be frustrated in its investigation. Can you not see an argument for perhaps having a power to continue with the investigation if necessary to finalise the brief?

**Mr CRIPPS:** I can see an argument. I might ask Theresa to speak about this because, after all, she came from Queensland, where they did have that power.

**Ms HAMILTON:** They have a clear power to continue to gather evidence at the request of the ODPF but I do not think they did actually use compulsory powers as part of that. But I can say there does often reach the stage where we are gathering information for the brief where there is a lack of cooperation in providing information. It is certainly not provided as readily as when one can serve a notice with a return date, so I guess it is something the Commission would have to think about. It can sometimes be a practical problem that we do not have the same power to compel information when we are gathering the evidence for the brief after the investigation as before.<sup>248</sup>

5.11 In their supplementary submission the ICAC expanded on their position with respect to the issue of using their coercive powers to obtain further evidence after an investigation is finished. The ICAC advised that the Queensland CMC is able to use its coercive powers to obtain further evidence for the DPP following an investigation:

I note that section 49(4) of the Queensland Crime and Misconduct Act 2001 provides that the Crime and Misconduct Commission (the CMC) must take all reasonable steps to further investigate a matter or provide further information if required to do so by the Director of Public Prosecutions for the purpose of a prosecution. In her evidence to the Committee Deputy Commissioner Hamilton advised that she thought the CMC did not use its coercive powers when gathering further information at the request of the DPP. She has since ascertained that the CMC does, on occasion, use its coercive powers to gather evidence at the request of the DPP.<sup>249</sup>

<sup>246</sup> Mr Cripps, *Transcript of evidence*, 9 July 2008, p 2. Please see ICAC Committee, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, Report No 3/54, October 2008.

<sup>247</sup> Mr Cripps, *Transcript of evidence*, 11 September 2007, p 3. Please see ICAC Committee, *Review of the 2005-2006 Annual Report of the Independent Commission Against Corruption*, Report No 1/54, November 2007.

<sup>248</sup> Mr Cripps, *Transcript of evidence*, 4 May 2009, pp 9-10; Ms Hamilton, *Transcript of evidence*, 4 May 2009, pp 9-10

<sup>249</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, pp 3-4

Assembling admissible evidence

5.12 The Commission stated that the matter of the ICAC continuing to use its coercive powers in such circumstances 'requires careful consideration and ... may fundamentally affect the Commission's operations', further noting that this question is a matter for the Parliament to determine.<sup>250</sup>

5.13 On 1 July 2010 the Committee wrote to Commissioner Ipp seeking his views on the proposed amendments. Commissioner Ipp did not consider the amendment desirable or necessary. He commented:

The principal functions currently listed in section 13 properly capture the essential purpose of the Commission. The proposed inclusion would create an impression of the Commission's purpose that is inconsistent with its main role of investigating and exposing corrupt conduct. The Commission currently assembles evidence for the Director of Public Prosecutions. That role will continue. It is not necessary to make it a "principal" function.<sup>251</sup>

### **Inquiry participants' views**

5.14 The Office of the Director of Public Prosecutions (DPP), supported the proposed amendment to make the assembling of admissible evidence a primary function. The position of the DPP was that the proposed amendment would sit easily with the principal objects of the ICAC Act and present functions of the ICAC. The DPP observed that the current Memorandum of Understanding (MoU) between the DPP and the ICAC sets out liaison arrangements between the two offices and since the MoU there have been improvements. However, the DPP acknowledged that problems would always remain whilst evidence is not being compiled at the time of the investigation and hearing:

The focus is not placed on assembling evidence for criminal prosecutions until after the investigation and hearing have been completed. This often leads to issues with witnesses providing statements and the necessity for requisitions to be raised. This in turn leads to delay, which is a factor taken into account in any subsequent sentencing proceedings.<sup>252</sup>

5.15 The DPP considers that if the amendment was made, and internal ICAC procedures changed to implement the amendment, there would be fewer delays, less need for requisitions, the issues would be clearer, the status of witnesses known and the 'turnaround time for solicitors within the ODPP to analyse the evidence and for a final determination to be made will also be greatly improved.'<sup>253</sup>

5.16 In evidence before the Committee Ms Marianne Carey, Managing Lawyer (Group 6), representing the DPP elaborated on some of the issues raised in the DPP's submission:

- The MoU between the ICAC and the DPP has seen improvements in the relationship between the two offices and the briefs of evidence, however, problems still remain.<sup>254</sup>
- One of the biggest problems is that the focus of the ICAC is not on assembling admissible evidence until after the investigation and the hearings have been

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<sup>250</sup> Independent Commission Against Corruption, *Supplementary Submission 5a*, p 3-4

<sup>251</sup> Letter from the Commissioner of the ICAC, the Hon David Ipp AO QC, date 8 July 2010. See Appendix 3.

<sup>252</sup> Office of the Director of Public Prosecutions, *Submission 1*, p 1

<sup>253</sup> Office of the Director of Public Prosecutions, *Submission 1*, p 1

<sup>254</sup> Ms Marianne Carey, Managing Lawyer (Group 6), Office of the Director of Public Prosecutions, *Transcript of evidence*, 4 May 2009, p 31

completed. This leads to problems when the DPP request further evidence. Delays may occur for a number of reasons, for example, the evidence may no longer be available or the appropriate people may no longer be employed, for example, at a bank.<sup>255</sup>

- Some requisitions raised by the DPP require a search warrant to be raised. There is some apparent ambiguity over whether the ICAC have the power to request a search warrant once the investigation is over.<sup>256</sup>
- The DPP has a lack of resources. Group 6, within the DPP, must do all the requests for advice from ICAC and prepare the advice for the Director's decision. Group 6 will also have carriage of any prosecution. The lack of staff impacts on the time it takes to provide advice.<sup>257</sup>
- The ICAC often has a lack of resources. The DPP sometimes requests expert analysis or forensic accounting. These are often required because the matters are generally fraud briefs which are paper heavy.<sup>258</sup>

5.17 Given the slight improvements in the procedures between the DPP and the ICAC as a result of the MoU, Ms Carey was asked whether making the assembling of admissible evidence a primary function would actually improve the quality of the briefs of evidence forwarded to the DPP from the ICAC, that is, was a legislative amendment required. Ms Carey responded:

I expect that admissible evidence will come as a matter of course, not necessarily as a result of a requisition. I think the requisitions we are still asking for are directed towards admissible evidence such as, "Could you please obtain a statement in admissible form from X? Could you please obtain a statement from Y in admissible form producing these documents?" The majority of the requisitions we still issue are requests for evidence in admissible form. So I think that as a matter of course if it is a primary function that may be the difference.<sup>259</sup>

5.18 Ms Carey was also questioned on the issue of the ICAC being able to use their coercive powers after an investigation and whether she considered this may alter the nature and role of the ICAC. She expressed the view that there should be greater emphasis placed by the ICAC on gathering evidence during investigations:

**CHAIR:** There is a difference though between going and getting a statement from someone and exercising coercive powers. The Commissioner tells us that he receives your request for requisitions and he will go out and get further evidence where he can to plug any holes in a brief, et cetera, but he cannot use his coercive powers. You concede that once this becomes a principal function of the ICAC, gathering admissible evidence, then it does change the very nature of how it was put together and why it was put together?

**Ms CAREY:** It may. Another way to look at it is when they are executing a search warrant, for example, during the course of an investigation or a reference. If the ICAC's mind is turned to gathering admissible evidence on that point there may be no need, once the reference is concluded, for the DPP, for example, to requisition material in the search. So it may not change it if ICAC's mind as a collective is directed towards a collecting of admissible evidence at the same time that they are carrying out an investigation. They may not be required once an investigation has concluded to, for

<sup>255</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 31

<sup>256</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 32

<sup>257</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 31

<sup>258</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 32

<sup>259</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 33

Assembling admissible evidence

example, seek to execute another search. Therefore, it may not change their function per se.<sup>260</sup>

5.19 In evidence before the Committee, Mr Robert Needham, former Chairperson of the Crime and Misconduct Commission (the CMC) stated that he understood the issue with the proposed amendment to be that the ICAC would like a clear statement of their power to conduct further inquiries where it is needed, after they have finished investigating and provided the matter to the DPP. Mr Needham was of the view that simply making the assembling of admissible evidence a primary function would not necessarily solve the issue. Mr Needham suggested an amendment to the ICAC Act in similar terms to what is contained in the *Crime and Misconduct Act 2001*. Mr Needham commented:

If you make it a primary function to collate evidence, that does not then, I would not have thought, make it totally clear that after they have finished collating and sent the DPP the brief, they could then later start gathering further evidence if requested by the DPP. May I suggest that the way I would like to see it is the way we have it in Queensland. Section 49 of our Act is the one that enables us to send a matter to the DPP. Section 49(4) states:

If the Director of Public Prosecutions requires the Commission to make further investigation or supply further information relevant to a prosecution, whether started or not, the Commission must take all reasonable steps to further investigate the matter or provide the further information.

