



PARLIAMENT OF NEW SOUTH WALES

# Committee on the Independent Commission Against Corruption

REPORT 4/56 – NOVEMBER 2017

PROTECTIONS FOR PEOPLE WHO MAKE VOLUNTARY DISCLOSURES TO THE  
INDEPENDENT COMMISSION AGAINST CORRUPTION



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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## Chair's Foreword

It has been my pleasure to Chair an inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption (ICAC).

The inquiry came about because of concerns that protections provided to people who make voluntary disclosures to the ICAC are currently patchy and unclear. Protections vary according to whether the person making the disclosure is doing so voluntarily or under compulsion, and whether he or she is a public official.

It is vital that whistleblowers receive appropriate protection from criminal, civil and disciplinary liability for disclosing information to the ICAC. If they are discouraged from doing so, opportunities will be missed to detect, expose and prevent corrupt conduct in this State.

As a result of its inquiry, the Committee has made a suite of practical recommendations designed to provide more comprehensive protection for whistleblowers into the future.

The Committee heard from a variety of stakeholders during the inquiry process and I would like to thank each and every one of them for their participation. It is their expert knowledge that has enabled us to make suggestions for improvement to the current system.

In addition, I would like to thank my Committee colleagues for their valuable contributions throughout the inquiry process. Finally, I would like to thank the Committee staff for their professionalism and support in conducting the inquiry.



**Damien Tudehope MP**  
Chair

## Summary

On 22 March 2017, the Joint Committee on the ICAC resolved to conduct an inquiry into protections for people who make voluntary disclosures to the ICAC. The inquiry terms of reference required the Committee to examine whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purposes of its functions.

This followed the *Independent Commission Against Corruption Amendment (Disclosure of Information) Bill 2016*, introduced into Parliament in November 2016 by Mr Jamie Parker MP. The object of the Bill was to protect persons who lodge complaints about corrupt conduct with the ICAC, or who otherwise voluntarily give statements or documents to the ICAC, from any criminal or civil liability that might otherwise result. This included liability for defamation or breach of confidentiality and the taking of disciplinary action by an employer. The Bill has since lapsed.

In the course of its inquiry, the Committee found that the current protections for people who make disclosures to the ICAC are too narrow and unclear in their application. Protections can vary according to whether the discloser is a compelled witness or making a voluntary disclosure, and whether or not he or she is a public official.

The Committee found that there is significant public interest in increasing the protections available to people who make voluntary disclosures to the ICAC. It appears the current lack of protection deters people from making voluntary disclosures to the ICAC, thereby stopping the detection, exposure and prevention of corrupt conduct.

Therefore, the Committee has recommended that the *Independent Commission Against Corruption Act 1988* (ICAC Act) be amended to protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability for doing so.

Further, the Committee has recommended against making the protections conditional upon informants meeting threshold requirements. Some stakeholders argued people should only be protected where they have made a disclosure based on an honest and reasonable belief that corrupt conduct has occurred. Otherwise disclosures may be made for improper purposes causing unfair reputational damage and wasting the ICAC's resources in dealing with them. However, the Committee found such thresholds would do little to deter vexatious complaints and may deter people from making genuine complaints for fear of attracting liability. Further, the ICAC Act already contains criminal penalties for those who wilfully make false complaints.

While thresholds are not the answer, the Committee remains concerned about people who make false complaints to the ICAC. In particular, the Committee is concerned about complainants publicly airing the fact that they have made a complaint to the ICAC where they have no suspicions regarding corrupt conduct and simply wish to weaken a political opponent or induce an elected person to decide a matter in a particular way. Such people unfairly damage reputations and may jeopardise impartial, objective and sound public decision-making.

To deter such behaviour, the Committee has recommended that the ICAC examine whether more could be done to deter people from making false complaints to the ICAC, and to limit the

damage caused where this does occur. In particular, the ICAC should consider whether the ICAC Act should be amended to provide that it is an offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC.

Finally, the Committee has made it clear that increased protections for people who make voluntary disclosures to the ICAC should protect people for the act of disclosing, not against liability for their own wrongdoing. People should not be automatically protected from the consequences of their wrongdoing merely because they have disclosed it to the ICAC. This could bring the entire justice system into disrepute.

Notwithstanding this, informants' evidence can be crucial in uncovering corrupt conduct. Therefore, the Committee has found existing provisions giving the Attorney General discretion to immunise a person against prosecution on the recommendation of the ICAC, should remain. The Committee has also recommended a very limited extension of the right against self-incrimination for people who make voluntary disclosures to the ICAC, that could be applied at the discretion of the ICAC or the DPP.

## Findings and Recommendations

Finding 1 _____	1
The current protections for people who make disclosures to the ICAC are too narrow and unclear in their application. There should be increased legislated protections in this area.	
Finding 2 _____	5
There is significant public interest in increasing the protections for people who make voluntary disclosures to the ICAC.	
Recommendation 1 _____	8
That the ICAC Act be amended to protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability, and reprisal action for doing so.	
Recommendation 2 _____	8
That increased protections for people who make voluntary disclosures to the ICAC not be conditional upon those people meeting threshold requirements.	
Recommendation 3 _____	12
That the ICAC examine whether more could be done to deter people from making false complaints to the ICAC, and to limit the damage caused where this does occur, including whether the ICAC Act should be amended to provide that it is an offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC.	
Recommendation 4 _____	14
That any amendments to increase protections available to people who make voluntary disclosures to the ICAC not operate to negate legal professional privilege.	
Recommendation 5 _____	16
That the ICAC Act be amended to protect the identity of people who make voluntary disclosures to the ICAC, where appropriate.	
Recommendation 6 _____	16
That any legislative amendment to protect the identity of people who make voluntary disclosures to the ICAC not fetter the ICAC’s ability to investigate properly in the public interest, or to provide natural justice to accused persons.	
Finding 3 _____	17
There is a risk the ICAC’s public inquiries will deter people from making voluntary disclosures; in other cases they may encourage people to do so.	
Recommendation 7 _____	19

That increased protections for people who make voluntary disclosures to the ICAC, be drafted to provide immunity to people against adverse consequences for the act of disclosing, not against liability for their own wrongdoing.

Recommendation 8 \_\_\_\_\_ 22

That the ICAC provide readily-available, plain English information on its website about its policies and procedures for managing disclosures made to it by wrongdoers.

Recommendation 9 \_\_\_\_\_ 22

That the ICAC be required to warn a person where it has reason to believe the person is about to make a voluntary disclosure involving his or her own wrongdoing, that they will not necessarily be granted immunity from adverse consequences for doing so.

Recommendation 10 \_\_\_\_\_ 24

That the ICAC Act be amended to extend a very limited protection against self-incrimination to people who make voluntary disclosures to the ICAC.

- The provision should not apply so as to protect all people who make voluntary disclosures about their own wrongdoing to the ICAC.
- However, there should be discretion to grant a person protection against self-incrimination to the extent that his or her voluntary disclosure reveals s/he has engaged in wrongdoing that is a consequence of making the disclosure. This discretion could be vested in the ICAC; or in the Director of Public Prosecutions, following the ICAC's recommendation.



# Commentary

## Protections for people who make voluntary disclosures to the ICAC

There should be increased protections for people who make disclosures to the ICAC

### Finding 1

**The current protections for people who make disclosures to the ICAC are too narrow and unclear in their application. There should be increased legislated protections in this area.**

*What are the current protections for people who make disclosures to the ICAC?*

1.1 The current protections for people who make disclosures to the ICAC are too narrow and unclear in application. Protections can vary according to whether the discloser is a compelled witness or making a voluntary disclosure, and whether or not he or she is a public official. Other protections that may apply to ordinary citizens who make voluntary disclosures do not clearly do so. There are further protections that do clearly apply to ordinary citizens who make voluntary disclosures, but they only apply to particular types of liability for example, defamation, and not more broadly.

1.2 The *Independent Commission Against Corruption Act 1988* (the 'ICAC Act'), contains protections for people who provide information or evidence to the ICAC where the person is legally required to do so. The ICAC Act provides that:

- No civil or criminal liability (apart from the ICAC Act) attaches to any person for compliance or purported compliance in good faith, with any requirement made under the ICAC Act.<sup>1</sup>
- If a person gives any statement of information or produces any document or other thing in response to a notice served by the ICAC under section 21 or 22 of the ICAC Act, no civil liability attaches to the person for doing so, whether that liability would arise under contract or otherwise.<sup>2</sup>

1.3 As the Department of Premier and Cabinet (DPC) explains in its submission to the inquiry, these sections provide immunity to individuals from criminal or civil liability where they comply with a legal obligation under the ICAC Act to provide the ICAC with information or evidence:

For example, where a notice is issued to a person under section 21 of the ICAC Act requiring the person to produce a statement of information, and the person is bound not to disclose the information by a private confidentiality agreement, the person has immunity from any liability under the confidentiality agreement for producing the information to the ICAC.<sup>3</sup>

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<sup>1</sup>*Independent Commission Against Corruption Act 1988*, s109(5).

<sup>2</sup>*Independent Commission Against Corruption Act 1988*, s109(6).

<sup>3</sup>Submission 22, Department of Premier and Cabinet, p4.

1.4 Confidentiality and secrecy requirements are often a particular concern for people making disclosures to the ICAC. The ICAC told the Committee:

There are numerous secrecy and confidentiality provisions in legislation under which public authorities operate that have the effect of prohibiting the disclosure of information obtained by a public official in the course of their employment unless that disclosure is for the administration of or a function of operating legislation or is otherwise required by a law... Similarly, private individuals who voluntarily provide information to the Commission may be at risk of incurring civil liability because of contractual or employment undertakings into which they have entered.<sup>4</sup>

1.5 Sections 93 and 94 of the ICAC Act may also provide protection to people who voluntarily provide information to the ICAC. Section 94 makes it an offence for an employer to dismiss or prejudice an employee because the employee is assisting the ICAC. Meanwhile, section 93 makes it an offence to cause or inflict any damage, loss or disadvantage to any person because he or she is assisting the ICAC.

1.6 However, in his submission to the inquiry, the Acting NSW Ombudsman, Professor John McMillan AO, indicated it is unclear whether these provisions would protect a person who voluntarily provides information to the ICAC, or whether they would protect only those who comply with notices and directions issued by the ICAC. It would depend on whether the words ‘assisting the Commission’ were construed broadly or narrowly.<sup>5</sup>

1.7 The Acting Ombudsman also indicated that section 80 of the ICAC Act, which provides it is an offence to obstruct or hinder the ICAC in the exercise of its functions, may indirectly provide protection to voluntary informants to the ICAC.<sup>6</sup>

1.8 The *Defamation Act 2005* also extends a defence of absolute privilege to any matter that is published to or by the ICAC and its staff.<sup>7</sup> This means that nobody can be sued for defamation for making a disclosure to the ICAC, voluntarily or otherwise.<sup>8</sup>

1.9 In addition to protections applying under the ICAC Act and Defamation Act, the *Public Interest Disclosures Act 1994* (PID Act) provides protections for public officials who make disclosures to the ICAC in certain circumstances.

1.10 To be protected by the PID Act, as a ‘public interest disclosure’, a disclosure to the ICAC must be:

- made by a public official;
- in accordance with the ICAC Act; and

<sup>4</sup> Submission 3, Independent Commission Against Corruption, p2.

<sup>5</sup> Submission 11, Professor John McMillan AO, Acting NSW Ombudsman, p2.

<sup>6</sup> Submission 11, Acting NSW Ombudsman, p2.

<sup>7</sup> See *Defamation Act 2005*, s27 and Schedule 1, clause 19.

