

INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT BILL 2015**Bill introduced on motion by Mr Mike Baird, read a first time and printed.****Second Reading****Mr MIKE BAIRD** (Manly—Premier, and Minister for Western Sydney) [3.36 p.m.]: I move:

That this bill be now read a second time.

The Government is resolute in its commitment to restore integrity in public administration. We have zero tolerance for corruption in this State. Ensuring that the Independent Commission Against Corruption [ICAC] is fully equipped to fight corruption is a key priority for this Government. Earlier this year, in relation to an investigation of Ms Margaret Cunneen, SC, the High Court found that the definition of "corrupt conduct"—and therefore the ICAC's jurisdiction—is narrower than the ICAC had previously assumed. The court held that the ICAC can investigate the conduct of public officials when they are exercising public official functions. The ICAC can also investigate the conduct of any other person but only if the conduct could adversely affect the probity of the exercise of a public official's functions.

This Government acted promptly in responding to the High Court's judgement, and I acknowledge the Opposition's support at that time. In May Parliament passed the Independent Commission Against Corruption (Validation) Act 2015 to validate actions and findings of the ICAC before the date of the Cunneen judgement where they were based on the ICAC's previous understanding of its jurisdiction. The Government also commissioned an independent panel of distinguished legal minds to review the jurisdiction of the ICAC in light of the High Court's decision and to provide considered and expert guidance as to the best way forward.

The panel was appointed by the Governor on 27 May 2015. It comprised former High Court Chief Justice, the Hon. Murray Gleeson, AC, and eminent barrister Mr Bruce McClintock, SC, and I pay tribute to both of them for their considered work and considerable effort in putting this together. The panel made four formal recommendations for legislative reform. The Government accepts all of those recommendations, to be implemented in the bill. The panel did not support the broader definition of "corrupt conduct" proposed by the ICAC, nor did it consider that the ICAC's jurisdiction should be confined to the High Court's narrower definition. Rather, the panel proposed a "fresh approach". It recommended that the existing definition of "corrupt conduct" in the Independent Commission Against Corruption Act remain but that it be supplemented by a new limb to include certain conduct by any person that could impair public confidence in public administration.

This new limb will ensure that the ICAC can continue to investigate conduct such as collusive tendering for government contracts, fraudulently obtaining government mining leases and fraudulently obtaining or retaining employment or appointment as a public official. The Government strongly supports this recommendation. The bill implements it by inserting a new subsection (2A) in section 8 of the Act, which defines the "General nature of corrupt conduct".

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The new subsection will enable the ICAC to investigate those specified matters even if they involve no wrongdoing or potential wrongdoing on the part of any public official but could nevertheless seriously undermine confidence in public administration. As the panel noted in its report, the nature of the matters listed "should be sufficient to indicate that the confidence referred to is not confined to faith in the probity of individual public officials". The bill also makes minor amendments consequential on the proposed new section 8 (2A) and provides that the proposed subsection extend to conduct occurring before the commencement of these amendments.

In addition, an amendment is made to section 8 to clarify that people who seek public office—such as candidates for an election—may be engaged in corrupt conduct even if they do not succeed in being elected or appointed to public office. A candidate who accepts an unlawful payment in return for promising to do something once elected will clearly have engaged in "corrupt conduct", and this should be so whether or not they happen to subsequently be elected as a public official. The proposed amendment will make this clear. Reflecting the panel's second recommendation, the bill will

also amend the Independent Commission Against Corruption Act to clarify the broad scope of the ICAC's advisory, educational and prevention functions. The panel recommended that these functions be amended so that they may be used generally for "promoting the integrity and good repute of public administration".

Although there has been a great deal of attention placed on the ICAC's investigations and especially its public hearings, in many respects its functions of supporting government agencies to avoid corruption risks should be seen as equally, if not more important. Prevention of corruption before it occurs, including through appropriate advice, education and training, is clearly a better way of promoting public confidence in the integrity of our public institutions. The panel's third recommendation was that, if Parliament sees fit to do so, the ICAC be given a new jurisdiction to investigate breaches of electoral and lobbying laws. As the panel explained:

Many but not all breaches of [the electoral and lobbying laws] strike at the heart of the democratic process and for that reason have a connection with public administration that may be regarded as warranting special treatment.