That makes it totally clear that we have the power, even though we have sent the brief off to the DPP; if the DPP wants further information, we can go out and do it. We go even further than that; section 333(1), which I do not know that you need quite as broadly as this, makes it very clear that we can, in effect, just do anything we want to insofar as investigation, even in fact if the criminal proceedings have started. It is very broad.<sup>261</sup>

5.20 On the point of whether the ICAC should be permitted to use their coercive powers after an investigation has concluded, Mr Needham commented that such an intention would need to be clearly spelt out in the legislation. Mr Needham stated:

...If you were to leave it as just saying, "One of the primary functions of the ICAC is to assemble evidence" it would still be arguable. You would still get an argument able to be mounted by a defence, say, in a criminal matter that ICAC had no such power to use the coercive powers at that stage and therefore the evidence obtained should not, in the exercise of the discretion of the court, be utilised against the accused person.<sup>262</sup>

5.21 Mr Needham also commented on the quality of briefs of evidence that should be provided to the DPP after an investigation is concluded. Mr Needham was of the view that it is inappropriate for the DPP, as the prosecuting authority, to be involved with investigating:

...I take the view at the Crime and Misconduct Commission [CMC] that if we investigate a matter, then it has to be put into a state that it can be prosecuted. I cannot expect to send a matter off to the Director of Public Prosecutions [DPP] and for the DPP to be running around, finding witnesses and taking statements. That is not the function of the DPP; it has no investigative capacity.<sup>263</sup>

5.22 The Western Australian Corruption and Crime Commission (CCC) advised the Committee that under s 43(5) of the *Corruption and Crime Act 2003* the CCC may

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<sup>260</sup> Ms Carey, *Transcript of evidence*, 4 May 2009, p 34

<sup>261</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 18

<sup>262</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 15

<sup>263</sup> Mr Needham, *Transcript of evidence*, 11 May 2009, p 14

make recommendations regarding criminal prosecutions. If the DPP is to conduct a prosecution recommended by it, the CCC prepares the brief of evidence and provides it to the DPP. The CCC considered it was unclear as to why the ICAC was seeking this amendment but submitted if there is a need for legislative cover for a function that it necessarily performs it would be sensible to provide it.<sup>264</sup>

- 5.23 In evidence before the Committee, the Police Integrity Commissioner, Mr John Pritchard addressed the Department of Premier and Cabinet's concern that if the proposed amendments to section 37 were granted then the ICAC might start to focus more on disciplinary and civil proceedings and neglect their function of assembling admissible evidence for criminal prosecutions. Mr Pritchard commented that in his experience he did not regard that as a particular concern. Although, the assembling of admissible evidence is a secondary function for the PIC as it is for the ICAC, Mr Pritchard stated that prosecutions are very important and are vigorously pursued to the extent they can be:

...If you conduct an investigation and collect evidence, you do not treat that as some sort of a subsidiary thing. You treat it as a very serious matter and something that should be pursued as a desirable outcome of your investigation.<sup>265</sup>

- 5.24 Mr Pritchard did observe that, if the proposed amendment was granted, there may be a risk that the ICAC may become an agency primarily concentrating on collecting admissible evidence for prosecutions. The PIC Commissioner commented that to a large extent that is the role of a crime commission.<sup>266</sup> The PIC submission also noted that the amendment may represent a significant change to the nature and functions of the ICAC:

Such a change might also significantly alter the nature and functions of the ICAC from that originally contemplated when the agency was first established with the passage of the ICAC Act in 1988. It could have the effect of changing it from being primarily an investigative fact-finding body based on the inquisitorial model to merely a specialised criminal investigation type body such as the various Crime Commissions which operate in a number of Australian jurisdictions.

- 5.25 Like the ICAC, the Inspector of the ICAC, Mr Harvey Cooper AM, also expressed concern that this proposed amendment was conditional upon the amendments being made to section 37 of the ICAC Act. The Inspector considered that the amendment to make assembling admissible evidence a primary function was quite distinct from the other two.<sup>267</sup>

- 5.26 In the Inspector's view, this proposed amendment was an attempt to overcome the problem of the collection of admissible evidence for prosecution falling between two independent statutory authorities that have no statutory procedures for allocating their respective functions to that task.<sup>268</sup> Although the Inspector submitted that he did not object to the suggested amendment, in evidence to the Committee he stated that he considered that an administrative solution may be more appropriate: 'I see it as something that has really got to be determined by organisation rather than perhaps by legislation.'<sup>269</sup>

<sup>264</sup> Corruption and Crime Commission, *Submission 7*, p 2

<sup>265</sup> Mr Pritchard, *Transcript of evidence*, 4 May 2009, p 27

<sup>266</sup> Mr Pritchard, *Transcript of evidence*, 4 May 2009, p 27

<sup>267</sup> Office of the Inspector of the ICAC, *Submission 6*, p 3

<sup>268</sup> Office of the Inspector of the ICAC, *Submission 6*, pp 3-4

<sup>269</sup> Office of the Inspector of the ICAC, *Submission 6*, p 4 and the Hon Harvey Cooper AM, Inspector of the ICAC, *Transcript of evidence*, 4 May 2009, p 16

Assembling admissible evidence

5.27 During his appearance before the Committee, the ICAC Inspector also addressed the issue of the adequacy of ICAC's resources to assemble evidence, stating that the Commission may need 'extra resources to enable it to do that part of the work more efficiently.'<sup>270</sup>

5.28 The ICAC Inspector also drew the Committee's attention to the use of the word "assemble". The Inspector expressed concern as to whether the power to "assemble evidence" would extend to obtaining further evidence at the request of the DPP as the word assemble might be limited to the collation of material that the ICAC already has. The Inspector commented:

I am probably being a little bit picky or pedantic here, but, knowing the way lawyers think, they could argue that the word "assemble" means getting together things you already have and it does not include getting new things in. That may or may not be a valid point; I just suggest that if you are going to amend it to cover this particular power at least get the parliamentary draftsman to have a look at whether the word "assemble" is an adequate description of what might be required.<sup>271</sup>

5.29 In his submission Mr Bruce McClintock SC also observed that the connection between the first two terms of reference and this term of reference was unclear. Despite this, Mr McClintock indicated his support for the amendment. He commented that the ICAC already perform the significant task of assembling admissible evidence and that it would be wise to make it a primary function so that emphasis is given to its importance.<sup>272</sup>

5.30 When giving evidence to the Committee, Mr McClintock was asked about the views he expressed in his independent review of the ICAC Act completed in January 2005. In that review Mr McClintock commented that 'there is no justification to change or modify its principal functions as a fact-finding investigative body to one where its primary or principal functions are directed more to securing criminal convictions.'<sup>273</sup> In response Mr McClintock stated:

My view was that there was no need to change it at that stage. I have taken a different position in here, partly because of my own concern about the lack of convictions that are coming through and whether that was not a way of addressing the issue. I am not being facetious when I say this, but the false swearing ones before the Commission do not impress me—they never have. That is not corruption: it is a criminal offence and obviously they should be punished for it, but that is because it damages the process. But the significant thing is obtaining evidence of crimes that involve corruption, taking bribes, and so on. Obviously, there have been some convictions but not as many as I would have thought or that some of the findings and evidence before the Independent Commission Against Corruption warrant.

If that change to the Independent Commission Against Corruption legislation improves that and improves its ability or adeptness for getting material together to enable prosecutions that would be a very good thing.<sup>274</sup>

5.31 Mr Alan Robertson SC also did not consider there to be a connection between the proposed amendments to section 37 and the proposed amendment to make the assembling of admissible evidence a primary function. Mr Robertson observed that it

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<sup>270</sup> Mr Cooper, *Transcript of evidence*, 4 May 2009, p 16

<sup>271</sup> Mr Cooper, *Transcript of evidence*, 4 May 2009, p 17

<sup>272</sup> Mr Bruce McClintock SC, *Submission 10*, p 2

<sup>273</sup> Mr Bruce McClintock SC, *Independent Review of the Independent Commission Against Corruption Act*, commissioned by the Department of Premier and Cabinet, published January 2005, [3.4.25], p 39

<sup>274</sup> Mr McClintock SC, *Transcript of evidence*, 4 May 2009, p 43

seems to be 'a purely intra-agency question or a question of pure resources; it does not seem to raise any issues of fairness or other policy.'<sup>275</sup>

- 5.32 In their submission the Law Society of New South Wales considered that the proposed amendment would detract the ICAC from its charter of preventing corruption, enhancing integrity in the public service and detecting the truth in relation to alleged corrupt conduct.<sup>276</sup> The Law Society also argued that it would represent a considerable broadening of the Commission's functions:

The proposal to amend s 37 of the Act and to make the assembling of admissible evidence for criminal prosecutions a primary function of ICAC would substantially widen ICAC's existing functions and powers in its operating Act. The amendments would involve ICAC more in the administration of justice rather than the impartial discovery of truth surrounding allegations of corruption.<sup>277</sup>

- 5.33 This was a view shared by Mr Don McKenzie, who also submitted that in its current form, the ICAC has the primary function of combating public sector corruption through corruption exposure and other means. A secondary function is to support the administration of the criminal justice process that flows on from an ICAC inquiry. Mr McKenzie submitted that, although the support for the administration of the criminal justice process is a secondary function, this does not mean it is unnecessary and should not be performed effectively and efficiently.<sup>278</sup>

### Committee comment

- 5.34 The Committee was tasked with inquiring into whether, if either of the proposed amendments to section 37 of the ICAC Act are made, the Act should also be amended to make the ICAC's current function of assembling evidence for criminal prosecutions a primary function.
- 5.35 Several inquiry participants, including the former ICAC Commissioner, expressed the view that the proposed amendment to the Commission's primary functions is not necessarily connected with the other proposed amendments to section 37 of the Act. The Committee concurs with this view and notes that many of the points raised by inquiry participants in relation to amending the ICAC's primary functions do not relate to the proposed amendments to section 37.
- 5.36 The Committee agrees with those participants who expressed the view that the amendment would represent a significant change to the primary functions of the ICAC. The original intention for the establishment of the ICAC was for it to investigate, expose and prevent corruption, and it was expressly stated that it would not have a prosecutorial or law enforcement role. In the second reading speech to the ICAC Bill, the Hon Nick Greiner MP, stated that the ICAC's focus would be on corruption:

... the independent commission will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation, and it was made clear in the statements I made prior to the election. It is nonsense, therefore, for anyone to suggest that the establishment of the independent commission will in some way derogate from the law enforcement role of the police or

<sup>275</sup> Mr Robertson, *Transcript of evidence*, 11 May 2009, p 34

<sup>276</sup> The Law Society of New South Wales, *Submission 8*, p 2

<sup>277</sup> The Law Society of New South Wales, *Submission 8*, p 2

<sup>278</sup> Mr Don McKenzie, *Submission 11*, p 8

Assembling admissible evidence

bodies such as the National Crime Authority. On the contrary, the legislation makes it clear that the focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption.<sup>279</sup>