<sup>8</sup> Mr Bruce McClintock SC, Inspector of the ICAC, *Transcript of Evidence*, 7 August 2017, p32.

- be a disclosure of information the person honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.<sup>9</sup>

- 1.11 'Public official' is defined to include public service employees and Members of Parliament, but not general members of the public.<sup>10</sup>
- 1.12 Section 20 of the PID Act makes it an offence to take detrimental action against another person substantially in reprisal for the other person making a public interest disclosure. Similarly, section 21 of the PID Act provides that a person is not subject to any liability for a making a public interest disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.

*What protections apply under other legislative regimes?*

- 1.13 Many equivalent legislative regimes, both in NSW and elsewhere, offer greater protection to people who make disclosures to oversight bodies than those currently available for disclosures to the ICAC. In particular, various protections are plainly available to people who have made voluntary disclosures, and it is not necessary for the discloser to be a public official for them to apply.
- 1.14 For example, in NSW the *Ombudsman Act 1974* (the Ombudsman Act) provides greater protections for those who make disclosures to the Ombudsman. Section 37(4) makes it an offence to cause damage, loss or disadvantage to a person on account of that person making a complaint to, or assisting, the Ombudsman. Similarly, section 37(5) makes it an offence for an employer to dismiss or cause prejudice to any employee on account of their assisting the Ombudsman. There is no doubt that general members of the public who make voluntary disclosures are protected. The Ombudsman told the Committee:
- The Ombudsman Act provides more extensive – or, at least more explicit – protection than the ICAC Act to any person who voluntarily assists the Ombudsman.<sup>11</sup>
- 1.15 Similarly, the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CSC Act) provide protections against detrimental action to anyone who supplies information to the Ombudsman about the provision of a community service, or to an Official Community Visitor, including persons who do so on a voluntary basis.<sup>12</sup>
- 1.16 In Victoria, the Independent Broad-based Anti-corruption Commission (IBAC) is responsible for assessing complaints to determine whether a complaint is a 'protected disclosure' under section 26 of the *Protected Disclosure Act 2012 (Vic)* (the PD Act). A 'protected disclosure' includes a disclosure that shows or tends to show a person, public officer, or public body has engaged in improper conduct,

<sup>9</sup> See *Public Interest Disclosures Act 1994*, s4 and Part 2, in particular ss8 and 10.

<sup>10</sup> *Public Interest Disclosures Act 1994*, s4A.

<sup>11</sup> Submission 11, Acting NSW Ombudsman, p2, see also comments on p3.

<sup>12</sup> See *Community Services (Complaints, Reviews and Monitoring) Act 1993*, s47; and Submission 11, Acting NSW Ombudsman, pp2-3.

which has been made in accordance with the prescribed procedure. A protected disclosure may be made to the IBAC by any natural person (not just a public official) and may be made voluntarily.<sup>13</sup>

1.17 If the IBAC assesses a complaint as a protected disclosure:

- the discloser is not subject to any civil or criminal liability, or any liability arising by way of administrative process (including disciplinary action) for making the disclosure, unless the person has provided information that the person knows to be false or misleading in a material particular;<sup>14</sup>
- the discloser does not breach any laws requiring him/her to maintain confidentiality;<sup>15</sup>
- in any defamation proceedings, there is a defence of absolute privilege for making the disclosure;<sup>16</sup>
- it is an offence to take detrimental action against the discloser where the disclosure is the substantial reason for doing so.<sup>17</sup>

1.18 In Queensland, section 343 of the *Crime and Corruption Commission Act 2001(Qld)* protects people from civil liability or disciplinary action where they disclose information to the Queensland Crime and Corruption Commission (QCCC) for the purposes of its functions, both voluntarily and under compulsion. Section 343 provides that:

- no obligation to maintain secrecy or other restriction on the disclosure of information applies to the disclosure of information to the QCCC for the performance of its functions; and
- a person who discloses such information does not contravene any legislative requirement to maintain confidentiality; incur any civil liability, including for defamation; or become liable to disciplinary action.

1.19 In Western Australia (WA), the *Corruption, Crime and Misconduct Act 2003 (WA)* contains protections for people who provide information to the WA Corruption and Crime Commission (WACCC) voluntarily and under compulsion. Subsection 220(2) provides that if an allegation has been made to the Office of the Parliamentary Inspector or information given to the WACCC, no civil or criminal liability (other than liability under the Act) attaches to the person by reason that the allegation was made or the information was given.

1.20 In South Australia (SA) too, there are protections for people who make disclosures to the SA Office for Public Integrity (OPI) or the Independent Commissioner Against Corruption. However, in his submission to the inquiry, the

<sup>13</sup> *Protected Disclosure Act 2012 (Vic)*, Part 2.

<sup>14</sup> *Protected Disclosure Act 2012 (Vic)*, ss39(1), 72(1)-(2).

<sup>15</sup> *Protected Disclosure Act 2012 (Vic)*, s40(1).

<sup>16</sup> *Protected Disclosure Act 2012 (Vic)*, s41(1).

<sup>17</sup> *Protected Disclosure Act 2012 (Vic)*, s45.

SA Independent Commissioner Against Corruption, the Hon Bruce Lander QC, indicated that these could be strengthened.

- 1.21 Section 50 of the *Independent Commissioner Against Corruption Act 2012 (SA)* (SA ICAC Act) overrides any contractual or legislative obligation to maintain confidentiality in respect of information or complaints provided to the OPI or the Commissioner.
- 1.22 Similarly, section 57 of the SA ICAC Act prohibits causing detriment to another person because the person or a third person has made or intends to make a complaint or report under the Act or has provided information or other assistance to the Commissioner. The provision is backed up by civil and criminal sanctions.
- 1.23 In addition, section 21 of the SA ICAC Act makes it an offence to prevent another person from making a complaint or report under the Act about a matter that may involve corruption, misconduct or maladministration, or hinder or obstruct another person in making such a complaint.
- 1.24 The SA Commissioner told the Committee that while section 50 would protect a person against prosecution or a claim for failing to maintain secrecy, it does not protect against broader civil/criminal liability for the making and content of the report e.g. defamation.<sup>18</sup>

*Why should the current protections for people who make disclosures to the ICAC be increased?*

## Finding 2

**There is significant public interest in increasing the protections for people who make voluntary disclosures to the ICAC.**

- 1.25 There is significant public interest in increasing the protections available to people who make voluntary disclosures to the ICAC. This will promote integrity and accountability in public administration, consistent with the objects of the ICAC Act.<sup>19</sup> It appears that a lack of protection deters voluntary disclosures thereby preventing the detection, exposure and prevention of corrupt conduct.
- 1.26 The Committee agrees with the comments of the Acting NSW Ombudsman on this matter, who has stated:
- It is essential that public officials, government contractors and members of the public should be able to provide information to statutory oversight bodies without suffering detriment for doing so. This information is a crucial element of the intelligence that is relied on by these bodies to discharge their statutory function of providing assistance to complainants and ensuring integrity in government and public administration.<sup>20</sup>
- 1.27 Mr Lloyd Babb SC, the NSW Director of Public Prosecutions (DPP), made similar observations:

<sup>18</sup> Submission 15, Hon Bruce Lander QC, Independent Commissioner Against Corruption, South Australia, pp2-3.

<sup>19</sup> See *Independent Commission Against Corruption Act 1988*, s2A.

<sup>20</sup> Submission 11, Acting NSW Ombudsman, p7.

...the disclosure of corruption is a very important public issue in the interests of justice. And anything that encourages disclosure, say for example, making sure there was no obligation or perceived obligation to remain silent about knowledge of corruption would be a positive thing.<sup>21</sup>

- 1.28 A lack of protections may deter people from making disclosures. Private citizens may become aware of corrupt conduct that falls within the ICAC’s mandate. However, as they do not receive the same protection for making a voluntary disclosure that a public official would receive, they may choose not to make a disclosure, or not to attach their name to it. The NSW Information Commissioner explained this in her submission to the inquiry:

...a number of [NSW] statutes...provide for penalties for the disclosure of information held by public sector agencies, unless the disclosure is made under certain conditions [that is, one of the limited legislated protections applies to the disclosure]

...In the absence of these conditions persons who are considering voluntarily reporting corruption to the ICAC may be open to criminal, civil or disciplinary liability. This...may deter voluntary disclosure of information relevant to any investigation of corrupt conduct and detract from the objects of the ICAC Act...particularly in relation to the exposure and prevention of corrupt conduct and...educating public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.<sup>22</sup>

- 1.29 Statistics have been provided to the Acting Ombudsman that indicate fear of reprisal does deter people from making disclosures to NSW oversight agencies. Where disclosures have been made, some allegations of reprisal action have also followed. The Acting Ombudsman told the Committee:

...only about 2 per cent of the public interest disclosures made to New South Wales agencies over a two-year period involved an allegation of reprisal. In total numbers, about 36 people had alleged that they had suffered reprisals...We [also] drew attention to the annual People Matter Employee Survey that the New South Wales Public Service Board conducts. It has a large response rate of nearly 128,000 public sector employees. Twenty-two per cent of them said they were not confident that they would be protected from reprisal.<sup>23</sup>

- 1.30 The Acting Ombudsman also commented on the possible psychological effects of the current gaps in the ICAC Act:

If somebody rang the ICAC and said, “I’m a member of the public and I want to provide information to you. I am happy to put my name. Is there any risk involved?” You would probably have to say that there is an issue about the legislative scope of the protections that exist in the Act and so the guarantee is not as strong...you can see the psychological reaction.<sup>24</sup>

<sup>21</sup> Mr Lloyd Babb SC, NSW Director of Public Prosecutions, *Transcript of Evidence*, 7 August 2017, p24.

<sup>22</sup> Submission 10, Ms Elizabeth Tydd, NSW Information Commissioner and Chief Executive Officer Information and Privacy Commission NSW, p3.

<sup>23</sup> Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, p11.

<sup>24</sup> Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, p11.

- 1.31 Likewise, KPMG Forensic, which has operated a confidential, anonymous, whistleblower hotline called *FairCall* since 1998, told the Committee that, in its experience, retaliation is a key concern of whistleblowers and it can prevent whistleblowers proceeding with a complaint.<sup>25</sup>
- 1.32 ICAC Commissioner, Ms Patricia McDonald SC, indicated that many complaints to the ICAC come from ordinary citizens. Of 1,766 matters that the ICAC inquired into in the last financial year, 1,096 were complaints made under section 10 of the ICAC Act – the section allowing ‘any person’ to make a complaint (as opposed to those sections facilitating complaints from public officials and agencies).<sup>26</sup> However, a number of those complaints are made anonymously, which can make it harder for the ICAC to investigate them. Commissioner McDonald told the Committee:
- ...a number of the complaints we get under section 10 are anonymous. The handicap with that is if we want to make further inquiries we cannot. I can only speculate that if a more general protection against disclosure was included in the Act whether that would mean we would have more named complainants...<sup>27</sup>
- 1.33 The Committee considers increased protections may encourage disclosures by named people who would otherwise be too afraid to do so, and they would assist to deter reprisal action. Similarly, by encouraging disclosures, increased protections may not only assist the ICAC to investigate individual cases of corrupt conduct but may also help it to identify systemic issues. In this way they may not only help the ICAC to investigate and expose corruption but also to exercise its other primary functions of preventing corruption and educating people about it.<sup>28</sup> The Information Commissioner told the Committee:
- ...in circumstances where investigative bodies are required to focus on harm minimisation or a preventative approach, complaints and information provided to those bodies may provide insights not only in respect of the individual issue and the subject matter but also in respect of identifying and highlighting systemic issues where a proactive approach may be beneficial...Examination of complaints in that context can inform a preventative and harm minimisation approach through the development of advice and guidance.<sup>29</sup>
- 1.34 During the Committee’s inquiry there was broad stakeholder support for increasing the current protections for people who make voluntary disclosures to the ICAC.<sup>30</sup>

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<sup>25</sup> Submission 19, KPMG, p2.

