



New South Wales

# Independent Commission Against Corruption Amendment Bill 2015

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* to implement all of the recommendations of the report made on 30 July 2015 by the Independent Panel established to review the jurisdiction of the Independent Commission Against Corruption (ICAC) following the decision of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14. That decision excluded certain conduct of private persons from the definition of “corrupt conduct” under that Act that had previously been assumed to be within ICAC’s jurisdiction. The Hon Murray Gleeson AC (Chair) and Mr Bruce McClintock SC were commissioned by the Government to conduct the review by letters patent issued on 27 May 2015.

The Panel made the following specific recommendations that are implemented by the Bill:

- (a) to extend ICAC’s jurisdiction in respect of “corrupt conduct” to include certain specified acts of non-public officials that could impair public confidence in public administration,
- (b) to provide that ICAC’s education, advisory and prevention functions can be used generally for the purpose of promoting the integrity and good repute of public administration,
- (c) to limit ICAC’s power to make findings of “corrupt conduct” against an individual to cases where the corrupt conduct is serious.

The Panel also recommended that ICAC be given jurisdiction to investigate possible criminal offences under electoral and lobbying laws (without extending the meaning of “corrupt conduct”) should Parliament consider that breaches of those laws should be made the subject of ICAC’s jurisdiction. The Bill implements this recommendation as follows:

- (a) Conduct that may involve possible criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the

*Lobbying of Government Officials Act 2011* may be referred to ICAC for investigation by the Electoral Commission (which has responsibility for enforcing compliance with those Acts):

- (i) if there are reasonable grounds to suspect that the conduct may involve possible criminal offences of a designated kind, or
- (ii) if the conduct is related to possible corrupt conduct that ICAC is already investigating.

ICAC is required to discontinue an investigation if, after a preliminary investigation, the conduct does not involve possible criminal offences of the designated kind and is not related to possible corrupt conduct that ICAC is already investigating.

- (b) Conduct that may involve possible criminal offences under any of those Acts that is already under investigation by ICAC in the investigations known as Operation Spicer and Operation Credo are taken to have been referred to ICAC so that it can complete and report on those investigations.
- (c) Persons who seek public office may be engaged in corrupt conduct for the purposes of ICAC's jurisdiction in respect of any proposed future exercise of their functions as public officials even if they do not succeed in being elected or appointed to the public office.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

## **Schedule 1      Amendment of Independent Commission Against Corruption Act 1988 No 35**

**Schedule 1 [3]** amends section 8 of the Act to insert proposed subsection (2A) to extend the definition of "corrupt conduct" to conduct of non-public officials that could impair public confidence in public administration and which could involve any of the following:

- (a) collusive tendering,
- (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
- (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
- (d) defrauding the public revenue,
- (e) fraudulently obtaining or retaining employment or appointment as a public official.

**Schedule 1 [1] and [2]** make minor amendments consequent on the insertion of proposed section 8 (2A).

**Schedule 1 [4]** amends section 8 (3) of the Act to provide that proposed section 8 (2A) extends to conduct occurring before the commencement of the proposed Act.

**Schedule 1 [5]** amends section 8 (4) of the Act to make it clear that persons who seek public office may be engaged in corrupt conduct for the purposes of ICAC's jurisdiction in respect of any proposed future exercise of their functions as public officials even if they do not succeed in being elected or appointed to the public office.

**Schedule 1 [6]** amends section 8 (5) of the Act to extend its application to proposed section 8 (2A) so that the offences or other matters related to impairing public confidence in the public

administration of the State extend to matters arising outside the State or under the law of the Commonwealth or another jurisdiction.

**Schedule 1 [7]** amends section 8 (6) of the Act to make it clear that proposed section 8 (2A) does not operate to either expand or limit the other provisions of section 8 that define “corrupt conduct”, and in particular the provisions of section 8 (2) that were the subject of the High Court’s decision in *Independent Commission Against Corruption v Cunneen*.

**Schedule 1 [8]** amends section 13 of the Act to provide that ICAC’s education, advisory and prevention functions can be used generally for the purpose of promoting the integrity and good repute of public administration.

**Schedule 1 [10]** inserts proposed section 13A into the Act to include in the functions of ICAC the jurisdiction to investigate conduct that could involve possible criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011* that are referred to ICAC for investigation by the Electoral Commission because:

- (a) there are reasonable grounds to suspect that the conduct may involve possible criminal offences of a designated kind, or
- (b) the conduct is related to possible corrupt conduct that ICAC is already investigating.