- 5.37 The objects of the Act make it clear that the focus of the Commission investigating and exposing corrupt conduct. The Committee does not agree that assembling evidence for criminal prosecutions should be elevated to a primary function. Such a change to the functions of the Commission may create the impression that it has functions akin to a law enforcement, crime commission style body.
- 5.38 The Committee is also persuaded by the views of the current ICAC Commissioner, the Hon David Ipp AO QC. Commissioner Ipp did not consider that the proposed amendment was desirable or necessary. He commented that the principal functions capture the essential purpose of the Commission and any inclusion of assembling admissible evidence would create an impression of the ICAC's purpose which is inconsistent with its main role of investigating and exposing corrupt conduct. The Committee concurs with this view.
- 5.39 The Office of the DPP supported the proposed amendment, as they felt it would result in improvements to the prosecution by the DPP of offences arising from ICAC investigations. According to the Office of the DPP, the proposed amendment would address problems with prosecutions, which arise as a result of admissible evidence not being compiled for prosecution by the ICAC until after an investigation has been completed.
- 5.40 However, it is not clear to the Committee that an amendment to the primary functions of the ICAC is necessary in order to improve the ICAC's processes in relation to gathering evidence for criminal prosecutions. For instance, organisational change and improved resourcing may be more effective in achieving improvements in ICAC's assembling of evidence.
- 5.41 The Committee has heard evidence during several previous ICAC annual report reviews, detailing attempts to improve ICAC's assembling of evidence and compilation of briefs of evidence for the Office of the DPP.<sup>280</sup> The DPP also acknowledged in evidence during the current inquiry that there have been recent improvements in the quality of briefs provided by the ICAC. The Commission has clearly sought to focus on improving the way in which it gathers admissible evidence for the DPP.
- 5.42 The Committee notes that organisational attempts to improve aspects of this function, such as amendments to the Memorandum of Understanding between the ICAC and the DPP, changes to processes, and improved communication between the DPP and the ICAC have resulted in improvements in ICAC's performance of its secondary function of assembling admissible evidence. The Committee will continue to monitor the assembling of evidence by the ICAC during its regular annual report reviews and meetings with the ICAC.
- 5.43 The ICAC initially submitted in support of the amendment that assembling evidence for prosecutions consumes substantial resources and therefore should be elevated

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<sup>279</sup> The Hon Nick Greiner MP, Second Reading Speech: Independent Commission Against Corruption Bill, Legislative Assembly, 26 May 1988, p 674

<sup>280</sup> Committee on the ICAC, *Review of the 2005-2006 Annual Report of the Independent Commission Against Corruption*, report 1/54, November 2007, pp 18-21 and *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, pp 1-6



to a primary function. The Committee acknowledges that significant resources are required by the Commission to compile briefs of evidence for the Office of the DPP and gather admissible evidence in preparing these briefs. For example, the ICAC submitted that in relation to its recent investigation into allegations of corruption affecting RailCorp:

... section 74A(2)(a) statements were made with respect to 33 individuals involving over 660 different offences. As of 1 March 2009 the Commission was in the process of completing briefs of evidence arising out of this and other investigations involving 38 individuals. Briefs of evidence relating to another 94 individuals, previously prepared by the Commission, were with the DPP awaiting advice.<sup>281</sup>

- 5.44 It is relevant to note that, during its recent review of the ICAC's 2007-2008 Annual Report, the Committee supported the Commission's request for additional recurrent funding to recruit extra staff to its Investigation Division.<sup>282</sup> During the review, the former Premier advised that the Commission's request for additional funding, and the Committee's letter expressing support for the request, had been referred to Treasury for consideration.<sup>283</sup> Subsequently, ICAC received additional funding to the amount of \$850,000.<sup>284</sup>
- 5.45 The Committee will continue to monitor the adequacy of the Commission's staffing and resources and its effect on ICAC's ability to discharge its function under section 14 of the Act, to assemble admissible evidence for prosecutions for criminal offences relating to corrupt conduct and furnish such evidence to the Office of the DPP.
- 5.46 The Committee is not recommending that the proposed amendment to the Commission's primary functions be made. In the Committee's view, organisational attempts to improve processes and an increase in resources for the ICAC are the preferred ways of addressing the ICAC's ability to perform this function, without altering the primary purpose of ICAC as an inquisitorial, investigatory body.

**RECOMMENDATION 4:** The Committee recommends against amending the *Independent Commission Against Corruption Act 1988* to make assembling admissible evidence a primary function of the Independent Commission Against Corruption.

- 5.47 One of the arguments initially presented by the former ICAC Commissioner in support of the amendment was that section 14 of the Act does not make it clear that the Commission may assemble admissible evidence for criminal and other offences related to corrupt conduct after an investigation has been completed. The Committee considers that an amendment to the ICAC Act to put this matter beyond doubt is an appropriate way of resolving the lack of clarity cited by the ICAC. Such an amendment would make the existing function and practices of the ICAC clearer, without altering its primary functions or use of coercive powers.

<sup>281</sup> Independent Commission Against Corruption, *Submission 5*, p 4

<sup>282</sup> Committee on the ICAC, *Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption*, report 9/54, May 2010, pp 1-4

<sup>283</sup> Committee on the ICAC, *Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption*, report 9/54, May 2010, p 4

<sup>284</sup> The Hon David Ipp AO QC, Commissioner, Independent Commission Against Corruption, Inquiry into review of the 2008-2009 Annual Report of the Independent Commission Against Corruption, *Transcript of evidence*, 27 August 2010, pp 7-8

Assembling admissible evidence

- 5.48 While the ICAC do not currently use their coercive powers beyond the completion of the investigation, the potential extension of ICAC's use of coercive powers to collect evidence once an inquiry has been concluded was raised during the course of the inquiry. The Committee does not support this proposition, as to extend the use of coercive powers after an investigation is completed would fundamentally alter the nature of ICAC's role and purpose. The ICAC have a clear mandate to use their coercive powers only to investigate, expose and prevent corruption.
- 5.49 The Committee is recommending an amendment to the ICAC Act to clarify that the Commission may assemble evidence that may be admissible in the prosecution of a person for criminal offences in connection with corrupt conduct, both in the course of its investigations and after investigations have been completed. However, the suggested amendment to the ICAC Act should not enable ICAC to use its coercive powers after an investigation is completed.

**RECOMMENDATION 5:** The Committee recommends that the Premier consider introducing amendments to the *Independent Commission Against Corruption Act 1988* to clarify that the Independent Commission Against Corruption may assemble admissible evidence for the prosecution of a person for criminal offences in connection with corrupt conduct, and furnish any such evidence to the Director of Public Prosecutions, both in the course of its investigations and after investigations have been completed.

The Committee further recommends that the proposed amendment to the *Independent Commission Against Corruption Act 1988* not permit the use by the Commission of its coercive powers after an investigation is completed.

## Appendix One - ICAC's amendment proposals



INDEPENDENT COMMISSION AGAINST CORRUPTION

ICC 227  
C08/720



ICAC COMMITTEE

15 AUG 2008

RECEIVED

Mr Frank Terenzini MLA  
Chair  
ICAC Parliamentary Joint Committee  
Parliament of NSW  
Macquarie Street  
Sydney NSW 2000

Our Ref: Z08/0094

Dear Mr Terenzini

**RE: Proposed amendments to the *Independent Commission Against Corruption Act 1988***

The purpose of this letter is to identify and seek the Committee's support for a number of amendments to the *Independent Commission Against Corruption Act 1988* (the *ICAC Act*).

Some of these amendments were foreshadowed by the Commissioner during our recent appearance before the Committee on Wednesday 9 July 2008.

### Section 116(2)

Section 116(2) provides that if an offence against the *ICAC Act* is an indictable offence, a Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent. Section 116(3) provides that if a Local Court convicts a person of such an offence then the maximum penalty that the court may impose is, in the case of an individual, the smaller of a fine of 50 penalty units or imprisonment for two years, or both, or the maximum penalty otherwise applicable to the offence.

The concern in relation to these provisions arises in the context of convictions for offences under section 87 of the *ICAC Act* of giving false or misleading evidence to the Commission. Section 87 of the *ICAC Act* creates an indictable offence with a maximum penalty of 200 penalty units or imprisonment for five years, or both.

The giving of false or misleading evidence to the Commission at a compulsory examination or public inquiry fundamentally affects the Commission's ability to effectively perform its principal functions under the *ICAC Act*. It has been the Commission's experience that most witnesses who are involved in corrupt conduct knowingly give false evidence. It is only when

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TELEPHONE (02) 8281 5999 FACSIMILE (02) 9264 5364  
TOLL FREE 1800 463 909  
[www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

they are faced with overwhelming evidence of their involvement in corrupt conduct that some change their evidence and make admissions. Even these admissions are often limited to what they think the Commission already knows.

Witnesses who give false evidence do not appear to be concerned about the possible criminal consequences. This may be due to the relatively light sentences which are being imposed on persons convicted of offences under section 87 of the *ICAC Act*. The Commission is concerned that a perception exists that people who tell lies at a compulsory examination or public inquiry will either not be punished or will not receive any serious punishment. It is certainly the case that the prospect of possible punishment is not acting as a deterrent.

In considering sentencing for an offence under section 87 of the *ICAC Act*, the Court of Criminal Appeal has previously held that, at least in the absence of extraordinarily compelling subjective circumstances, penalties which do not involve a significant sentence of full-time imprisonment are manifestly inadequate and inadequate to a point verging on irresponsibility (*R v Aristodemou*, NSW CCA, 30 June 1994).

Unfortunately, there has been a tendency of lower courts to impose comparatively light sentences for offences under section 87 of the *ICAC Act*. Where terms of imprisonment are imposed these have generally been suspended. In the last few years convictions in the Local Court for section 87 offences have all, with one exception, resulted in the imposition of suspended sentences. The one exception involved the imposition of a 4 month period of imprisonment to be served as home detention.

The Commission has recently been provided by the Office of the Director of Public Prosecutions with some statistics comparing penalties imposed by local and higher courts with respect to offences of perjury under section 327(1) of the *Crimes Act 1900* (which is analogous to an offence under section 87 of the *ICAC Act*) and making a false statement on oath under section 330 of the *Crimes Act 1900*. A copy is attached.

The statistics clearly indicate a substantial difference in penalties imposed by the Local Court and those imposed by higher courts. The number of sentences involving an actual period of imprisonment is significantly higher in the higher courts. The fact higher courts more often impose periods of imprisonment is recognition of the seriousness of such offences.

The Commission requests that section 116 of the *ICAC Act* be amended so that it does not apply to offences under section 87 of the *ICAC Act*. This would ensure that such offences are dealt with in the higher courts where the maximum penalty may be imposed.

#### Section 37

The current effect of section 37 of the *ICAC Act* is that, if a witness at a compulsory examination or public inquiry objects to answering a question or producing a document or

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other thing, then the answer, the document or other thing is not admissible in evidence against the witness in any criminal, civil or disciplinary proceedings. The legislation provides an exception in relation to prosecutions for offences under the *ICAC Act*.