<sup>26</sup> Ms Patricia McDonald SC, Commissioner of the ICAC, *Transcript of Evidence*, 15 September 2017, p5; see also the *Independent Commission Against Corruption Act 1988*, ss11 & 16.

<sup>27</sup> Ms Patricia McDonald SC, *Transcript of Evidence*, 15 September 2017, p5.

<sup>28</sup> See *Independent Commission Against Corruption Act 1988*, ss2A and 13.

<sup>29</sup> Ms Elizabeth Tydd, NSW Information Commissioner and Chief Executive Officer Information and Privacy Commission NSW, *Transcript of Evidence*, 7 August 2017, p2.

<sup>30</sup> See for example, Submission 1, Hon Harvey Cooper AM, p1; Submission 2, Mr Andrew Tink AM, p1; Submission 3, ICAC, p1; Submission 5, His Honour Judge Graham Henson AM, Chief Magistrate of the Local Court, p1; Submission 10, NSW Information Commissioner, p3; Submission 11, Acting NSW Ombudsman; Submission 14, Mr Jamie Parker

## Model for increased protections

**Legislative amendments should be made to protect people against criminal, civil and disciplinary liability and reprisal action for making voluntary disclosures to the ICAC, and be contained in the ICAC Act**

### Recommendation 1

**That the ICAC Act be amended to protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability, and reprisal action for doing so.**

- 1.35 The Committee considers that ordinary citizens who make voluntary disclosures to the ICAC should be comprehensively protected from adverse consequences for doing so. That is, legislative amendments should be made that cover people against criminal, civil and disciplinary liability and reprisal action.
- 1.36 As outlined above, common concerns for people who make disclosures to oversight bodies include being held liable for defamation, being the subject of retaliation or reprisal action, and breaching confidentiality or secrecy requirements contained in legislation or employment agreements. Therefore, in increasing protections for people who make disclosures to the ICAC so they clearly apply to ordinary citizens and voluntary disclosures, protections must be drafted to cover the full range of circumstances – criminal, civil and disciplinary liability and reprisal action for making the disclosure.
- 1.37 The Committee notes that the PID Act provides a good model in this regard because it protects against all kinds of liability – civil, criminal and disciplinary, and reprisal action.
- 1.38 In addition, although it may lead to some overlap with the PID Act, the Committee considers the increased protections should be contained in the ICAC Act. The Committee notes the evidence of the Acting Ombudsman in this regard:

...as a matter of legislative drafting it is probably necessary to have an Act like the PID Act that applies across the whole of government...and then have protections written into the Acts of the actual oversight bodies and of the Ombudsman, Information Commissioner and ICAC. That will mean that you get quite a lot of overlap between the protective provisions but, at the end of the day, I think it is important that all the gaps are closed.<sup>31</sup>

**The increased protections for people who make voluntary disclosures to the ICAC should not be conditional upon those people meeting threshold requirements**

### Recommendation 2

**That increased protections for people who make voluntary disclosures to the ICAC not be conditional upon those people meeting threshold requirements.**

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MP, pp1-2; Submission 16, NSW Council for Civil Liberties, p8; Submission 17, Rule of Law Institute, pp2-3; Submission 19, KPMG, pp1-2; Submission 21, Law Society of NSW, p2.

<sup>31</sup>Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, p12.

- 1.39 The Committee considers further, that the proposed increased protections for people who make voluntary disclosures to the ICAC should not be drafted so they are confined to people who have met threshold requirements (e.g. to those who have made the disclosure based on an honest and reasonable belief that corruption exists). The Committee heard evidence such thresholds would do little to deter many of the vexatious complaints oversight bodies receive, and may deter people from making genuine complaints for fear of attracting liability.
- 1.40 The ICAC Act already contains criminal penalties for those who wilfully make false complaints.<sup>32</sup> In addition, the ICAC has assessment procedures to sort vexatious complaints from genuine ones. It also operates under secrecy provisions at this early stage of its processes and does not release information about unsubstantiated allegations made to it without further investigation. This greatly lessens the chance that vexatious complaints will cause reputational damage.
- 1.41 Some stakeholders told the Committee that people who provide vexatious, false or misleading disclosures to the ICAC should not be protected against adverse consequences. They considered that any new protections should be confined to people who have met threshold requirements. For example, in its submission to the inquiry DPC stated:
- In considering whether existing protections from civil and criminal liability and disciplinary action should be expanded, the Committee may wish to consider the potential risk that this would result in disclosures being made for improper purposes or encourage the making of vexatious complaints, in the knowledge that the person making the disclosure is protected from liability. The potential risk may be reduced if any additional protections apply to disclosures of information: made in good faith for the purpose of the ICAC's functions; that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or public official has engaged, is engaged or proposes to engage in corrupt conduct.<sup>33</sup>
- 1.42 Similarly, the Chief Magistrate of the NSW Local Court told the Committee:
- Any protections should not extend to disclosures that are knowingly false or vexatious, but be limited to circumstances where it is found that the disclosure is based upon an honest belief on reasonable grounds.<sup>34</sup>
- 1.43 This is the approach taken under some of the legislative regimes that protect whistleblowers in Australia. For example, as touched upon above, to be protected by the PID Act, a public official's disclosure to the ICAC must be made in accordance with the ICAC Act and be a disclosure the person honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged, or proposes to engage in corrupt conduct.<sup>35</sup>

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<sup>32</sup> *Independent Commission Against Corruption Act 1988*, s81.

<sup>33</sup> Submission 22, Department of Premier and Cabinet, pp6-7. See also Mr Lloyd Babb SC, *Transcript of Evidence*, 7 August 2017, p25; and Ms Pauline Wright, Chair, Public Law Committee and President, Law Society of NSW, p22.

<sup>34</sup> Submission 5, Judge Graeme Henson AM, Chief Magistrate, NSW Local Court, p1.

<sup>35</sup> See *Public Interest Disclosures Act 1994*, s10.

1.44 Similarly, in Victoria, the PD Act provides a person is protected from liability for making a disclosure to the IBACC unless the person has provided information that he or she knows to be false or misleading in a material particular.<sup>36</sup>

1.45 Likewise, when Mr Jamie Parker MP introduced the *Independent Commission Against Corruption Amendment (Disclosure of Information) Bill* into the NSW Parliament in November 2016, the protections sought by the Bill for people who make voluntary disclosures to the ICAC were drafted to be conditional upon the disclosures being made ‘in good faith’.<sup>37</sup>

1.46 Such thresholds may deter some of the vexatious complaints that oversight agencies receive, which are very wasteful of resources. As the South Australian Independent Commissioner Against Corruption told the Committee:

...We get a lot of complaints that are clearly vexatious and probably even more that are trivial or frivolous and do not require any sort of investigation at all. That does take up resources in assessing those complaints and advising the complainant or reporter that the matter will not be investigated. Even more draining on resources are the persons who come back complaining about our failure to investigate these trivial or frivolous complaints.<sup>38</sup>

1.47 Ms Pauline Wright, President of the Law Society of NSW, also stressed that vexatious complaints should not be protected because they can do unfair reputational damage. Ms Wright told the Committee:

You cannot say, “I want the protection but I should be allowed to say what I want.” Because when you have an open and transparent system, as we do in NSW, the potential for reputational damage for the person complained about is enormous. In our view there has to be that test of honest belief on reasonable grounds.<sup>39</sup>

1.48 Other stakeholders argued against threshold requirements because they may deter a person with a genuine complaint from coming forward for fear of exposing themselves to liability. These stakeholders argued, on balance, it is better to let the ICAC deal with vexatious complaints through its intake procedures. For example, the Inspector of the ICAC, Mr Bruce McClintock SC, told the Committee:

The issue is whether it is better to allow every complaint to be made without restriction and allow the crazy ones, the bad faith ones, the ones that have no basis in fact to be weeded out by ICAC itself...I am inclined to think myself that it is probably better to allow ICAC to do the weeding out because you do not want people when they have come across an example of what they think might be

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<sup>36</sup>*Protected Disclosures Act 2012* (Vic), ss39(1) and 72(1)-(2). Note also the comments of the Chief Justice of the NSW Local Court that threshold requirements exist under the Commonwealth’s *Public Interest Disclosures Act 2013*, Submission 5, Judge Graeme Henson AM, p1.

<sup>37</sup>*Independent Commission Against Corruption Amendment (Disclosure of Information) Bill 2016*, Schedule 1, Clause 2.

<sup>38</sup>Hon Bruce Lander QC, *Transcript of Evidence*, 7 August 2017, p29.

<sup>39</sup>Ms Pauline Wright, *Transcript of Evidence*, 7 August 2017, p22.

corruption to hesitate and think that I might be exposing myself to some sort of liability.<sup>40</sup>

- 1.49 The Acting Ombudsman too, stressed that the intake procedures of oversight agencies are the more practical way to deal with vexatious complaints as it is difficult to prosecute a person for such conduct. Professor McMillan stated:

The legislative exclusion of vexatious or malicious behaviour from the scope of an immunity provision will usually state that a person is not protected if they knowingly or purposely provide false information. But it would ordinarily be very difficult to prove beyond reasonable doubt that a person has intentionally provided false information. It is likely too that a prosecuting authority would be reluctant to run a prosecution under a provision of that kind.

...the more practical and effective way of dealing with vexatious or troublesome complaints is through the intake assessment processes of the oversight body. The Ombudsman and other bodies routinely deal with complaints of doubtful veracity or questionable motivation. We filter them out and ensure they do not cause damage and occasionally we counsel complainants about the importance of probity in how a complaint or voluntary disclosure is framed.<sup>41</sup>

- 1.50 This is consistent with the evidence of the South Australian Independent Commissioner Against Corruption, who indicated some people make vexatious complaints regardless of the sanctions in place. He told the Committee:

I do not think you can impose a sanction on some of these people [who make vexatious complaints]. The only way to deter them is to end correspondence with them, say that you looked at their recontact, you are still not going to investigate it and you do not intend to correspond with them again.<sup>42</sup>

- 1.51 In respect of reputational damage, the Acting Ombudsman also noted that, at the stage a person makes a complaint to the ICAC, the agency is bound by secrecy provisions. While the ICAC can conduct public inquiries which air damaging allegations, evidence disclosed at such inquiries is compelled – the witness is answering a summons to attend to give evidence. In contrast, complaints or voluntary disclosures are not made at public inquiries, they are fed into the ICAC’s assessment and triaging systems and are not publicly mentioned by the ICAC without further investigation. This greatly lessens the chance that vexatious complaints will cause reputational damage.<sup>43</sup>

- 1.52 For its part, the ICAC argued against thresholds for increased protections to apply. Like the Inspector, the Chief Commissioner, the Hon Peter Hall QC, stated that thresholds could deter genuine complainants from making a disclosure, and that the ICAC should be left to sort the vexatious complaints from those that are not vexatious. The Chief Commissioner stated:

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<sup>40</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 7 August 2017, p33.

<sup>41</sup> Professor Bruce McMillan AO, *Transcript of Evidence*, 7 August 2017, p7.

<sup>42</sup> Hon Bruce Lander QC, *Transcript of Evidence*, 7 August 2017, p29.

<sup>43</sup> Submission 11, Acting NSW Ombudsman, p7, and Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, p8.