This bill will implement that recommendation by inserting a new section 13A to give the ICAC the function of investigating conduct referred to it by the New South Wales Electoral Commission that may involve possible criminal offences under the Parliamentary Electorates and Elections Act 1912, the Election, Funding, Expenditure and Disclosures Act 1981 and/or the Lobbying of Government Officials Act 2011. These particular Acts were specified by the panel in its report. The Electoral Commission will only be able to refer such conduct to the ICAC for investigation if there are reasonable grounds to suspect that the conduct may involve a possible criminal offence from a specified list of offences against these Acts or if the conduct is related to possible corrupt conduct that the ICAC is already investigating.

If either of those criteria is met, the Electoral Commission will have the discretion to refer the matter to the ICAC for investigation. In deciding whether to exercise that discretion, the Electoral Commission will be required to have regard to certain factors including, importantly, the fact that we expect that primary responsibility for investigating, enforcing and prosecuting breaches of the electoral and lobbying laws rests and will continue to rest with the Electoral Commission. I stress that it is not the Government's intention in any way to supersede or downgrade the Electoral Commission's own jurisdiction in respect of these laws. Last year, we legislated to reform the structure of the Electoral Commission, a change that included the appointment of the Hon. Keith Mason, AO, QC, as its independent chair.

The Government also provided \$1.37 million in additional funding for the reconstitution of the Electoral Commission, including funding to support the commission's enhanced enforcement function. The Government will continue to work with the Electoral Commission to ensure that it continues to have the resources necessary to enforce and prosecute breaches of the relevant legislation. However, there may be some circumstances where an investigation would particularly benefit from the resources, statutory powers and operational expertise of the ICAC. To this end, the bill lists certain offences against the electoral and lobbying laws that are so serious or systemic in nature that they have the potential to undermine public confidence in public administration or the electoral process generally.

In such cases, the Electoral Commission will be able to refer the matter to the ICAC, initially for preliminary investigation. If the preliminary investigation confirms that there have been possible criminal offences from the list of designated offences or that the conduct is related to possible corrupt conduct that the ICAC is already investigating, the ICAC will be authorised to undertake a full investigation. If not, it will refer the matter back to the Electoral Commission, unless it is otherwise authorised to investigate the conduct. In deciding whether or not to continue an investigation, the ICAC will be required to have regard to the same list of factors that the Electoral Commission must consider before referring a matter, including the Electoral Commission's primary responsibility for investigating, enforcing and prosecuting breaches of the relevant criminal offences and the serious or systemic nature of the matter being investigated.

So that the ICAC might complete and report on its investigations in operations Spicer and Credo—

which were current when the Cunneen decision was handed down—the bill ensures that conduct that may involve possible criminal offences against the electoral or lobbying laws that is already under investigation in these matters is taken to have been referred to the ICAC. The panel's final recommendation was that the Independent Commission Against Corruption Act be amended so that the ICAC's power to make findings of corrupt conduct may be exercised only in the case of "serious corrupt conduct". As the panel explained:

If the conduct investigated ultimately is found to be other than serious it should not be stigmatised as corrupt. A power which has such obvious capacity to harm individuals should be reserved only for cases where the misconduct in question is serious.

The Government has adopted this recommendation. We are conscious that—as the High Court recognised in the *Independent Commission Against Corruption v Cunneen*—the ICAC has "extraordinary" powers which may abrogate fundamental rights and privileges. These powers, including the ability to publicly denounce corruption when it is uncovered, are central to the goal of ridding this State of corruption. However, it is also crucial to ensure that these powers are exercised within appropriate boundaries. A balance must be struck, and this is what this bill seeks to achieve. Finally, I note that the panel also considered the ICAC's power to initiate criminal prosecutions, although it did not make any formal recommendation in this regard.

The practice of the ICAC initiating criminal prosecutions on the recommendation of the Director of Public Prosecutions is longstanding and consistent with arrangements for other investigating authorities. However, as the panel indicated in its report, legislative amendments may be needed to confirm the continuation of this practice, particularly in respect of common law offences. This issue will likely have implications beyond the ICAC and will affect other investigating authorities and their relationship with the criminal justice process and the Department of Public Prosecutions. As such, it is intended that this matter will be dealt with separately and will address the issue not only for the ICAC but for all investigating authorities that may initiate criminal prosecutions in a similar way. I commend the bill to the House.

Debate adjourned on motion by Mr Luke Foley and set down as an order of the day for a future day.