The protection should not extend to protect witnesses who may be facing disciplinary proceedings who are or become involved in civil proceedings. I do not consider there is any real justification for a person who has given evidence compulsorily to be protected from those answers in subsequent disciplinary or civil proceedings.

A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.

The removal of the protection with respect to disciplinary proceedings is not without precedent. Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the *ICAC Act*. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Law Enforcement Integrity Commissioner Act 2006* also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.

It is not unusual for the Commission to hear admissions from witnesses of frauds perpetrated on public authorities. In the Commission's recent investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto), evidence was given by a number of witnesses in which they admitted defrauding RailCorp of substantial sums of money. This evidence was given under objection which means that it cannot be used by RailCorp in any civil action it might consider taking to recover the amounts.

Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.

#### Summary offences

A number of offences in the *ICAC Act* are summary offences which means that a prosecution must be commenced within 6 months of the date from when the offence was alleged to have

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been committed, unless another limitation period is specified with respect to the particular offence (section 179 *Criminal Procedure Act 1986*). Given the nature of the Commission's investigations it is not always possible to identify that an offence has occurred until after the expiration of the 6-month period. In other cases it may be that the offence has been identified but it may not be possible to commence criminal proceedings within the 6-month period without compromising the Commission's investigation by alerting persons to the fact that the Commission is conducting an investigation or divulging evidence obtained in the course of the investigation.

Recent examples of these problems have emerged in the Commission's investigation into corruption allegations affecting Wollongong City Council (Operation Atlas).

During the course of this investigation a number of public officials were required to provide statements of information under section 21 of the *ICAC Act*. It subsequently became apparent, as additional evidence was obtained, that a number of people provided false or misleading responses. It is an offence under section 82 of the *ICAC Act* for a person to knowingly furnish information in response to a section 21 notice which is false or misleading in a material particular. The relevant penalty includes imprisonment for up to 6 months. The offence however is a summary offence. As the false or misleading nature of the statements was not apparent until after the 6-month period it was not possible to commence any prosecution action under section 82 of the *ICAC Act*.

An additional problem arose in Operation Atlas when it was discovered that two persons had impersonated Commission officers. Evidence in relation to this was only obtained more than 6 months after the event. Although it is an offence under section 95 of the *ICAC Act* to impersonate a Commission officer, no prosecution could be commenced due to the expiration of time.

Section 116 of the *ICAC Act* has previously been amended to provide that proceedings for summary offences under sections 80(c) and 81 of the *ICAC Act* may be commenced within 3 years of the commission of the alleged offence. That section also provides that proceedings for an offence under section 112 of the *ICAC Act* may be commenced within 2 years after the commission of the alleged offence.

The Commission recommends that section 116 be amended to provide that proceedings for offences under sections 82 and 95 of the *ICAC Act* may be commenced within 3 years after the commission of the alleged offence.

#### Section 112

Section 112 allows the Commission to make non-publication orders. There is considerable doubt as to whether this section allows the Commission to make non-publication orders with

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respect to written submissions made about available findings and recommendations arising from evidence given at compulsory examinations or public inquiries.

At the conclusion of its public inquiries (and some compulsory examinations if it is proposed to produce a public report) Counsel Assisting the Commission makes submissions as to what findings and recommendations may be available to the Commission on the evidence. These submissions are usually written.

It is the usual practice for the submissions of Counsel Assisting to be provided to all relevant parties. In certain circumstances submissions received in response may also be circulated to other interested parties for comment.

In many cases it is preferable that submissions not be publicly available, at least until such time as the Commission has published its findings and recommendations in its section 74 report. This is because the submissions may canvass findings and recommendations that may not ultimately be accepted by the Commission. Publication of such submissions may have an adverse impact on reputation and may incite unnecessary public speculation. Publication may result in members of the public erroneously believing the submissions represent the findings or view of the Commission.

There have been cases in the past where copies of submissions have been obtained and published by the media which has led to unnecessary speculation as to what findings might ultimately be made by the Commission. This problem could be overcome by amending section 112 of the *ICAC Act* to make it clear that the Commission has power to make non-publication orders with respect to written submissions.

Please advise if you require any additional information in relation to any of the above matters.

A copy of this letter will be provided to the Premier for his information.

Yours sincerely



Theresa Hamilton  
Deputy Commissioner  
14<sup>th</sup> August 2008

DI0135371

## Appendix Two - Referral letter

C08/1252



Premier of New South Wales  
Australia

Rec'd 2/12/08  
MM

27 NOV 2008

Mr Frank Terenzini MP  
Chair  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Mr Terenzini

I refer to the letter from the Commissioner of the Independent Commission Against Corruption (Commission) dated August 2008 to the Committee setting out the Commission's view as to the need for a number of amendments to the *Independent Commission Against Corruption Act 1988*.

I also refer to the Committee's October 2008 report on the 2006-2007 Annual Report of the Commission and your letter of 21 October 2008 providing a copy of the report.

One of the amendments requested by the Commission was an amendment to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Commission in disciplinary proceedings and civil proceedings.

This requested amendment raises important issues in relation to the scope of the privilege against self-incrimination.

The Committee's report expresses the view that the Commission's requested amendment to section 37 would require detailed examination and consultation.

I request that the Committee, pursuant to its functions under section 64(1)(b), inquire into and report to Parliament on:

1. Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption in disciplinary proceedings;
2. Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained; and

LEVEL 39, GOVERNOR MACQUARIE TOWER, 1 FARRER PLACE, SYDNEY 2000, AUSTRALIA  
TEL: (02)9228 5239 FAX: (02)9228 3935 URL: www.premiers.nsw.gov.au G.P.O. BOX 5341, SYDNEY 2001.



3. If either of the amendments referred to in paragraphs 1 or 2 above is made, whether the *Independent Commission Against Corruption Act 1988* should also be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function.

If amendments of the kind referred to in paragraphs 1 or 2 above are made, there would be a risk that the Commission would use its powers to obtain evidence under compulsion to a greater extent, which may be to the detriment of obtaining admissible evidence for possible criminal proceedings. It is for this reason that advice would be appreciated on whether the Act should also be amended as proposed in paragraph 3 to make the Commission's current function of assembling evidence for criminal proceedings a primary function.

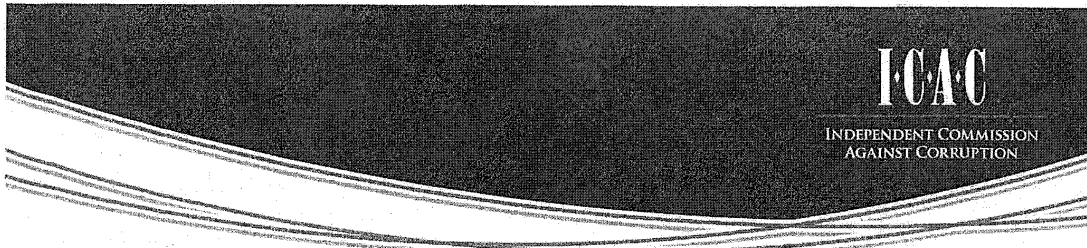
I would be grateful if the Committee would give priority to consideration of these matters.

Yours sincerely



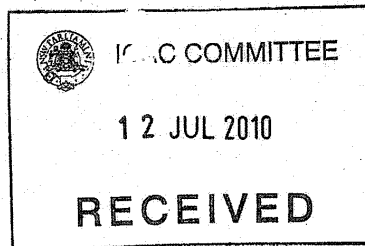
**Nathan Rees MP**  
Premier

## Appendix Three - Letter from ICAC Commissioner



The Hon Richard Amery MP  
Chair  
Committee on the ICAC  
Parliament of NSW  
Macquarie Street  
Sydney NSW 2000

FAX: 9230 3309



08 July 2010

Dear Sir,

**RE: INQUIRY INTO PROPOSED AMENDMENTS TO THE ICAC ACT**


I am writing in response to your letter of 1 July seeking my comments in relation to the proposed amendments.

The Commission's submission of 23 March 2009 supported amendment of the ICAC Act to remove the restrictions in section 37 of the Act prohibiting the use in disciplinary proceedings and civil proceedings of evidence given under objection. I support that submission and agree with the reasons set out in the submission.

The Commission also submitted that the Commission's current function of assembling evidence for criminal proceedings should be included in the principal functions set out in section 13 of the ICAC Act. I do not consider such an amendment desirable or necessary. The principal functions currently listed in section 13 properly capture the essential purpose of the Commission. The proposed inclusion would create an impression of the Commission's purpose that is inconsistent with its main role of investigating and exposing corrupt conduct. The Commission currently assembles evidence for the Director of Public Prosecutions. That role will continue. It is not necessary to make it a "principal" function.

Please let me know if you require any further information.

Yours sincerely

  
The Hon David Ipp AO QC  
Commissioner

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Sydney NSW 2000  
GPO Box 500, Sydney NSW 2001  
T 02 8281 5999 F 02 9264 5364  
E [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au)  
[www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

## Appendix Four - Section 13 of the ICAC Act

### 13 Principal functions

- (1) The principal functions of the Commission are as follows:
- (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
    - (i) corrupt conduct, or
    - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
    - (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,
  - (b) to investigate any matter referred to the Commission by both Houses of Parliament,
  - (c) to communicate to appropriate authorities the results of its investigations,
  - (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,
  - (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,
  - (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,
  - (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,
  - (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,
  - (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,
  - (j) to enlist and foster public support in combating corrupt conduct,
  - (k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.
- (1A) Subsection (1) (d) and (f)–(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the Police Integrity Commission Act 1996.
- (2) The Commission is to conduct its investigations with a view to determining:
- (a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and
  - (b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and
  - (c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

Appendix Four - Section 13 of the ICAC Act

- (2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.
- (3) The principal functions of the Commission also include:
- (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
  - (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.
- (3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.
- (4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).
- (5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:
- (a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,
  - (b) opinions as to:
    - (i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or
    - (ii) whether consideration should or should not be given to the taking of other action against particular persons,
  - (c) findings of fact.