In drafting possible amendments it should be done in a way that does not have the unintended effect of discouraging people to come forward or give rise to concern that they might be said not to have reasonable grounds for a complaint...If it is vexatious we, the Commission staff, will soon sort that out.<sup>44</sup>

1.53 In addition, the Chief Commissioner noted that section 81 of the ICAC Act already deals with vexatious complaints. It provides that any person who wilfully makes a false complaint to the ICAC is liable to a maximum penalty of 6 months imprisonment, or a fine of \$2,200, or both. Rather than thresholds, he argued any new protections should be drafted to cross reference to section 81.<sup>45</sup>

1.54 The Chief Commissioner further contrasted vexatious claims made before the Courts with vexatious complaints to the ICAC, arguing the latter are far less likely to cause harm:

If complaints are made which are vexatious it is different from ordinary litigation. Vexatious claims in court cause angst for the...defendant, and are costly...Those sorts of proceedings should be stopped early in their tracks, but still there is a lot of disadvantage to the hapless litigant who has to face a vexatious claim. It is different in the Commission. The Commission has the facility of sifting and sorting the wheat from the chaff...That is part of its function in its assessment panel...<sup>46</sup>

1.55 In the same vein, Mr Stephen Rushton SC, ICAC Commissioner, did not favour thresholds, arguing they could deprive the ICAC of useful intelligence. Commissioner Rushton told the Committee:

Sometimes when complainants or people lodge a concern it may not be made out but the information they provide has intelligence value. It may, unbeknownst to them, trigger something in relation to another investigation. To put a threshold on it at that stage may deprive the Commission of very useful intelligence.<sup>47</sup>

1.56 In terms of the number of vexatious complaints made to the ICAC, Commissioner McDonald indicated that exact numbers are hard to assess. In the last financial year, of the 1,766 matters triaged by the Commission's assessment panel and subject to initial inquiries, only 1 per cent moved to the ICAC's preliminary investigation stage. This does not mean, however, that all the other complaints were vexatious. Commissioner McDonald indicated that complaints are often made by people outside the relevant decision-making process who have limited information. In such cases, complainants can genuinely think corruption exists where it in fact does not. Other complaints are not investigated by the ICAC but referred to other agencies.<sup>48</sup>

### Recommendation 3

**That the ICAC examine whether more could be done to deter people from making false complaints to the ICAC, and to limit the damage caused where this does occur, including whether the ICAC Act should be amended to provide that**

<sup>44</sup> Hon Peter Hall QC, Chief Commissioner of the ICAC, *Transcript of Evidence*, 15 September 2017, pp4 & 8.

<sup>45</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p4.

<sup>46</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p8.

<sup>47</sup> Mr Stephen Rushton SC, Commissioner of the ICAC, *Transcript of Evidence*, 15 September 2017, p8.

<sup>48</sup> Ms Patricia McDonald SC, *Transcript of Evidence*, 15 September 2017, p5.

**it is an offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC.**

- 1.57 As above, the Committee accepts there is limited ability for vexatious complainants to do unfair reputational damage because the ICAC operates under secrecy provisions and does not disclose unsubstantiated allegations made to it without further investigation. Notwithstanding this, it is sometimes complainants who publicly air the fact that they have made a complaint to the ICAC.
- 1.58 Therefore, the Committee also considers that the ICAC should examine whether more could be done to deter people making false complaints to the ICAC, and to limit the damage caused where it does occur. In particular, the ICAC should consider whether criminal penalties should apply to a person who discloses or threatens to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC.
- 1.59 The Committee is particularly concerned about the potential for a complainant to publicly air the fact they have made, or will make, a complaint to the ICAC where they have no suspicions regarding corrupt conduct and simply wish to weaken a political opponent or induce an elected person to decide a matter in a particular way. The ICAC Chief Commissioner told the Committee:
- ...people have ulterior motives sometimes for making a complaint and then making it public that that complaint has been made to the ICAC. If it were the case that such a complaint was totally baseless and was simply done with that ulterior purpose, it would in my view be a plain breach of section 81...The risk of [this]...sort of vexatious complaint...is high in political circles, perhaps, but particularly in local government. It seems not to be a coincidence that they happen to come out in the lead-up to an election.<sup>49</sup>
- 1.60 While the Committee has recommended against threshold requirements for whistleblower protections to apply, because it does not want to deter genuine complaints, it cannot be blind to the fact that the above type of conduct can occur. Where it does, it not only damages reputations unfairly but has the potential to jeopardise impartial, objective and sound public decision-making. Deterring such behaviour is important.
- 1.61 The Committee notes that prosecutions for making a false complaint to an oversight body appear to be rare. The ICAC Chief Commissioner stated that, to his knowledge, there have not been any prosecutions under section 81 of the ICAC Act.<sup>50</sup> The Acting Ombudsman also told the Committee:
- ...it would ordinarily be very difficult to prove beyond reasonable doubt that a person has intentionally provided false information. It is likely too that a prosecuting authority would be reluctant to run a prosecution under a provision of that kind.<sup>51</sup>
- 1.62 Therefore, the Committee considers that the ICAC should examine whether more could be done to deter people from making false complaints to the ICAC,

<sup>49</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p8.

<sup>50</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p8.

<sup>51</sup> Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, p7.

particularly in the politicised circumstances discussed above. For example, the Committee notes the evidence of the ICAC Chief Commissioner that educational campaigns may be warranted:

I would imagine that most, if not close to all, people in local government – or perhaps even higher levels of government – do not know about section 81. Perhaps there should be steps taken to properly inform the community as to the ramifications of making complaints... whether it be in the political field or ...in the area of property development, which [are] calculated to try and deflect decision-makers from impartial, objective and sound decision-making. The first thing is to inform and warn people against that form of abuse of the notifications or complaints made under the ICAC Act. There has been no discussion about it in the community that I am aware of.<sup>52</sup>

1.63 As above, the ICAC should also consider the merits of creating an offence provision to deal with people who publicise or threaten to publicise the fact that they have made a disclosure to the ICAC. In addition, given there appear to have been no prosecutions under section 81 of the ICAC Act, the ICAC should consider, whether barriers exist to prosecutions and, if so, whether anything could be done to address them.

1.64 The ICAC could also examine whether more could be done to limit any damage where people do make false complaints to the ICAC, particularly in the politicised circumstances discussed above. The Committee notes further evidence from the Chief Commissioner that special powers could be considered allowing the ICAC to intervene early to limit damage in certain circumstances, such as when a person may be using the Commission’s processes for their own political gain at election time:

It is worthy of consideration as to whether or not there should be in certain circumstances – such as perhaps what may be attacks using the Commission’s processes in election time – early intervention by the Commission to be able to deal with the matter if the circumstances are shown to warrant intervention by the Commission to make...an early assessment, a bit like an interim injunction in the Supreme Court, to maintain the status quo until this complaint is properly investigated and persons are made aware of the fact that no finding has been made.<sup>53</sup>

### **Legal professional privilege should not be negated by the increased protections**

#### **Recommendation 4**

**That any amendments to increase protections available to people who make voluntary disclosures to the ICAC not operate to negate legal professional privilege.**

1.65 In the Committee’s view, the proposed increased protections for people who make disclosures to the ICAC should not operate to negate legal professional privilege. Put differently, a lawyer who breaches his or her client’s privilege and discloses information to the ICAC that he or she has received from the client,

<sup>52</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, pp8-9.

<sup>53</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p9.

should not receive protection against adverse consequences for doing so. Any legislation to increase protections for voluntary disclosures, should make this clear.

- 1.66 Legal professional privilege protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client, or for use in current or anticipated litigation.<sup>54</sup> According to the Australian Law Reform Commission, the rationale for the privilege is:

...to enhance the proper conduct of litigation by promoting free disclosure between clients and lawyers, to enable lawyers to give proper advice and representation to their clients. [In doing so] the privilege is also considered a human right.

Wilson J in *Baker v Campbell* commented that ‘the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and...[the] privilege...is an important element in that protection.’<sup>55</sup>

- 1.67 During the Committee’s hearings, in supporting increased protections for people who make disclosures to the ICAC, the Law Society stated that lawyers may become aware of suspected corrupt conduct in the course of litigation. Under current law, they would risk incurring liability were they to disclose this to the ICAC.<sup>56</sup>

- 1.68 However, the Law Society did not support protections for lawyers who breach their clients’ privilege to make a disclosure.<sup>57</sup> The Law Society indicated there may be many scenarios where lawyers would make a disclosure to the ICAC that did not breach their own client’s privilege for example, where they come into possession of information disclosed on a without-prejudice basis by a third party. The Law Society contended it was in these sorts of cases that protections should apply.<sup>58</sup>

- 1.69 Under section 24(2) of the ICAC Act, where the ICAC compels a person to produce a statement of information or to produce any document or other thing, the ICAC is to set the requirement aside if the person has a ground of privilege. The Committee considers a similar provision should be made in respect of voluntary disclosures to the ICAC.

<sup>54</sup> Information and Privacy Commission NSW, *Legal Professional Privilege Factsheet*, Information and Privacy Commission NSW website, <http://www.ipc.nsw.gov.au/legal-professional-privilege>, viewed 5 October 2017.

<sup>55</sup> Australian Law Reform Commission website, ‘Privileges: Extension to Pre-trial Matters and Client Legal Privilege’, Australian Law Reform Commission website, <http://www.alrc.gov.au/publications/14.%20Privileges%3A%20Extension%20to%20Pre-Trial%20Matters%20and%20Client%20Legal%20Privilege/client-legal->, viewed 5 October 2017.

<sup>56</sup> Ms Pauline Wright, *Transcript of Evidence*, 7 August 2017, p19.

<sup>57</sup> Ms Pauline Wright, *Transcript of Evidence*, 7 August 2017, pp19-20.

<sup>58</sup> Mr Andrew Chalk, Deputy Chair, Public Law Committee, Law Society of NSW, *Transcript of Evidence*, 7 August 2017, p20.

**The legislation containing the increased protections should also contain provisions to protect of the identity of people who make voluntary disclosures to the ICAC, where appropriate**

**Recommendation 5**

**That the ICAC Act be amended to protect the identity of people who make voluntary disclosures to the ICAC, where appropriate.**

**Recommendation 6**

**That any legislative amendment to protect the identity of people who make voluntary disclosures to the ICAC not fetter the ICAC’s ability to investigate properly in the public interest, or to provide natural justice to accused persons.**

1.70 To encourage voluntary disclosures to the ICAC, the Committee also considers that legislative amendments to increase protections for people who make disclosures, should include provisions to protect the identity of people who make voluntary disclosures, where appropriate. Section 22 of the PID Act provides a good model for such a protection. It strikes the right balance between protecting informants’ identities and not fettering the ICAC’s ability to investigate properly in the public interest, and to provide natural justice to accused persons.

1.71 Section 22 of the PID Act restricts the ability of the ICAC and other investigating agencies to disclose the identity of public officials who provide information to them. The restriction is not absolute and confidentiality does not apply in certain circumstances for example, where the ICAC considers disclosure of the person’s identity is necessary to investigate the matter effectively or it is otherwise in the public interest to do so. Another instance is where disclosure is essential having regard to the principles of natural justice.