Any such conduct may be referred to ICAC for investigation whether or not it involves corrupt conduct. The proposed section sets out the matters that must be considered when the Electoral Commission decides whether to refer conduct for investigation and when ICAC decides, after a preliminary investigation, to investigate the conduct. ICAC may decide not to continue an investigation and is required to discontinue an investigation if the conduct does not involve possible criminal offences of the designated kind and is not related to possible corrupt conduct that ICAC is already investigating. The designated offences that may be referred to ICAC for investigation are as follows:

- (a) *Election Funding, Expenditure and Disclosures Act 1981*:
  - section 54 (False statements—registration),
  - section 75 (False statements—campaign funding),
  - section 96GE (7) (Provision of false or misleading information with regards to a determination by Electoral Commission that person not a prohibited donor),
  - section 96H (1), (2) and (3) (Failure to make disclosure and false statements relating to disclosures),
  - section 96HA (Offences relating to caps on donations and expenditure),
  - section 96HB (1) (Offence relating to scheme to circumvent the donation or expenditure prohibitions or restrictions),
  - section 96I (1) (Unlawful acts relating to donations etc),
  - section 97M (False statements—administrative and policy development funding),
  - section 110A (7) (Provision of false or misleading documents and information),
- (b) *Parliamentary Electorates and Elections Act 1912*:
  - section 66L (False statements—applications for registration of parties),
  - section 81L (False child-related conduct declarations),
  - section 106 (Provisional voting),
  - section 112 (False answer to questions etc or multiple voting),
  - section 114A (3) (False statements in relation to application for postal vote),
  - section 114AA (8) (False statements in application to be general postal voter),
  - section 114J (1) (Person other than voter marking vote on postal ballot paper),
  - section 114P (3), (4) and (5) (False or misleading statements in application for permission to vote before polling day),

- section 114V (Person other than voter marking vote on pre-poll ballot paper),
- section 114ZU (Person other than voter marking vote on pre-poll ballot paper (declared institutions)),
- section 115 (Untrue declaration to vote outside electoral district),
- section 120AH (False and misleading statements in technology assisted voting),
- section 120AI (Protection of computer hardware and software),
- section 122A (6) and (7) (Ballot papers not to be informal in certain circumstances),
- section 147 (Bribery etc),
- section 149 (Electoral treating),
- section 151 (Intimidation),
- section 151A (Printing etc false information),
- section 176D (Untrue statements in forms),
- section 176F (Forging or uttering electoral papers),
- section 177 (Offence of stuffing ballot box),
- (c) *Lobbying of Government Officials Act 2011*:
  - section 15 (Ban on success fees),
  - section 18 (Cooling-off period for ex-Ministers and ex-Parliamentary Secretaries),
- (d) an offence against any of the above Acts, or the regulations under any of the above Acts, that is prescribed by the regulations for the purposes of the proposed section.

**Schedule 1 [11]–[13]** amend section 14 of the Act to authorise ICAC to gather and assemble evidence of possible criminal offences the subject of a reference from the Electoral Commission and to furnish any such evidence to the Electoral Commission or (if considered appropriate) to the Director of Public Prosecutions, together with any observations or recommendations for action ICAC considers should be taken in relation to the evidence.

**Schedule 1 [14]** amends section 16 of the Act to require ICAC to work (as far as practicable) in co-operation with the Electoral Commission in exercising its proposed function relating to the investigation of possible criminal offences referred to it for investigation by the Electoral Commission.

**Schedule 1 [15]** inserts proposed section 74BA into the Act to limit ICAC's power to make findings of "corrupt conduct" against an individual in its reports to cases where the corrupt conduct is serious. **Schedule 1 [9]** makes a consequential amendment to section 13 (4) of the Act to apply that limitation to findings made, or opinions or recommendations formulated, by ICAC otherwise than in ICAC reports.

**Schedule 1 [16]** amends Schedule 4 to the Act to insert savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular:

- (a) the clarification in the amendment made by Schedule 1 [5] in relation to persons who fail to be elected or appointed as a public official is applied to conduct occurring before the enactment of the proposed Act, and
- (b) the proposed power of the Electoral Commission to refer possible criminal offences to ICAC for investigations is applied to offences that may have been committed before the enactment of the proposed Act and ICAC is taken to have had a referral to investigate possible criminal offences that have come to light as a result of the investigations of ICAC known as Operation Spicer and Operation Credo, and
- (c) the proposed limitation on the power of ICAC to make findings of corrupt conduct only in the case of serious corrupt conduct is applied to reports made after the enactment of the proposed Act and is so applied even if the report relates to investigations commenced or undertaken before that enactment.