## Appendix Five - Section 14 of the ICAC Act

### 14 Other functions of Commission

- (1) Other functions of the Commission are as follows:
  - (a) to assemble evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish any such evidence to the Director of Public Prosecutions,
  - (b) to furnish other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.
- (1A) Evidence of the kind referred to in subsection (1) (b) may be accompanied by any observations that the Commission considers appropriate and (in the case of evidence furnished to the Attorney General) recommendations as to what action the Commission considers should be taken in relation to the evidence.
- (1B) A copy or detailed description of any evidence furnished to the appropriate authority of another jurisdiction, together with a copy of any accompanying observations, is to be furnished to the Attorney General.
- (2) If the Commission obtains any information in the course of its investigations relating to the exercise of the functions of a public authority, the Commission may, if it considers it desirable to do so:
  - (a) furnish the information or a report on the information to the authority or to the Minister for the authority, and
  - (b) make to the authority or the Minister for the authority such recommendations (if any) relating to the exercise of the functions of the authority as the Commission considers appropriate.
- (2A) A copy of any information or report furnished to a public authority under subsection (2), together with a copy of any such recommendation, is to be furnished to the Minister for the authority.
- (3) If the Commission furnishes any evidence or information to a person under this section on the understanding that the information is confidential, the person is subject to the secrecy provisions of section 111 in relation to the information.

## Appendix Six - Section 37 of the ICAC Act

### 37 Privilege as regards answers, documents etc

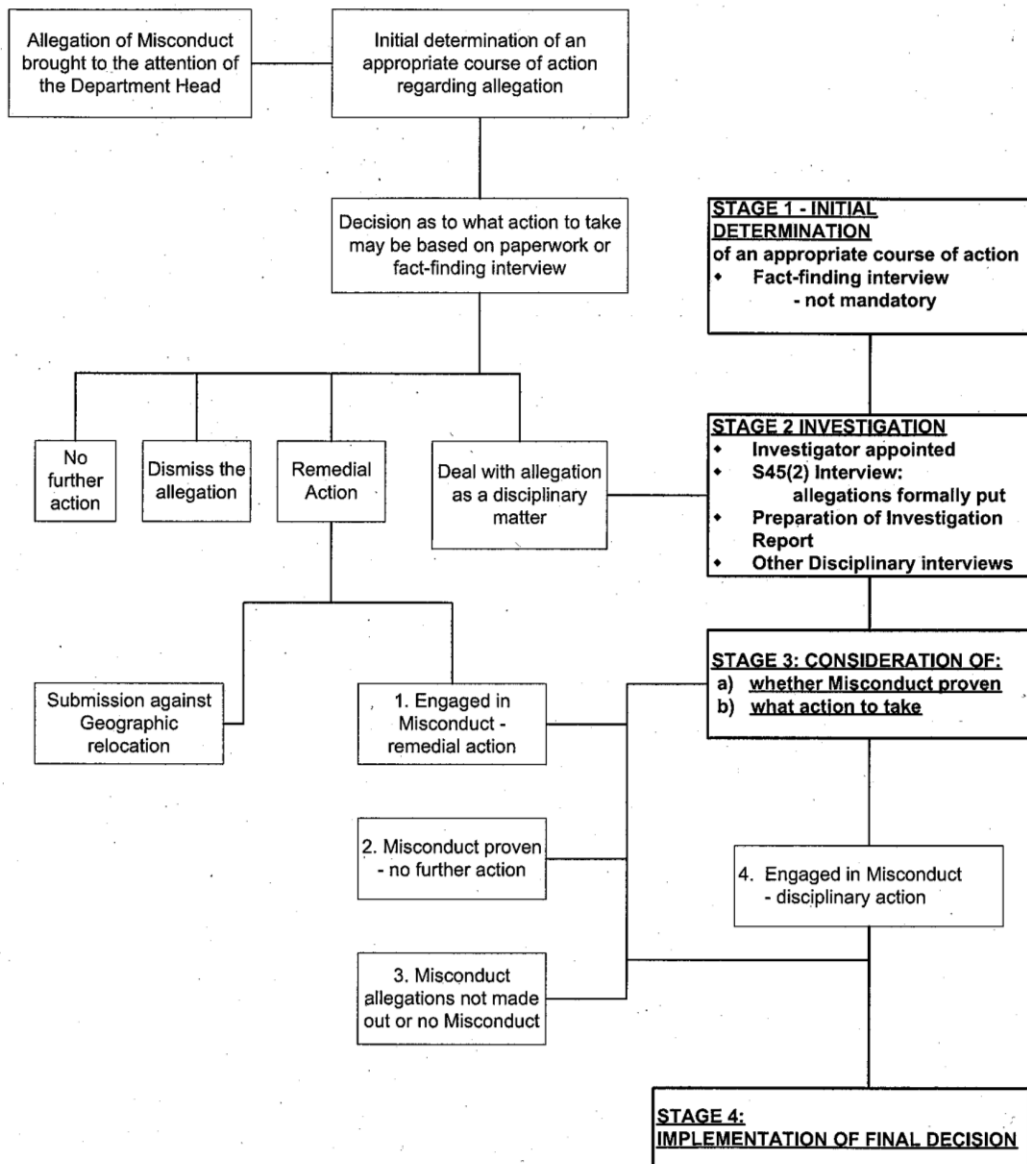
- (1) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse:
  - (a) to be sworn or to make an affirmation, or
  - (b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a compulsory examination or public inquiry, or
  - (c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.
- (2) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.
- (3) An answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.
- (4) Nothing in this section makes inadmissible:
  - (a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or
  - (b) any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or
  - (c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.
- (5) Where:
  - (a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a compulsory examination or public inquiry before the Commission, and
  - (b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission,

the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

- (6) (Repealed)

# Appendix Seven - Schematic of dealing with misconduct<sup>285</sup>

## SCHEMATIC OF PROCESS IN PROCEDURAL GUIDELINES



<sup>285</sup> NSW Government, Department of Premier and Cabinet, *Personnel Handbook*, Appendix 9-1, p 29, <[http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0019/739/Chapter\\_9.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0019/739/Chapter_9.pdf)> accessed 20 May 2010

## Appendix Eight - Submissions

<b>Submission</b>	<b>Individual/organisation</b>
No 1	Office of the Director of Public Prosecutions
No 2	Inspector of the Police Integrity Commission
No 3	Crime and Misconduct Commission
No 4	Police Integrity Commission
No 5	Independent Commission Against Corruption
No 5a	Independent Commission Against Corruption
No 6	Inspector of the Independent Commission Against Corruption
No 7	Corruption and Crime Commission
No 8	The Law Society of New South Wales
No 9	NSW Crime Commission
No 10	Mr Bruce McClintock SC
No 11	Mr Donald McKenzie
No 12	Civil Liberties Australia
No 13	Australian Commission for Law Enforcement Integrity
No 14	NSW Fire Brigades
No 15	NSW Police Association
No 16	NSW Bar Association
No 17	Department of Premier and Cabinet
No 18	Public Interest Advocacy Centre
No 19	Mr Evan Whitton



## Appendix Nine - Witnesses

Date	Witness	Position	Organisation
<b>Monday 4 May 2009</b> Parliament House	The Hon Jerrold Cripps QC	Commissioner	Independent Commission Against Corruption
	Ms Theresa Hamilton	Deputy Commissioner	
	Mr Roy Waldon	Solicitor to the Commission	
	The Hon Harvey Cooper AM	Inspector	Office of the Inspector of the Independent Commission Against Corruption
	Mr John Pritchard	Commissioner	Police Integrity Commission
	Ms Michelle O'Brien	Commission Solicitor	
	Ms Marianne Carey	Solicitor, Managing Lawyer (Group 6)	Office of the Director of Public Prosecutions
Mr Bruce McClintock SC	Barrister		
Mr Stephen Odgers SC	Chair, Criminal Law Committee	NSW Bar Association	
<b>Monday 11 May 2009</b> Parliament House	Mr Jeff Loy	Acting Assistant Commissioner, Professional Standards Command	NSW Police Force
	Ms Karen McCarthy	Superintendent, Professional Standards Command	
	Mr Peter Cotter	Detective Chief Superintendent, Professional Standards Command	
	Mr Christopher Leeds	Director Strategic Support	
	Mr Robert Needham	Chairperson	Crime and Misconduct Commission
	Mr Gregory Chilvers	Director, Research and Resource Centre	Police Association of NSW
	Mr Phillip Tunchon	Assistant Secretary	
	Mr Alan Robertson SC	Barrister	
	Ms Natasha Case	Senior Solicitor	Public Interest Advocacy Centre
	Mr Phillip Bradley	Commissioner	NSW Crime Commission
Mr Peter McGhee	Criminal Law Committee	Law Society of NSW	
<b>Tuesday 11 August 2009</b> Parliament House	The Hon Jerrold Cripps QC	Commissioner	Independent Commission Against Corruption
Ms Theresa Hamilton	Deputy Commissioner		
Mr Roy Waldon	Solicitor to the Commission		

# Appendix Ten - Minutes

## Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 22)

Thursday, 5 March 2009 at 9.30 am  
Room 814-15, Parliament House

### 1. Attendance

#### Members present

Mr Terenzini (Chair), Mr Harris, Mr Khoshaba, Ms Beamer, Mr Amery, Mr Khan, Revd Nile, Mr O'Dea, Mr Donnelly, Mr Smith, and Mr Stokes.

**In attendance** Jasen Burgess, Les Gonye, Dora Oravecz, Amy Bauder, and Emma Wood.

### 2. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Donnelly, that the minutes of the meetings of 13 November, 24 November and 1 December 2008 be confirmed.

### 3. \*\*\*

### 4. Inquiry into proposed amendments to the ICAC Act

#### i. Correspondence from the Premier

The Chair drew the Committee's attention to a letter, previously circulated, from the Premier dated 27 November 2008 requesting that the Committee inquire into the ICAC's proposals to amend s 37 of the ICAC Act and for such an inquiry to also address whether if any amendments were made to s 37, the ICAC Act should be further amended to make assembling evidence for criminal proceedings a primary function.

The Chair indicated that the Premier's letter was in response to the Committee's previous review report on the 2006-2007 annual reports of the ICAC wherein the Committee had indicated that the ICAC's proposed amendments to s 37 required more detailed examination.

Discussion ensued.

#### ii. Adoption of terms of reference

The Chair spoke to the draft terms of reference for the inquiry.