1.72 Consistent with the approach of the PID Act, the ICAC Chief Commissioner told the Committee that any new provision to protect the identity of people who make voluntary disclosures to the ICAC should not apply as a matter of course. Rather, the ICAC should have discretion to disclose identities where this is in the public interest.<sup>59</sup> The Chief Commissioner stated:

A blanket protection which attaches simply because information is volunteered may not properly account for what use the Commission might or should make of the information... [I]t may be unavoidable that the Commission...to properly investigate particular information brought to it...may...need to disclose information that might tend to reveal the volunteer’s identity at some point. Accordingly, the Commission would be concerned to ensure that any amendment not fetter its ability to fully and appropriately investigate or otherwise deal with information brought to it relating to possible criminal or corrupt conduct.<sup>60</sup>

1.73 The Chief Commissioner also told the Committee that informants’ security is a paramount consideration for the ICAC:

The confidentiality and security of those providing information to the Commission is one of its paramount concerns. Were it to be undermined, it would foreclose a vital

<sup>59</sup> Hon Peter Hall QC, Chief Commissioner of the ICAC, Questions Taken on Notice, 15 September 2017, p4.

<sup>60</sup> Hon Peter Hall QC, Questions Taken on Notice, 15 September 2017, p3.

resource needed to identify possible corrupt conduct and render the Commission's task that much more difficult.<sup>61</sup>

1.74 He further pointed to the powers the ICAC already has to deal with this issue, for example:

- Section 111 of the ICAC Act provides that documents or any other things coming into a person's possession as a result of the person's exercise of functions under the ICAC Act, cannot be required to be produced in Court. The ICAC considers that the identity of people volunteering information would fall within the scope of protected information under this provision. However, the protection is not absolute. For example, a Court can still order disclosure of the information where it is necessary in the interests of justice; and there is a duty for the ICAC to make disclosures to the DPP in certain circumstances.<sup>62</sup>
- The ICAC can also make orders to protect the safety of a person who is assisting it, including making orders to protect those who assist by volunteering information.
- The Commissioners have a broad discretion to restrict or authorise the disclosure of information according to whether satisfied that it is necessary or desirable in the public interest to do so.<sup>63</sup>

### Finding 3

**There is a risk the ICAC's public inquiries will deter people from making voluntary disclosures; in other cases they may encourage people to do so.**

1.75 On the topic of identity protections, there is also the risk that a person who has made a voluntary disclosure to the ICAC will eventually be compelled to give that evidence at a public inquiry. The unwanted publicity may deter people from making a voluntary disclosure.

1.76 Notwithstanding this, the Committee considers the benefits of public inquiries outweigh these risks. The ICAC Act contains various protections for witnesses compelled to give evidence at a public inquiry, which again strike the right balance because they are subject to the ICAC's assessment of the public interest. Similarly, in some cases, public inquiries may actually encourage voluntary disclosures.

1.77 During the Committee's inquiry, the Parliamentary Inspector of the Crime and Corruption Commission (CCC), Western Australia, the Hon Michael Murray AM QC, raised concerns that public inquiries may deter people from making voluntary disclosures to anti-corruption bodies. Speaking of decisions to open inquiries to the public Mr Murray stated:

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<sup>61</sup> Hon Peter Hall QC, Questions Taken on Notice, 15 September 2017, p2.

<sup>62</sup> Hon Peter Hall QC, Questions Taken on Notice, 15 September 2017, pp2-3.

<sup>63</sup> Hon Peter Hall QC, Questions Taken on Notice, 15 September 2017, p3.

...the CCC should always err on the side of privacy....In my view premature publicity of that kind is more likely to dissuade informants from coming forward voluntarily than it will encourage them to identify themselves to the Commission and, as has been seen, there is always, until the investigation is at an end, a real risk of unwarranted damage to the reputations and livelihoods or careers of those who may in the end not be proved to be guilty of corrupt conduct or guilty involvement.<sup>64</sup>

1.78 Mr Murray expanded on this at the Committee's hearing on 7 August:

...if the general view is that the system operates so that all those who get involved in its activities find themselves on the front page of a newspaper, you will discourage people coming forward in droves.<sup>65</sup>

1.79 In discussing these issues, the Acting NSW Ombudsman and the Law Society of NSW acknowledged that there is always a risk that the fact of a disclosure to the ICAC may ultimately become public knowledge. They indicated this is one of the consequences of a very deliberate policy decision in NSW to privilege the public interest in integrity in public administration over individual rights to privacy, and to allow public inquiries by the ICAC.<sup>66</sup> Mr Andrew Chalk, of the Law Society of NSW told the Committee:

...unlike in Western Australia, there is a much greater emphasis in New South Wales not on the privacy of individuals, whether they be informants or perpetrators of corrupt conduct, but on the public confidence in the integrity of our systems of Government. That focus has led to a preference for matters to be conducted in public...The initial approach [when a person makes a voluntary disclosure to the ICAC] is necessarily confidential. The risk of course, is that at some stage they may be compelled to give that confidential disclosure in evidence in a public forum. Yes, people know that is the risk they may take.<sup>67</sup>

1.80 The ICAC Chief Commissioner also noted that the ICAC Act contains protections for people who are compelled to give evidence at a public inquiry. Parts of public inquiries can be conducted in private<sup>68</sup> and the ICAC can make directions under section 112 to restrict the publication of evidence where it considers it is in the public interest to do so.<sup>69</sup>

1.81 As outlined in its 2016 report, the Committee firmly supports the ICAC having the power to hold public inquiries where it is in the public interest to do so. As outlined in that report, public inquiries have many benefits, and the Committee considers these benefits outweigh the risk that public inquiries may deter some from making a voluntary disclosure to the ICAC. These benefits include helping the ICAC to fulfil one of its primary functions of exposing corruption; and

<sup>64</sup> Submission 18, Hon Michael Murray AM QC, Parliamentary Inspector of the Crime and Corruption Commission, Western Australia, p2.

<sup>65</sup> Hon Michael Murray AM QC, *Transcript of Evidence*, 7 August 2017, p16.

<sup>66</sup> See Professor John McMillan AO, *Transcript of Evidence*, 7 August 2017, pp9&12-13.

<sup>67</sup> Mr Andrew Chalk, *Transcript of Evidence*, 7 August 2017, p21.

<sup>68</sup> See *Independent Commission Against Corruption Act 1988*, s31(9).

<sup>69</sup> Hon Peter Hall QC, Questions Taken on Notice, 15 September 2017, p3.

promoting transparency and keeping the ICAC accountable for the way in which it carries out its functions.<sup>70</sup>

- 1.82 Furthermore, in some circumstances, public inquiries may actually encourage people to make disclosures to the ICAC. As noted in the Committee's 2016 report, because issues are discussed openly as part of a public inquiry, this can encourage further witnesses to come forward. Similarly, by promoting transparency and holding the ICAC accountable for the way in which it carries out its functions, public inquiries also encourage the public confidence in the ICAC that is necessary if people are to report wrongdoing in the knowledge it will be dealt with appropriately.<sup>71</sup> Indeed, at the Committee's 7 August hearing, the Law Society indicated public inquiries can sometimes encourage disclosures to the ICAC. Mr Chalk told the Committee:

...if a disclosure is made privately and the whole system is one that emphasises privacy...you can have retaliation once the person who is the subject of the complaint becomes aware that somebody has blown the whistle. They go searching for the leakers and the informants and while that whole process is in private, the witnesses do not have the protections that they know come from the light being shone on the issue. So those considerations do counterbalance the [WA] Inspector's comment, and that is before you get to the wider public interest of people within the community who believe where there is potential corruption going on that it will be exposed in a way that they can see the workings and the evidence of what is going on.<sup>72</sup>

- 1.83 Of all the matters that are reported to the ICAC, relatively few proceed to public inquiry. As noted earlier, in the last financial year, of the 1,766 matters triaged by the ICAC's assessment panel and subject to initial inquiries, only 1 per cent proceeded to preliminary investigation, let alone the full scale investigation that precedes a decision to proceed to a public inquiry.<sup>73</sup>

**The increased protections should afford immunity to people against adverse consequences for the act of disclosing, not against liability for wrongdoing**

**Recommendation 7**

**That increased protections for people who make voluntary disclosures to the ICAC, be drafted to provide immunity to people against adverse consequences for the act of disclosing, not against liability for their own wrongdoing.**

- 1.84 The Committee also considers that any increased protections for people who make voluntary disclosures to the ICAC should afford immunity to people against adverse consequences for the act of disclosure, not against liability for their own wrongdoing.

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<sup>70</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, 2016, pp2-3.

<sup>71</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, 2016, p3.

<sup>72</sup> Mr Andrew Chalk, *Transcript of Evidence*, 7 August 2017, p22.

<sup>73</sup> Ms Patricia McDonald SC, *Transcript of Evidence*, 15 September 2017, p5.

1.85 The Committee agrees with the DPP that automatically protecting people from the consequences of their own wrongdoing just because they make a disclosure could bring the justice system into disrepute. The DPP told the Committee:

One of my real concerns would be someone who has engaged in corrupt conduct and protects themselves by disclosing it and getting some protection from any further action as a result...I could not imagine anything more harmful to the public's perception of the criminal justice system than to think that you could avoid liability by self-disclosing in those circumstances.<sup>74</sup>

1.86 Any amendments to the ICAC Act should be drafted to make the limited nature of the protection clear. The Committee notes the evidence of the ICAC Chief Commissioner in this regard:

Any provision put in the Act by way of amendment... should [make]...plain – it would be a straightforward drafting exercise – that any immunity or protection that is given to a person making a disclosure would relate to the disclosure but does not relate to any underlying criminal offence that might be the subject of or related to the disclosure itself.<sup>75</sup>

1.87 The Chief Commissioner suggested the following wording:

This protection applies only to the disclosure and does not extend to any substantive criminal conduct to which the complaint or information refers or to which it in any way relates.<sup>76</sup>

1.88 In protecting public officials who make voluntary disclosures to the ICAC, the PID Act already makes this distinction. That is, it protects public officials for the act of disclosure, not their own wrongdoing. The Acting Ombudsman told the Committee:

...all that I and some others propose is that a person should obtain immunity from legal processes in respect of the act of voluntary disclosure. But a voluntary disclosure does not prevent the operation of normal legal processes that may result in adverse consequences if there is other broader evidence of a person's wrongful actions. The Public Interest Disclosures Act draws that distinction. The objects clause in the PID Act, section 3 subsection (2) states that: "Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority".<sup>77</sup>

1.89 Limited protections for wrongdoers who make disclosures to the ICAC are discussed below.

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<sup>74</sup> Mr Lloyd Babb SC, *Transcript of Evidence*, 7 August 2017, p24.

<sup>75</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p4.

<sup>76</sup> Hon Peter Hall QC, *Answers to Questions Taken on Notice*, 15 September 2017, 1.

<sup>77</sup> Professor John McMillian AO, *Transcript of Evidence*, 7 August 2017, p7.

## Protections for wrongdoers who make disclosures to the ICAC

### There should continue to be very limited protections for wrongdoers who make disclosures to the ICAC

1.90 As above, the Committee does not support provisions that would automatically protect people who make disclosures to the ICAC, from the consequences of their own wrongdoing. However, the Committee does support the very limited protections that already exist for some such people. This is because wrongdoers' culpability in a corrupt enterprise can vary greatly, and informants' evidence can be crucial in uncovering corrupt conduct. It is important, in appropriate cases, that informants not be deterred by the prospect of prosecution from making a disclosure.

1.91 Currently, under section 49 of the ICAC Act, the ICAC can recommend to the Attorney General that a person be granted an indemnity so that evidence provided to the ICAC cannot be used to prosecute that person. If the Attorney General thinks it appropriate to do so, he or she can grant that immunity.<sup>78</sup>

1.92 As above, a number of stakeholders did not support provisions automatically granting informants immunity from the consequences of their own wrongdoing. However, they did support a more discretionary approach, like the one offered by section 49. For example, the Inspector of the ICAC stated:

As to the...question whether persons actually involved in corrupt conduct should receive an immunity in respect of that corrupt conduct, my unequivocal answer is no...It is extremely dangerous to create a legislative provision for such matters. They must be left to the appropriate authority, in this case the ICAC or the Director of Public Prosecutions, to determine whether, given the disclosure made by the person, they should be protected from prosecution for the actions they have engaged in. It is impossible because of the range of relevant factors to predict in advance whether such granted immunity is appropriate and it must be left to the authorities who have to actually deal with the issue.<sup>79</sup>

1.93 In short, a more discretionary approach acknowledges the importance of informants' evidence to some corruption cases, while allowing the authorities to assess the circumstances and extent of the informants' involvement before granting any immunity. The following evidence from the South Australian Commissioner Against Corruption is also instructive. When asked if a person involved in corrupt conduct should be protected from liability he stated:

Probably not. If they make a disclosure about themselves, for example, they probably should not be entitled to any sort of immunity for outing themselves. If they were to make a disclosure about the conduct of a person with whom they were associated as well they should not be subject to any immunity...<sup>80</sup>

<sup>78</sup> See also section 32 *Criminal Procedure Act 1986*.

<sup>79</sup> Submission 23, Inspector of the ICAC, p2. See also Mr Lloyd Babb SC, *Transcript of Evidence*, 7 August 2017, pp24-25; and Hon Michael Murray AM QC, Parliamentary Inspector of the Crime and Corruption Commission, Western Australia, *Transcript of Evidence*, 7 August 2017, p15.

<sup>80</sup> Hon Bruce Lander QC, *Transcript of Evidence*, 7 August 2017, p29.

1.94 The Committee questioned the South Australian Commissioner further, raising the scenario of a junior employee who reports corruption he or she has engaged in, on the instructions of a senior person, because afraid s/he will otherwise lose his/her job. The South Australian Commissioner was asked if a person in these circumstances should receive protection from liability for the disclosure. He told the Committee:

It would depend, I suppose, upon the extent of their involvement and the reasons why they became involved. In those circumstances the Director of Public Prosecutions could probably offer immunity to that person from prosecution on the basis that they cooperated in an investigation and prosecution about whom the report is made. On the face of it you would not want to give a carte blanche immunity to persons of that kind without knowing exactly what their involvement was and the reasons for it.<sup>81</sup>

1.95 For his part, the ICAC Chief Commissioner emphasised informants' assistance can sometimes be crucial in uncovering evidence of corrupt conduct:

It is terribly important to get information from people on the inside. It is notoriously challenging...to prove corrupt conduct. It is usually heavily dependent upon circumstantial evidence...the informer is valuable.<sup>82</sup>

1.96 The Chief Commissioner also indicated the judgment of the ICAC's Commissioners may operate as a 'safety valve'.<sup>83</sup> There have been cases before the ICAC where Commissioners have declined to make corrupt conduct findings against certain wrongdoers. This was because they were assisting the ICAC's investigation in cases where their own levels of culpability were not high.

1.97 In one case, the Chief Commissioner himself, who was then an Assistant Commissioner, declined to make a corrupt conduct finding against a public official whose superiors had required her to re-evaluate a matter to their liking, on pain of losing her job. The Chief Commissioner indicated that to make a corrupt conduct finding in such a case would unnecessarily deter people from stepping forward to assist the ICAC.<sup>84</sup>

**The ICAC should provide upfront, readily-available information about the very limited protections available to wrongdoers who make disclosures**

**Recommendation 8**

**That the ICAC provide readily-available, plain English information on its website about its policies and procedures for managing disclosures made to it by wrongdoers.**

**Recommendation 9**

**That the ICAC be required to warn a person where it has reason to believe the person is about to make a voluntary disclosure involving his or her own**

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<sup>81</sup> Hon Bruce Lander QC, *Transcript of Evidence*, 7 August 2017, p29.

<sup>82</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p7.

<sup>83</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p7.

<sup>84</sup> Hon Peter Hall QC, *Transcript of Evidence*, 15 September 2017, p7.

**wrongdoing, that they will not necessarily be granted immunity from adverse consequences for doing so.**

- 1.98 As above, the Committee supports the continuation of the very limited protections available to wrongdoers who make disclosures to the ICAC. This would continue to mean that the ICAC cannot offer automatic immunity to a wrongdoer who makes a voluntary disclosure – the ICAC could not assess indemnities until after it has heard the disclosure.
- 1.99 For this reason, the ICAC should have an upfront obligation to warn potential informants about the very limited nature of these protections and to provide information about the ICAC’s policies and procedures for managing such disclosures, on its website. This is consistent with traditional common law rights against self-incrimination that are already upheld by the ICAC’s legislative regime.<sup>85</sup>
- 1.100 The Committee notes evidence from the Inspector of the ICAC on this matter. The Inspector drew an analogy with voluntary disclosures made by wrongdoers to the Australian Competition and Consumer Commission, for which protections are also limited.

**Mr McClintock:** ...in competition cartel cases or price-fixing cases...the majority, if not all, of the investigations that the Australian Competition and Consumer Commission [ACCC] initiates come from disgruntled company executives who for some reason have fallen out...I understand the attitude of the ACCC to this is to say, “If you come forward first we will go easier on you and we will take into account the fact that you came forward first.” But then they say “Ultimately, it is a matter for the court what actually happens”...

**The CHAIR:** How does the ACCC know about a conspiracy unless someone has gone to them and said, “I have got something to tell you” and the ACCC would reasonably then say, “We do not know whether we can give you an indemnity until we know what you are going to say”.

**Mr McClintock:** Exactly. That is what they say...“You tell us and if you are completely frank and open it will be better for you” but they will not say how it will be better for them.<sup>86</sup>

- 1.101 He further agreed the ICAC should have clear and freely available policies and procedures to inform people upfront about how it deals with such disclosures, and to put them on notice that the ICAC cannot assess indemnities until it hears the disclosure.<sup>87</sup>

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<sup>85</sup> See *Independent Commission Against Corruption Act*, s26.

<sup>86</sup> *Transcript of Evidence*, 7 August 2017, pp35-36.

<sup>87</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 7 August 2017, pp35-36.

**An additional very limited protection could be extended to wrongdoers who make voluntary disclosures to the ICAC**

**Recommendation 10**

**That the ICAC Act be amended to extend a very limited protection against self-incrimination to people who make voluntary disclosures to the ICAC.**

- **The provision should not apply so as to protect all people who make voluntary disclosures about their own wrongdoing to the ICAC.**
- **However, there should be discretion to grant a person protection against self-incrimination to the extent that his or her voluntary disclosure reveals s/he has engaged in wrongdoing that is a consequence of making the disclosure. This discretion could be vested in the ICAC; or in the Director of Public Prosecutions, following the ICAC's recommendation.**

1.102 As well as supporting the continuation of the very limited protections available to wrongdoers who make disclosures to the ICAC discussed above, the Committee considers an additional limited protection against self-incrimination could be extended to wrongdoers who make voluntary disclosures to the ICAC. As above, informants' evidence can be crucial in uncovering corrupt conduct. However, this additional protection should apply only in very limited circumstances and be at the discretion of the ICAC or the DPP.

1.103 Currently, section 26 of the ICAC Act provides that where the ICAC requires a person to make a statement or produce a document or thing, and the statement, document or thing incriminates that person, he or she can object at the time. If he or she does object, the statement, document or thing cannot be used in any proceedings against the person. The Acting Ombudsman explained to the Committee this does not mean other corroborative material gleaned during an ICAC investigation cannot be used in proceedings against the person, only that the statement, document or thing cannot.<sup>88</sup>

1.104 The Committee does not favour extending this protection against self-incrimination to voluntary disclosures per se. The strong arguments for the protection against self-incrimination for compelled disclosures, do not apply to voluntary disclosures. A person who is compelled to give evidence of his or her wrongdoing to the ICAC is thus compelled to waive his or her basic common law right against self-incrimination.<sup>89</sup> In these circumstances, a protection that salvages the right to some degree (by preventing the compelled evidence being used in proceedings against the person) is important. In contrast, a person who voluntarily discloses such wrongdoing has made a choice to waive this right.

1.105 However, there should be discretion to grant a person protection against self-incrimination to the extent that his or her voluntary disclosure reveals that s/he

<sup>88</sup> See *Transcript of Evidence*, 7 August 2017, pp9-10.

<sup>89</sup> The Australian Law Reform Commission describes the right against self-incrimination as a basic and substantive common law right, see Australian Law Reform Commission website, <https://www.alrc.gov.au/publications/common-law-right-6>, viewed 20 October 2017.

has engaged in wrongdoing that is a consequence of making the disclosure. An example of this might be where an informant makes a voluntary disclosure about someone else's conduct and the disclosure reveals the informant has illegally obtained evidence of that conduct. If the discretion to protect the person against self-incrimination were exercised, the disclosure could not be used in proceedings against the person for illegally obtaining the evidence.

- 1.106 The discretion to grant the protection could be vested in the ICAC, or in the DPP, following the ICAC's recommendation.
- 1.107 As with the protections that already exist for wrongdoers under section 49 of the ICAC Act (discussed above), under the model proposed, the ICAC could not assess any protections for a person against self-incrimination until s/he has made his or her disclosure. The Committee has made recommendations above for the ICAC to have an upfront obligation to provide information and warnings about the very limited nature of the protections that apply to wrongdoers who make disclosures. These recommendations would apply equally in respect of the protection against self-incrimination proposed by the Committee, should it come into force.

# Appendix One – Conduct of the Inquiry

## Terms of Reference

On 22 March 2017, the Committee resolved to conduct an inquiry into protections for people who make voluntary disclosures to the ICAC, and adopted the following terms of reference:

That the Committee on the Independent Commission Against Corruption ('ICAC') inquire into and report on whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purposes of the ICAC's functions.

## Submissions

The Committee called for submissions by issuing a media release and writing to key stakeholders, inviting them to make a submission. The closing date for submissions was 2 June 2017.

The Committee received 23 submissions from a range of stakeholders including the ICAC; other NSW bodies with public oversight and/or prosecutorial functions including the Ombudsman, the Information and Privacy Commission, and the Director of Public Prosecutions; the ICAC Inspector; former ICAC Inspectors; the NSW Department of Premier and Cabinet; the NSW Local Court; a NSW Member of Parliament; KPMG; integrity agencies and inspectorates in other jurisdictions; expert individuals and private individuals.

A complete list of submission makers can be found at Appendix Two.

## Public Hearing

The Committee held public hearings for the inquiry on 7 August and 15 September 2017 at Parliament House Sydney. 12 witnesses appeared to give evidence to the inquiry. They included the ICAC Chief Commissioner and Commissioners; the ICAC Inspector; the NSW Director of Public Prosecutions; the NSW Information Commissioner; the Independent Commissioner Against Corruption, South Australia; the Parliamentary Inspector of the Crime and Corruption Commission, Western Australia; and representatives of the Law Society of NSW. A full list of witnesses who appeared can be found at Appendix Three.

The transcripts of evidence from the hearings can be found at the inquiry webpage:

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2433>.