Resolved, on the motion Revd Nile, seconded Mr Amery:

'That the Committee, pursuant to its functions under s 64(1)(b) of the Independent Commission Against Corruption Act 1988, inquire into and report to Parliament on:

1. whether the Independent Commission Against Corruption Act 1988 should be amended to remove the restriction in s 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption;
2. whether the Independent Commission Against Corruption Act 1988 should be amended to remove the restriction in s 37, which prohibits the use, in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery

of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption;

3. if either of the amendments referred to in paragraphs 1 or 2 above is made, whether the Independent Commission Against Corruption Act 1988 should further be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function; and
4. any related matters.'

**iii. Draft advertisement**

Resolved, on the motion of Revd Nile, seconded Mr Khoshaba, that the Committee advertise and call for submissions as per the advertisement previously circulated.

**iv. Publication of Premier's letter regarding proposed amendments**

Resolved, on the motion of Mr Amery, seconded Ms Beamer that the letter from the Premier, dated 27 November, requesting that the ICAC Committee inquire into amendments proposed by the ICAC to s 37 of the ICAC Act and related matters, be published.

**v. Conduct of the inquiry**

The Committee noted the proposed organisations/stakeholders to invite to make a submission and the draft inquiry timeline.

**4. \*\*\***

Deliberations concluded, the meeting adjourned at 10.17am until 9.30am Thursday, 12 March 2009 in Room 814-815.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 23)  
Thursday, 12 March 2009 at 9.37 am  
Room 814-15, Parliament House**

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Mr Harris, Mr Khoshaba, Mr Amery, Mr Khan, Mr O'Dea, Mr Donnelly, Mr Smith, and Mr Stokes.

**Apologies**

Revd Nile  
Ms Beamer

**In attendance** Jasen Burgess, Les Gonye, Dora Oravec, Amy Bauder, and Emma Wood.

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Harris, that the minutes of the meeting of 5 March 2009 be confirmed.

Appendix Ten - Minutes

- 3. \*\*\*
- 4. \*\*\*
- 5. \*\*\*

**6. General business**

**i. Future meetings**

The Committee agreed to meet next on Tuesday 21 April 2009 to decide on witnesses for the Inquiry into amendments to the ICAC Act and to hold hearings on Monday 4 May and Monday 11 May 2009 for the same inquiry.

- ii. \*\*\*
- iii. \*\*\*

Deliberations concluded, the meeting adjourned at 10.09 am until 12:00 pm Tuesday, 21 April 2009, Room 814-15.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 24)  
Monday, 4 May 2009 at 10.00 am  
Waratah Room, Parliament House**

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Ms Beamer, Mr Khoshaba, Mr O'Dea, Mr Donnelly, Revd Nile, Mr Smith

**Apologies**

Mr Amery Mr Harris Mr Khan Mr Stokes

**In attendance** Helen Minnican, Amy Bauder, Jasen Burgess, Dora Oravec, and Emma Wood.

**2. Public hearing - Inquiry into proposed amendments to the Independent Commission Against Corruption Act 1988**

The Chair opened the public hearing and gave a brief address on the purpose of the public hearing.

The Hon. Jerrold Cripps QC, Commissioner of the Independent Commission Against Corruption, sworn and examined.

Ms Theresa Hamilton, Deputy Commissioner of the Independent Commission Against Corruption, sworn and examined.

Mr Roy Waldon, Solicitor to the Commission, sworn and examined.

The Commissioner made a short opening statement.

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

At 11.03am the Committee took a short adjournment. The Committee commenced deliberations in private at 11.13am.

### 3. Deliberative meeting

The Committee considered the following resolutions being items deferred from a deliberative meeting scheduled for 30 April 2009, which did not proceed due to the failure to achieve a quorum. The resolutions, previously circulated, were foreshadowed in discussions between Mr Terenzini, Ms Beamer, Revd Nile, Mr Smith and Mr Stokes on 30 April and there was general agreement on the proposed resolutions at that time.

#### 3.1 Minutes

Resolved, on the motion of Ms Beamer, seconded Mr Khoshaba, that the minutes of the meeting of 12 March 2009 be confirmed.

3.2 \*\*\*

3.3 \*\*\*

3.4 \*\*\*

3.5 \*\*\*

#### 3.6 Inquiry into proposed amendments to the ICAC Act

##### Submissions

The Committee noted receipt of the submissions to the inquiry (previously circulated) and also noted receipt of the response by the Commissioner of the ICAC, dated 22 April 2009, to submission no. 11 (previously circulated).

- Submission no. 11

Resolved on the motion of Revd Nile, seconded Ms Beamer, that the Committee agree to the request made by the author of submission no. 11, Mr Don McKenzie, to withdraw his original submission and substitute instead his new submission dated 27 April 2009, previously circulated.

- Publication on the Civil Liberties Australia (CLA) website of its submission to the inquiry

Resolved on the motion of Mr Khoshaba, seconded Revd Nile, that the Chair write to CLA clarifying parliamentary law, practice and procedure in relation to the receipt and publication of submissions to parliamentary committee inquiries, in respect of the following matters:

- i. Parliamentary privilege attracts to the proceedings of Parliament and is not able to be conferred by the Committee or rejected or declined by the submission author;
- ii. Submissions to parliamentary committees become part of the proceedings of parliament;
- iii. While the application and extent of absolute privilege in relation to parliamentary proceedings is defined in various statutes, including the Defamation Act 2005 (NSW), parliamentary privilege is complex and is grounded in both common and statute law;
- iv. The unauthorised publication of a submission to a parliamentary committee has the potential to result in a contempt of the Parliament;
- v. As per usual practice, the Committee will resolve to publish the submission made by the CLA to the inquiry on the Committee's website.

- Publication of submissions

The Committee noted correspondence from the Commissioner of the ICAC, received on 14 April 2009 requesting access to other submissions to the inquiry.

Resolved on the motion of Revd Nile, seconded Mr Donnelly, that:

Appendix Ten - Minutes

- i. in accordance with usual practice on LA Committees, witnesses be given an opportunity to address their submissions in evidence and that the relevant submissions be made public at the end of the public hearing. Remaining submissions, which are not confidential, will be published at the end of the public hearings by way of a formal resolution of the Committee at the end of proceedings; and
- ii. the Committee write to the Commissioner advising of the previous resolution not to publish submissions until after the public hearings and indicating that the Committee would welcome further submissions and/or final submissions from the ICAC after it has had an opportunity to consider the submissions and evidence.

Consideration and confirmation of witnesses for the hearings of 4 May and 11 May 2009  
Resolved on the motion of Mr O'Dea, seconded Mr Khoshaba, that the Committee seek evidence in relation to its inquiry from the following organisations and individuals:

- i. Commissioner of the ICAC (scheduled to give evidence 4 May)
- ii. ICAC Inspector (scheduled to give evidence 4 May)
- iii. Commissioner of the PIC (scheduled to give evidence 4 May)
- iv. Office of the DPP, Managing Lawyer, Ms Marianne Carey (scheduled to give evidence 4 May)
- v. Bruce McClintock SC (scheduled to give evidence 4 May)
- vi. NSW Bar Association (scheduled to give evidence 4 May)
- vii. Robert Needham, Chairperson, Crime and Misconduct Commission Qld (tentatively scheduled to give evidence 11 May)
- viii. Greg Chilvers, Director Research and Resource Centre, NSW Police Association (tentatively scheduled to give evidence 11 May)
- ix. NSW Crime Commission
- x. NSW Law Society
- xi. ACLEI – Australian Commission for Law Enforcement Integrity
- xii. NSW Police
- xiii. Premier's Department
- xiv. Civil Liberties Australia
- xv. Public Interest Advocacy Centre
- xvi. Other witnesses as agreed to by the Committee e.g. NSW Fire Brigades.

- Witness travel expenses

Approval for payment of travel expenses for Mr Robert Needham, Chairperson of Queensland Crime and Misconduct Commission, to appear at 11 May hearing and any other interstate witnesses as agreed to by the Committee.

Resolved on the motion of Revd Nile, seconded Ms Beamer, that:

- i. the Chair write to the Speaker seeking approval for funds to cover the cost of air travel for the Chairperson of the CMC, Robert Needham, in order that he can attend the public hearing on 11 May to give evidence in relation to the Committee's current inquiry; and,
- ii. where necessary, approval also be sought for the cost of air travel to facilitate the attendance of interstate witnesses, including representatives of ACLEI and CLA.

- Publication of Issues Paper on Committee web site

Resolved on the motion of Mr Smith, seconded Mr O'Dea, that the Issues Paper previously distributed to the Committee, as amended, be made public and lodged on the Committee's website.

**3.7 \*\*\***

**3.8 Publication of transcript and submissions**

Resolved on the motion of Mr Donnelly, seconded Mr Khoshaba, that the submissions made by witnesses appearing on 4 May 2009, which are not confidential, be published as they are given in evidence and posted on the Committee's website, along with the corrected transcript of evidence of the day's public hearing.

Resolved on the motion of Ms Beamer, seconded Mr Khoshaba, that the witnesses appearing before the Committee on 11 May 2009 be provided with a copy of the uncorrected transcript of evidence of the public hearing on 4 May, on a confidential basis, to assist them to prepare to give evidence.

**3.9 \*\*\***

Deliberations having concluded, the deliberative meeting adjourned at 11.24am and the Committee resumed the public hearing.

**4. Resumption of public hearing**

The Hon Harvey Cooper AM, Inspector of the Independent Commission Against Corruption, sworn and examined.

The Inspector made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr John Pritchard, Commissioner of the Police Integrity Commission, affirmed and examined.

Ms Michelle O'Brien, Commission Solicitor, affirmed and examined.

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

Ms Marianne Carey, Managing Lawyer, Office of the Director of Public Prosecutions, sworn and examined.

Ms Carey made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Bruce McClintock SC, affirmed and examined.

Mr McClintock made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short adjournment.

The public hearing resumed.

Mr Stephen Odgers SC, Chair of the Criminal Law Committee, NSW Bar Association, affirmed and examined.

Mr Odgers made a short opening statement.

Appendix Ten - Minutes

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The public hearing concluded at 4.00pm and the Committee adjourned until Thursday, 7 May 2009 at 9.30 am in Room 1102.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 25)**  
**Thursday, 7 May 2009 at 9.35 am**  
**Room 1102, Parliament House**

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Mr Amery, Ms Beamer, Mr Khan, Mr Khoshaba, Mr O'Dea, Mr Donnelly, Revd Nile, Mr Smith, Mr Stokes

**In attendance** Helen Minnican, Amy Bauder, Jasen Burgess, Dora Oravec, and Emma Wood.

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Revd. Nile, that the minutes of the public hearing and deliberative meeting of 4 May 2009 be confirmed.

**3. Inquiry into proposed amendments to the ICAC Act**

The Chair advised members of the arrangements made for the forthcoming public hearing on 11 May 2009 and a draft timetable for the proceedings was distributed.

The Chair confirmed that the following agencies were not scheduled to give evidence:

- Australian Commission for Law Enforcement Integrity (ACLEI);
- NSW Fire Brigades;
- Civil Liberties Australia.

Consideration of any further witnesses was deferred until the meeting scheduled for 14 May 2009.

**4. \*\*\***

**5. \*\*\***

There being no items of general business, deliberations concluded and the meeting closed at 10.56 am, until the public hearing at 10.00am on Monday 11 May 2009.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 26)**  
**Monday, 11 May 2009 at 10.03 am**  
**Waratah Room, Parliament House**

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Khan, Mr Khoshaba, Mr O'Dea, Mr Donnelly, Revd Nile, Mr Smith.



**Apologies**

Mr Amery

Mr Stokes

**In attendance** Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Amy Bauder.

**2. Public hearing - Inquiry into proposed amendments to the Independent Commission Against Corruption Act 1988**

The Chair opened the public hearing and gave a brief address on the purpose of the public hearing.

Acting Assistant Commissioner Jeff Loy, Professional Standards Command, NSW Police Force, sworn and examined.

Superintendent Karen McCarthy, Professional Standards Command, NSW Police Force sworn and examined.

Acting Detective Chief Superintendent Peter Cotter, Professional Standards Command, NSW Police Force sworn and examined.

Mr Christopher Leeds, Director, Strategic Support, NSW Police Force sworn and examined.

The Acting Assistant Commissioner made a short opening statement.

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

At 11.01am the Committee took a short adjournment.

The Chair re-opened proceedings to the public to the public at 11:11am.

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile that the submissions of witnesses appearing before the Committee at the public hearing on 11 May 2009 and the corrected transcript of the hearing be published.

The public hearing resumed at 11:13am.

Mr Robert Needham, Chairperson, Crime and Misconduct Commission, Queensland sworn and examined.

Mr Needham made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Greg Chilvers Director, Research and Resource Centre, NSW Police Association, sworn and examined.

Mr Phil Tunchon Manager, Legal Services, NSW Police Association, sworn and examined.

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee adjourned at 12:49pm.

Appendix Ten - Minutes

The public hearing resumed at 1:33pm.

Mr Alan Robertson SC, affirmed and examined.

Mr Robertson made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

Ms Natasha Case, Senior Solicitor, Public Interest Advocacy Centre, affirmed and examined.

Ms Case made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

Mr Phillip Bradley, Commissioner, NSW Crime Commission, affirmed and examined.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short adjournment at 3:34pm.

The hearing resumed at 4:01pm.

Mr Peter McGhee, Member, Criminal Law Committee, Law Society of NSW, sworn and examined.

Mr McGhee made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The public hearing concluded at 4.58pm and the Committee adjourned until Thursday, 14 May 2009 at 9.30 am.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 27)**

**Thursday, 14 May 2009 at 9.39 am**

**Room 814-15, Parliament House**

**1. Attendance:**

**Members present**

Mr Harris (Deputy Chair), Mr Amery, Ms Beamer, Mr Khoshaba, Mr Donnelly, Revd Nile, and Mr Stokes.

**Apologies**

Mr Terenzini (Chair)

Mr Khan

Mr O'Dea

Mr Smith

**In attendance** Helen Minnican, Jasen Burgess, Dora Oravec and Amy Bauder

In the absence of the Chair, the Deputy Chair presided over the meeting.

## 2. Minutes

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile, that the minutes of the deliberative meeting of 7 May and the public hearing of 11 May 2009 be confirmed.

3. \*\*\*

4. \*\*\*

## 5. Inquiry into proposed amendments to the ICAC Act

i. Late submission – received from Mr Evan Whitton

The Committee noted a late submission, previously circulated, received from Mr Evan Whitton on 12 May 2009.

ii. Publication of remaining submissions

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile, that the following submissions to the inquiry be made public and posted on the Committee's website:

Submission no. 2 - Inspector of the PIC

Submission no. 7 - Corruption and Crime Commission (Western Australia)

Submission no. 11 - Mr Don McKenzie

Submission no. 12 - Civil Liberties Australia

Submission no. 13 - Australian Commission for Law Enforcement Integrity

Submission no. 14 - NSW Fire Brigades

Submission no.17 - Department of Premier and Cabinet (NSW Government submission)

Submission no. 19 - Mr Evan Whitton.

Resolved, on the motion of Ms Beamer, seconded Mr Stokes that clarification be sought from the Commissioner of the ICAC as to whether he wishes to make any further comment or any changes to the comments made to the Committee by way of letter, dated 22 April 2009, in response to the revised submission from Mr McKenzie.

Resolved, on the motion of Revd Nile, seconded Ms Beamer that, as foreshadowed during the Commissioner's evidence, the Committee formally invite the Commissioner to make a final submission to the inquiry, having had the benefit of the evidence taken and the submissions received.

Discussion ensued in relation to arrangements for seeking a response from the Commissioner to Mr McKenzie's submission and for taking further evidence from the ICAC in response to the submissions to the inquiry.

6. \*\*\*

There being no items of general business, deliberations concluded and the meeting closed at 9:55am sine die.

## Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 28)

Tuesday, 11 August 2009 at 10.30am

Jubilee Room, Parliament House

### 1. Attendance

#### Members present

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes.

**In attendance** Helen Minnican, Jasen Burgess, Emma Wood and Amy Bauder

**2. \*\*\***

**PUBLIC HEARING**

- Inquiry into the protection of public sector whistleblower employees
- Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption
- Inquiry into proposed amendments to the Independent Commission Against Corruption Act 1988

The public hearing resumed at 1.35pm.

The Chair welcomed the witnesses.

The Hon Jerrold Sydney Cripps QC, Commissioner of the ICAC, Ms Theresa June Hamilton, Deputy Commissioner of the ICAC, Mr Michael Douglas Symons, Executive Director of the Investigation Division, and Mr Roy Alfred Waldon, Executive Director of Legal Division, Mr Robert William Waldersee, Executive Director of Corruption Prevention, Education and Research, and Mr Andrew Kyriacou Koureas, Executive Director of Corporate Services, all sworn and examined. The Commission's answers to question on notice in relation to the ICAC Annual Report for 2007-2008 and the submission in response to the Committee's Discussion Paper were included as part of the witnesses' evidence.

The Commissioner provided the Committee with a document entitled, "ICAC request for additional recurrent funding", and invited the Committee to consider and lend support to the funding proposal.

The Commissioner made an opening statement.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance. The Deputy Commissioner provided the Committee with a copy of the current Memorandum of Understanding with the Office of the Director of Public Prosecutions. The witnesses withdrew.

The Chair made a short statement in closing the hearing.

The public hearing concluded at 3:17pm, at which point the Committee took a short adjournment.

**3. DELIBERATIVE MEETING**

The deliberative meeting commenced at 3.40pm.

**i. Minutes**

Resolved, on the motion of Ms Beamer, seconded Revd Nile, that the minutes of the deliberative meeting of 14 May 2009 be confirmed.

**ii. Membership change**

The Chair announced that Mr Gerard Martin had been appointed to serve on the Committee on the Independent Commission Against Corruption in place of Mr Richard Amery, discharged (Votes and Proceedings of the New South Wales Legislative Assembly, 24 June 2009

**iii. \*\*\***

**iv. Inquiry into proposed amendments to the ICAC Act**

Publication of submissions and information

Resolved on the motion of Mr Donnelly, seconded Ms Beamer, that the following items, previously circulated, be authorised for publication and posted on the Committee's website:

- a. the NSW Police Association's cover letter, dated 21 May 2009, and the answers to questions taken on notice at the 11 May public hearing, including a notation indicating that the Association attached certain reports of the PIC Inspector;
- b. the NSW Police Association's published answers be accompanied by a link to the official tabled copies of the PIC Inspector's complaints reports;
- c. answers to questions taken on notice by Peter McGhee (Law Society of NSW) at the 11 May public hearing, dated 3 June 2009; and
- d. supplementary submission 5a from the ICAC (including answers to questions taken on notice at the 4 May 2009 public hearing).

The Committee noted correspondence from Civil Liberties Australia, dated 10 July 2009, regarding their submission and parliamentary privilege.

- v. \*\*\*  
vi. \*\*\*  
vii. \*\*\*

There being no items of general business, deliberations concluded and the meeting closed at 4.37pm sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 34)**  
**Thursday, 22 April at 9.38 am**  
**Room 1136, Parliament House**

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Pearce, Mr Smith, Mr Stokes.

**Apologies** Mr Khan

**In attendance** Helen Minnican, Carly Sheen, Dora Oravec, Emma Wood and Amy Bauder.

**2. Minutes**

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile, that the minutes of the deliberative meeting of 13 November 2009 be confirmed.

3. \*\*\*  
4. \*\*\*

**5. Inquiry into proposed amendments to the ICAC Act**

The Chair briefed the Committee on forward planning for the inquiry, including possible recommendations. Discussion ensued.

Resolved on the motion of Mr Donnelly, seconded Ms Beamer, that the Committee consider recommending that admissions obtained by the ICAC be admissible in subsequent disciplinary proceedings, arising from the matters under investigation by the ICAC, subject to the availability of certain safeguards: namely, a provision in similar terms to s.128 of the Evidence Act 1995; and consideration of the extent to which other corroborating evidence is available.

Mr Pearce requested that his dissent from the resolution be noted in the minutes.

6. \*\*\*

There being no further items of general business, the deliberations concluded at 10.12 am and the Committee adjourned sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 37)**

**Thursday, 2 September at 10.00 am**

**Room 814/815, Parliament House**

**1. Attendance**

*Members present*

Mr Amery, (Chair) Mr Pearce (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Dominello, Mr Khan, Mr Khoshaba, Revd Nile, Mr O'Dea, Mr Stokes, Mr West.