## Appendix Two – List of Submissions

Submission No 1	Hon Harvey Cooper AM, former Inspector of the ICAC
Submission No 2	Mr Andrew Tink AM
Submission No 3	Hon Reginald Blanch AM QC, Acting ICAC Commissioner
Submission No 4	Mr Graham Kelly, former Inspector of the ICAC
Submission No 5	His Honour Judge Graeme Henson, Chief Magistrate, NSW Local Court
Submission No 6	Confidential submission
Submission No 7	Mr Lloyd Babb SC, NSW Director of Public Prosecutions
Submission No 8	Mr Stephen O’Brien QC, Commissioner, Independent Broad-based Anti-Corruption Commission, Victoria
Submission No 9	Confidential submission
Submission No 10	Ms Elizabeth Tydd, NSW Information Commissioner and CEO, Information and Privacy Commission NSW
Submission No 11	Professor John McMillan AO, Acting NSW Ombudsman
Submission No 12	Confidential submission
Submission No 13	Confidential submission
Submission No 14	Mr Jamie Parker MP, Member for Balmain
Submission No 15	Hon Bruce Lander QC, Independent Commissioner Against Corruption, South Australia
Submission No 16	Ms Therese Cochrane, Secretary, NSW Council for Civil Liberties
Submission No 17	Mr Peter McLean, CEO, Rule of Law Institute of Australia
Submission No 18	Hon Michael Murray AM QC, Parliamentary Inspector, Corruption and Crime Commission of Western Australia
Submission No 19	KPMG
Submission No 20	NSW Bar Association
Submission	Ms Pauline Wright, President, Law Society of NSW

No 21

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Submission NSW Department of Premier and Cabinet

No 22

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Submission Mr Bruce McClintock SC, Inspector of the ICAC

No 23

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## Appendix Three – List of Witnesses

### Monday 7 August 2017, Jubilee Room, Parliament House

<b>Witness</b>	<b>Organisation</b>
Ms Elizabeth Tydd NSW Information Commissioner and CEO	Information and Privacy Commission, NSW
Ms Roxane Marcelle-Shaw Director, Investigation and Reporting	Information and Privacy Commission, NSW
Professor John McMillan AO Acting NSW Ombudsman	Ombudsman NSW
Hon Michael Murray AM QC Parliamentary Inspector of the Crime and Corruption Commission, Western Australia	Office of the Parliamentary Inspector of the Crime and Corruption Commission, Western Australia
Ms Pauline Wright President and Chair, Public Law Committee	Law Society of NSW
Mr Andrew Chalk Deputy Chair, Public Law Committee	Law Society of NSW
Mr Lloyd Babb SC NSW Director of Public Prosecutions	Office of the Director of Public Prosecutions
Hon Bruce Lander QC Commissioner	Independent Commissioner Against Corruption, South Australia
Mr Bruce McClintock SC Inspector	Office of the Inspector of the ICAC

### Friday 15 September 2017, Jubilee Room, Parliament House

<b>Witness</b>	<b>Organisation</b>
Hon Peter Hall QC Chief Commissioner	ICAC
Ms Patricia McDonald SC Commissioner	ICAC
Mr Stephen Rushton SC Commissioner	ICAC

## Appendix Four – Extracts from Minutes

### MINUTES OF MEETING No 23

2:47pm, 22 March 2017  
Macquarie Room, Parliament House

#### Members Present

Mr Tudehope (Chair), Mr Hoenig, Mr Khan, Mr Lynch, Ms Mihailuk, Revd Nile, Mr Taylor and Ms Voltz.

#### Officers in Attendance

Carly Maxwell, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

#### 1. Apologies

The Committee noted apologies from Mr Humphries, Mr Patterson and Mr Provost.

2. \*\*\*

3. \*\*\*

#### 4. Possible Inquiry into Protections for People who make Voluntary Disclosures to the ICAC

The Committee considered the Chair's proposal for it to conduct an inquiry into protections for people who make voluntary disclosures to the ICAC. The Committee also considered draft terms of reference for the inquiry, circulated to members in advance of the meeting.

Discussion ensued.

Resolved, on the motion of Mr Taylor, seconded by Revd Nile:

- That the Committee conduct an inquiry into protections for people who make voluntary disclosures to the ICAC.
- That the Committee adopt the terms of reference as circulated.

The Committee noted that Committee staff will draft a list of stakeholders to invite to make a submission to the inquiry and that the list will be emailed to members for consideration.

5. \*\*\*

6. \*\*\*

7. \*\*\*

8. \*\*\*

9. \*\*\*

10. \*\*\*

## **11. Next meeting**

The Committee adjourned at 4:22pm until a date and time to be determined.

## **MINUTES OF MEETING No 24**

12:32pm, 2 May 2017

Room 1254, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Mr Lynch, Ms Mihailuk, Revd Nile, Mr Patterson, Mr Taylor and Ms Voltz.

### **Officers in Attendance**

Helen Minnican, Carly Maxwell, Elspeth Dyer, Jacqueline Linnane, Derya Sekmen and Millie Yeoh.

#### **1. Confirmation of Minutes**

Resolved, on the motion of Mr Patterson, seconded by Mr Khan:

That the draft minutes of meeting no 23, held on 22 March 2017, be confirmed.

2. \*\*\*

3. \*\*\*

#### **4. Next meeting**

The Committee adjourned at 1:46pm until Thursday 4 May 2017.

## **MINUTES OF MEETING No 25**

1:01pm, 4 May 2017

Room 814-815, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Mr Lynch, Ms Mihailuk (from 1:13pm), Revd Nile (from 1:06pm), Mr Patterson, Mr Taylor and Ms Voltz.

### **Officers in Attendance**

Helen Minnican, Carly Maxwell, Elspeth Dyer, Jacqueline Linnane, Derya Sekmen and Millie Yeoh.

#### **1. Confirmation of Minutes**

Resolved, on the motion of Mr Taylor, seconded by Mr Patterson:

That the draft minutes of meeting no 24, held on 2 May 2017, be confirmed.

2. \*\*\*

3. \*\*\*

#### 4. Inquiry into Protections for People who make Voluntary Disclosures to the ICAC

The Committee noted that the Chair's draft list of stakeholders to invite to make a submission to its inquiry into protections for people who make voluntary disclosures to the ICAC was emailed to Committee members for comment on 24 March 2017.

The Committee also considered a draft timetable for the inquiry.

Resolved, on the motion of Mr Provest:

- That the Committee seek submissions to its inquiry into protections for people who make voluntary disclosures to the ICAC by 2 June 2017;
- That the Committee agree on the Chair's draft list of stakeholders to be invited to make a submission to the inquiry;
- That the Chair issue a media release announcing the inquiry and calling for submissions by 2 June 2017.

5. \*\*\*

6. \*\*\*

7. \*\*\*

#### 8. Next meeting

The Committee adjourned at 1:25pm until Wednesday 10 May 2017.

### MINUTES OF MEETING No 26

1:28pm, 22 June 2017

Room 1254, Parliament House

#### Members Present

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan (from 1:30pm), Mr Lynch, Ms Mihailuk, Revd Nile (from 1:29pm), Mr Taylor and Ms Voltz.

#### Officers in Attendance

Helen Minnican, Carly Maxwell, Elspeth Dyer, Jacqueline Linnane, Derya Sekmen and Millie Yeoh.

#### 1. Apologies

An apology was received from Mr Patterson.

#### 2. Confirmation of Minutes

Resolved, on the motion of Mr Lynch, seconded by Mr Hoenig:

That the draft minutes of meeting no 25, held on 4 May 2017, be confirmed.

3. \*\*\*

#### 4. Correspondence

\*\*\*

The Committee considered the following items of correspondence received:

- Mr Geoffrey Watson SC, email dated 5 May 2017, declining to make a submission to the Committee's inquiry into protections for people who make voluntary disclosures to the ICAC.
- Ms Cara Sorensen, email dated 8 May 2017 on behalf of the Chief Judge of the District Court declining to make a submission to the Committee's inquiry into protections for people who make voluntary disclosures to the ICAC.
- Mr Stephen Donaghue QC, Commonwealth Solicitor-General, dated 5 May 2017, declining to make a submission to the Committee's inquiry into protections for people who make voluntary disclosures to the ICAC.
- \*\*\*
- The Hon Reginald Blanch AM QC, ICAC Commissioner, dated 15 May 2017, regarding the ICAC's submission to the Committee's voluntary disclosures inquiry.
- \*\*\*
- The Hon T.F. Bathurst, Chief Justice NSW Supreme Court, dated 17 May 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- Ms Wendy Endebrock-Brown, Director Legal Services Directorate, Corruption and Crime Commission of Western Australia, email dated 18 May 2017 declining to make a submission to the Committee's voluntary disclosures inquiry.
- Mr Tony Norman, Manager EAU/Secretariat, Office of Commissioner, NSW Police Force, email dated 23 May 2017 advising Police will not be making a submission to the Committee's voluntary disclosures inquiry.
- Mr Robin Brett QC, Inspector, Victorian Inspectorate, email dated 26 May 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- Professor Adam Graycar, email dated 28 May 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- Mr Graeme Head, Public Service Commissioner, dated 29 May 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- The Hon Murray Gleeson AC, QC, dated 30 May 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- Mr David Cambridge, Associate to Chief Commissioner of the Law Enforcement Conduct Commission, email dated 31 May 2017 advising the Chief Commissioner the Hon MF Adams QC does not propose to make a submission to the Committee's voluntary disclosures inquiry.
- \*\*\*
- Mr Chris Dawson, CEO, Australian Criminal Intelligence Commission, dated 2 June 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.
- Ms Margaret Crawford, Auditor-General of NSW, dated June 2017, declining to make a submission to the Committee's voluntary disclosures inquiry.

Resolved, on the motion of Mr Lynch, seconded by Mr Taylor:

That the correspondence be noted.

## **5. Inquiry into Protections for People who make Voluntary Disclosures to the ICAC**

### **5.1 Publication of submissions**

The Committee considered publication resolutions for submissions lodged for its inquiry into protections for people who make voluntary disclosures to the ICAC.

Resolved, on the motion of Mr Lynch, seconded by Mr Provest:

That submissions 1-5, 7, 8, 10, 11 and 14-21 be received by the Committee and published in full.

Resolved, on the motion of Mr Lynch, seconded by Mr Provest:

That submissions 6, 9, 12 and 13 be received by the Committee but not published.

### **5.2 Public hearings**

The Committee considered when it would like to hold public hearings for its inquiry into protections for people who make voluntary disclosures to the ICAC. The Committee also considered the Chair's draft witness list for the public hearings.

Resolved, on the motion of Mr Lynch, seconded by Mr Taylor:

- That the Committee agree to the Chair's draft witness list for public hearings for the inquiry into protections for people who make voluntary disclosures to the ICAC, as circulated;
- That public hearings for the inquiry into protections for people who make voluntary disclosures to the ICAC take place on suitable Mondays and/or Fridays of the first or second sitting weeks of August 2017.

Resolved, on the motion of Revd Nile, seconded by Mr Provest:

That the Chair issue a media release announcing the public hearings for the inquiry into protections for people who make voluntary disclosures to the ICAC.

6. \*\*\*

7. \*\*\*

8. \*\*\*

## **9. Next meeting**

The Committee adjourned at 1:41pm until a date and time to be determined.

## **MINUTES OF MEETING No 27**

2:07pm, 24 July 2017

Room 1254, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Hoenig (by telephone, outside jurisdiction), Mr Khan, Ms Mihailuk, Mr Patterson (by telephone), Mr Taylor and Ms Voltz.

### **Officers in Attendance**

Helen Minnican, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

### **1. Apologies**

Apologies were received from Mr Provest (Deputy Chair), Mr Humphries, Mr Lynch and Revd Nile.

### **2. Confirmation of Minutes**

Resolved, on the motion Mr Khan, seconded by Mr Taylor:

That the draft minutes of meeting no 26, held on 22 June 2017, be confirmed.