*In attendance* Helen Minnican, Dora Oravecz, Emma Wood.

**Deliberations**

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Khan, that the minutes of the public hearing and deliberative meeting of 27 August 2010 be confirmed.

3. \*\*\*

**4. Correspondence received**

\*\*\*

*Inquiry related correspondence:*

- e. Letter to Commissioner Ipp, dated 1 July 2010, regarding his position on the amendments inquiry (as per memo circulated to members 25 June 2010) and response, dated 8 July 2010 – correspondence incorporated into the Chair's draft report. Consideration of authorisation for publication on the Committee's website deferred.
- f. Letter to Minister for Public Sector Reform, dated 1 July 2010, regarding the amendments inquiry (as per memo circulated to members 25 June 2010) – no response received to date.

**5. Inquiry into proposed amendments to the ICAC Act**

**a. Consideration of Chair's draft report**

The Chair spoke to the draft report, previously circulated. Discussion ensued.

A schedule of minor amendments prepared by the Committee Secretariat (see attachment 1) was distributed at the meeting. Consideration deferred.

Moved Mr Khan, seconded Mr Dominello that chapter 3 of the report be agreed to. Discussion ensued.

Resolved on the motion of Mr Amery, seconded Revd Nile that Recommendations 1 and 2 be agreed to.

Mr Khan foreshadowed amendments to Recommendation 2, Recommendation 3, and Chapter 4. Discussion ensued. Consideration deferred until the next deliberative meeting.

Resolved on the motion of Revd Nile, seconded Mr Pearce, that Recommendation 5 be agreed to.

The Committee agreed to defer consideration of the remainder of the report, and the proposed amendments circulated and foreshadowed at the meeting, until the next deliberative meeting.

6. \*\*\*

## 7. General business

There being no items of general business, the deliberations concluded at 10.39am and the Committee adjourned until Thursday, 9 September 2010 at 10.00am, subject to the availability of members.

### Attachment 1 Schedule of proposed amendments

#### List of Recommendations

Recommendation 1(b) – insert the word 'directly' before the word 'relate'; and make consequential amendments to the body of the report. Amendment for clarity to indicate the disciplinary proceedings should not be indirectly or only loosely connected to the conduct that ICAC investigated.

Recommendation 1(c) – replace the word 'disclosures' with the word 'evidence'; and make consequential amendments to the body of the report. Amendment more accurately reflects Committee's intention with the amendment. The term 'disclosures' arose in a submission to the inquiry.

Recommendation 5 – Insert a second paragraph in the recommendation as follows:

'The Committee further recommends that the proposed amendment to the *Independent Commission Against Corruption Act 1988* would not permit the use by the Commission of its coercive powers after an investigation is completed.'

Consequential amendments also would need to be made to Recommendation 5 as it appears in the body of the report, see p.74.

## Chapter Two

Table 2, following para 2.30 (p.10): delete and insert instead:

Disciplinary action taken	2008-2009	2007-2008	2006-2007
Counselling	40	35	6
Dismissal	39	25	6
Other	64	66	11
Resignation	25	20	10

Stylistic change to reorder columns, from most recent financial year to least recent.

## Chapter 5

Para 5.44 (p.73) – Update the advice in the paragraph concerning the Commission's request for additional funding by including a sentence at the end of the paragraph, indicating that the ICAC had received supplementation of \$850,000 (footnote: page 7 transcript of evidence, 27 August 2010)

Para 5.47, line 5 (p.73) – omit the words 'clarify this matter' and insert instead the words 'put this matter beyond doubt' in the fifth line of the paragraph. Stylistic change.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 38)**

**Wednesday, 8 September at 10.08 am**

**Speaker's Dining Room, Parliament House**

**1. Attendance**

*Members present*

Mr Amery, (Chair) Mr Pearce (Deputy Chair), Mr Donnelly, Mr Dominello, Mr Khan, Mr Khoshaba, Mr O'Dea, Mr Stokes, Mr West.

*Apologies:* Ms Beamer, Revd Nile

*In attendance* Helen Minnican, Dora Oravec, Emma Wood, Vanessa Pop, Amy Bauder.

**Deliberations**

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Khoshaba, that the minutes of the deliberative meeting of 2 September 2010, previously circulated, be confirmed.

**3. Inquiry into proposed amendments to the ICAC Act**

*Consideration of Chair's draft report deferred from 2 September*

The Chair opened discussion on the draft report and the proposed amendments deferred for consideration from 2 September 2010.

Proposed amendments to Recommendations 1(b) and (c), and 5, Chapter 2 and Chapter 5, previously distributed at the meeting on 2 September, agreed to.

The Chair opened discussion on an amendment foreshadowed by Mr West in relation to Recommendation 1 and distributed a proposed form of words for the amendment. Discussion ensued.

Resolved on the motion of Mr West, seconded Mr Stokes, that the report be amended by:

Inserting after Recommendation 1, the following recommendation -

**Recommendation 1A**

The Committee recommends that in bringing forward legislation to give effect to Recommendation 1, the Premier consult with the Commissioner of the ICAC on the extent of the discretions that the Commissioner should be able to exercise where the restriction in section 37 is removed in respect of disciplinary proceedings, in accordance with recommendation 1(b).

Making a consequential amendment to the body of the report by inserting the following paragraphs after paragraph 3.76 –

Paragraph 3.77 - At the conclusion of the inquiry the Committee considered the proposal that the ICAC Act should be amended to make express provision for the Commissioner to make a direction that evidence given under objection to the Commission, which would be admissible in disciplinary proceedings relating to the conduct investigated, not be used in such proceedings. This was not an issue on which the Committee had taken evidence during the



inquiry or that the Committee had examined in any detail. Nevertheless, the Committee is of the view that there is some merit in considering the discretions available to the Commissioner of the ICAC should the amendments proposed in Recommendation 1 proceed. Consequently, the Committee proposes that in bringing forward legislation to give effect to Recommendation 1, the Premier consult with the Commissioner of the ICAC on the extent of the discretions that the Commissioner should be able to exercise where the restriction in section 37 is removed in respect of disciplinary proceedings, and in what circumstances such decisions may be made. The exercise of such discretion is a matter that requires further clarification and advice from the Commissioner.

Paragraph 3.78 - In making this recommendation, the Committee presumes that one option available to the Commissioner when reporting on an investigation would be to recommend that disciplinary action not be taken against a public official. The Committee notes that the operation of the proposed amendment to the ICAC Act in respect of disciplinary proceedings has been recommended for review in two years time. The exercise of discretions by the Commissioner in respect of the new provisions is one area that may be examined in detail at that stage, if considered necessary.

The Chair opened discussion on the amendment proposed by Mr Khan to insert an additional recommendation 2A, previously distributed. Mr Khan spoke to the amendment. Discussion ensued.

Moved Mr Khan, seconded Mr Dominello, that an additional recommendation be inserted after Recommendation 2 as follows:

Recommendation 2A

The Committee recommends that consideration be given to a review of the penalties applying to the giving of false or misleading evidence before the Independent Commission for Corruption, including:

- i. That all offences be treated as strictly indictable; and
- ii. That a standard non-parole period for the offence under the Act be proscribed.

Question put that the amendment be agreed to. The Committee divided.

Ayes: Mr Khan, Mr Dominello

Noes: Mr Amery, Mr Pearce, Mr Donnelly, Mr Khoshaba, Mr O'Dea, Mr Stokes, Mr West.

Question negatived.

The Chair opened discussion on the amendment proposed by Mr Khan to omit Recommendation 3 and insert instead a new recommendation and to omit paragraphs 4.60 to 4.77, with a view to inserting a new commentary section. Mr Khan spoke to the amendment. Discussion ensued.

Moved Mr Khan, seconded Mr O'Dea, that Recommendation 3 be omitted and the following recommendation inserted instead,

Recommendation 3

The Committee recommends amending the *Independent Commission Against Corruption Act 1988* to remove the restrictions in section 37, of compulsorily obtained evidence provided under object to the Independent Commission Against Corruption, so far as they apply to the specific civil proceedings of:

- i. Defences to common law defamation or defamation under the Defamation Act 2005;
- ii. The recovery of funds or assets that were corruptly obtained; and
- iii. Termination of Contracts that were entered into corruptly by any party to that contract.

And that paragraphs 4.60 to 4.77 be omitted.

Appendix Ten - Minutes

Discussion ensued.

Mr O'Dea moved that Mr Khan's amendment be amended by adding the words:

'subject to the Commissioner having no objection to each of the type of proceedings listed *in seriatim* in the recommendation and, if the Commissioner agrees with the recommendation, that his view be sought as to what safeguards would best protect against this evidence being used in other proceedings.'

Question put that the amendment to the amendment be agreed to. The Committee divided.

Ayes: Mr O'Dea

Noes: Mr Amery, Mr Pearce, Mr Dominello, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Stokes, Mr West.

Question negated

Question put that the amendment proposed by Mr Khan be agreed to. The Committee divided.

Ayes: Mr Khan

Noes: Mr Amery, Mr Pearce, Mr Dominello, Mr Donnelly, Mr Khoshaba, Mr O'Dea, Mr Stokes, Mr West.

Question negated.

Resolved on the motion of Mr Amery that recommendations 3 and 4, Chapter 1, Chapter 2, as amended, Chapter 3, as amended, Chapter 4 and Chapter 5, as amended be agreed to.

Resolved on the motion of Mr Amery that:

- consequential amendments be made to the body of the report arising from changes to the recommendations;
- the draft report as amended be the report of the Committee and that it be signed by the Chair and presented to the House; and
- the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors.

*Inquiry related correspondence*

- a. Letter to Commissioner Ipp, dated 1 July 2010, regarding his position on the amendments inquiry (as per memo circulated to members 25 June 2010) and response, dated 8 July 2010

Resolved on the motion of Mr Amery, that the letter from Commissioner Ipp, dated 1 July 2010, regarding the amendments inquiry, be authorised for publication and uploaded on the Committee's website.

- b. The Committee noted the letter to Minister for Public Sector Reform, dated 1 July 2010, regarding the amendments inquiry (as per memo circulated to members 25 June 2010)

4. \*\*\*

5. \*\*\*

6. \*\*\*

**7. General Business**

There being no items of general business, the deliberations concluded at 11.01am and the Committee adjourned sine die.