### **3. Correspondence**

The Committee considered the following correspondence received \*\*\*

- i. \*\*\*
- ii. \*\*\*
- iii. Mr Alastair McConnachie, Deputy Executive Director, NSW Bar Association, email dated 3 July 2017 declining invitation for Bar Association to appear at a hearing for the Committee's voluntary disclosures inquiry.
- iv. Mr Bruce McClintock SC, email dated 4 July 2017, concerning the Committee's invitation to make a submission to its voluntary disclosures inquiry.
- v. Ms Pat Papas, Office Coordinator for Commissioner, Victorian Independent Broad-based Anti-Corruption Commissioner, email dated 6 July 2017 advising that Commissioner is unavailable to give evidence at the Committee's hearing for its voluntary disclosures inquiry.
- vi. \*\*\*

Resolved, on the motion of Mr Khan, seconded by Mr Taylor:

- That the correspondence be noted;
- \*\*\*

### **4. Inquiry into protections for people who make voluntary disclosures to the ICAC**

The Committee noted a submission to its inquiry from the Department of Premier and Cabinet.

Resolved, on the motion of Mr Khan, seconded by Mr Patterson:

That submission 22 to the Committee's voluntary disclosures inquiry from the Department of Premier and Cabinet be accepted by the Committee and published in full on the inquiry webpage.

5. \*\*\*

6. \*\*\*

7. \*\*\*

8. \*\*\*

9. \*\*\*

10. \*\*\*

### **11. Next meeting**

The Committee adjourned at 3:28pm until a date and time to be determined.

## **MINUTES OF MEETING No 28**

9:07am, 7 August 2017

Jubilee Room, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Ms Mihailuk, Revd Nile, Mr Patterson (by telephone), Mr Taylor.

### **Officers in Attendance**

Jason Arditi, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

#### **1. Apologies**

Apologies were received from Mr Humphries, Mr Khan, Mr Lynch and Ms Voltz.

#### **2. Confirmation of Minutes**

Resolved, on the motion Mr Taylor, seconded by Revd Nile:

That the draft minutes of meeting no 27, held on 24 July 2017, be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

6. \*\*\*

7. \*\*\*

#### **8. Inquiry into protections for people who make voluntary disclosures to the ICAC**

##### **8.1 Second Day of Hearings**

The Committee agreed to conduct a second public hearing for its inquiry into protections for people who make voluntary disclosures to the ICAC on a suitable Monday or Friday of the first or second sitting weeks of September 2017.

##### **8.2 Standard resolutions**

The Committee considered standard resolutions for the conduct of its public hearing on 7 August 2017 for the inquiry.

Resolved, on the motion of Revd Nile, seconded by Ms Mihailuk:

- That the Committee conduct a public hearing on 7 August 2017 for its inquiry into protections for people who make voluntary disclosures to the ICAC;
- That the Committee take evidence from witnesses from the Information and Privacy Commission NSW; the Law Society of NSW; and from the Acting NSW Ombudsman; the NSW Director of Public Prosecutions and the Inspector of the ICAC at the public hearing on 7 August 2017;

- That the Committee take evidence by telephone from the Parliamentary Inspector of the Crime and Corruption Commission WA; and from the Independent Commissioner Against Corruption, South Australia at the public hearing on 7 August 2017;
- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 7 August 2017;
- That the Chair send questions on notice to witnesses following the public hearing on 7 August 2017 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 7 August 2017 on the Committee's webpage;
- That the Committee secretariat publish the transcript of evidence taken at the public hearing on 7 August 2017, after making corrections for recording inaccuracy, on the Committee's webpage.

9. \*\*\*

10. \*\*\*

**11. Public Hearing – Inquiry into protections for people who make voluntary disclosures to the ICAC**

At 9:50am, the Chair declared the public hearing open and witnesses and the public were admitted.

Ms Elizabeth Tydd, NSW Information Commissioner and Chief Executive Officer, Information and Privacy Commission NSW, was sworn and examined.

Ms Roxane Marcelle-Shaw, Director, Investigation and Reporting, Information and Privacy Commission NSW, was affirmed and examined.

Ms Tydd made an opening statement.

At 10:18am the evidence of witnesses from the Information and Privacy Commission NSW concluded and the witnesses withdrew.

At 10:20am Professor John McMillan, Acting NSW Ombudsman, was affirmed and examined.

Professor McMillan made an opening statement.

At 10:58am the evidence of Professor McMillan concluded and the witness withdrew.

The Committee took the morning tea adjournment and the public withdrew.

The public hearing resumed at 11:25am and the public was admitted.

The Hon Michael Murray AM QC, Parliamentary Inspector, Corruption and Crime Commission of Western Australia, before the Committee via teleconference, was sworn and examined.

Mr Murray made an opening statement.

At 11:58am, the evidence of Mr Murray concluded and the witness withdrew.

At 11:59am, Ms Pauline Wright, Chair, Public Law Committee and President, Law Society of NSW, was affirmed and examined; and Mr Andrew Chalk, Deputy Chair, Public Law Committee, Law Society of NSW was sworn and examined.

Ms Wright made an opening statement.

At 12:25pm, the evidence of witnesses from the Law Society of NSW concluded and the witnesses withdrew.

At 12:25pm, the Committee took the luncheon adjournment.

The public hearing resumed at 1:19pm and the witness and the public were admitted.

Mr Lloyd Babb SC, Director of Public Prosecutions, was sworn and examined.

At 1:39pm, the evidence of Mr Babb concluded and the witness withdrew.

At 1:44pm, the Hon Bruce Lander QC, Commissioner, Independent Commissioner Against Corruption, South Australia, before the Committee via teleconference, was affirmed and examined.

At 2:00pm, the evidence of Mr Lander concluded, and the witness withdrew.

The Committee took the afternoon tea adjournment.

The public hearing resumed at 3:06pm, and the witness and the public were admitted.

Mr Bruce McClintock SC, Inspector of the Independent Commission Against Corruption, was affirmed and examined.

The Inspector made an opening statement.

At 3:23pm, the Committee agreed to resume its deliberative meeting. The public hearing was adjourned and the witness and the public withdrew.

**12. \*\*\***

**13. Resumption of Public Hearing – Inquiry into protections for people who make voluntary disclosures to the ICAC**

The public hearing resumed at 3:25pm and the witness and the public were re-admitted.

The Inspector, Mr Bruce McClintock SC, resumed giving evidence.

At 3:59pm, the evidence of the Inspector concluded and the witness withdrew.

The public hearing concluded at 3:59pm and the public withdrew.

**14. Next meeting**

The Committee adjourned at 3:59pm until a date and time to be determined.

## **MINUTES OF MEETING No 29**

9:08am, 15 September 2017  
Jubilee Room, Parliament House

### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Khan, Revd Nile and Mr Taylor.

### **Officers in Attendance**

Jason Ardit, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

#### **1. Apologies**

Apologies were received from Mr Humphries, Ms Mihailuk and Mr Patterson.

#### **2. Confirmation of Minutes**

Resolved, on the motion of Revd Nile, seconded by Mr Hoenig:  
That the draft minutes of meeting no 28, held on 7 August 2017, be confirmed.

3. \*\*\*

4. \*\*\*

#### **5. Inquiry into protections for people who make voluntary disclosures to the ICAC**

##### ***5.1 Submission***

The Committee noted it has received a submission to its voluntary disclosures inquiry from the Inspector of the ICAC, Mr Bruce McClintock SC, and that the Inspector has advised he has no objection to the submission being published.

Resolved, on the motion of Mr Hoenig, seconded by Mr Taylor:

That the ICAC Inspector's submission to the Committee's voluntary disclosures inquiry be accepted by the Committee and published on the inquiry webpage.

##### ***5.2 Standard resolutions for public hearing***

The Committee considered standard resolutions for the conduct of a public hearing on Friday 15 September 2017, for the inquiry.

Resolved, on the motion of Mr Khan, seconded by Mr Provest:

- That the Committee conduct a public hearing on 15 September 2017 for its inquiry into protections for people who make voluntary disclosures to the ICAC;
- That the Committee take evidence from witnesses from the Independent Commission Against Corruption;
- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 15 September 2017;
- That the Chair send questions on notice to witnesses following the public hearing on 7 August 2017 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 15 September 2017 on the Committee's webpage;

- That the Committee secretariat publish the transcript of evidence taken at the public hearing on 15 September 2017, after making corrections for recording inaccuracy, on the Committee's webpage.

6. \*\*\*

7. \*\*\*

**8. Public Hearing – Inquiry into protections for people who make voluntary disclosures to the ICAC**

At 10:29am, the Chair declared the public hearing open and witnesses and the public were admitted. Mr Lynch had arrived during the morning tea adjournment, and Mr Khan had departed.

Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, was sworn and examined.

Ms Patricia McDonald SC, Commissioner, Independent Commission Against Corruption, was sworn and examined.

Mr Stephen Rushton SC, Commissioner, Independent Commission Against Corruption, was affirmed and examined.

The Chief Commissioner made an opening statement.

Mr Khan returned at 11:25am.

At 11:57am, the evidence of the witnesses concluded, and the witnesses withdrew.

The public hearing concluded at 11:57am and the public withdrew.

9. \*\*\*

**10. Next meeting**

The Committee adjourned at 12 noon, until 19 September 2017 at 1pm.

**MINUTES OF MEETING No 30**

1:06pm, 19 September 2017  
Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk (from 1:11pm), Revd Nile, Mr Patterson (from 1:09pm), Mr Taylor.

**Officers in Attendance**

Jason Arditi, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

**1. Apologies**

Apologies were received from Ms Voltz.

**2. Confirmation of Minutes**

Resolved, on the motion Mr Taylor, seconded by Mr Khan:

That the draft minutes of meeting no 29, held on 15 September 2017, be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

6. \*\*\*

**7. Next meeting**

The Committee adjourned at 1:12pm until a date and time to be determined.

**MINUTES OF MEETING No 31**

1:02pm, 14 November 2017

Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Mr Khan, Mr Lynch, Ms Mihailuk, Revd Nile, Mr Taylor and Ms Voltz.

**Officers in Attendance**

Jason Arditi, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

**1. Apologies**

An apology was received from Mr Humphries.

**2. Confirmation of Minutes**

Resolved, on the motion Mr Taylor, seconded by Mr Provest:

That the draft minutes of meeting no 30, held on 19 September 2017, be confirmed.

**3. Correspondence**

The Committee considered the following items of correspondence sent:

a. \*\*\*

b. Letter to Mr Bruce McClintock SC, Inspector of the ICAC, dated 26 October 2017, requesting information about measures to deal with the issue of people who disclose to third parties that they have made a complaint to the ICAC (*the Committee agreed to send this letter out of session, by email, on 26 October 2017*).

The Committee also considered the following items of correspondence received \*\*\*:

a. \*\*\*

b. \*\*\*

c. \*\*\*

d. Letter from Mr Bruce McClintock SC, Inspector of the ICAC, dated 2 November 2017, responding to Committee's request for information about measures to deal with the

issue of people who disclose to third parties that they have made a complaint to the ICAC.

e. \*\*\*

Resolved, on the motion of Mr Khan, seconded by Mr Hoenig:

- That the correspondence be noted.
- \*\*\*

4. \*\*\*

#### **5. Inquiry into protections for people who make voluntary disclosures to the ICAC – Report Consideration**

The Committee noted the Chair's draft report, *Protections for People who make Voluntary Disclosures to the ICAC*, distributed to members by email on 3 November 2017.

The Committee agreed to consider the Chair's draft report, *in globo*.

Chair's draft report put, *in globo*.

Mr Lynch moved that recommendation 3, 'That the ICAC Act be amended to provide that it is offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC' be deleted.

Amendment put and agreed to.

Mr Lynch moved that recommendation 3 (circulated as recommendation 4 in the Chair's draft report) be amended by adding to the end 'including whether the ICAC Act should be amended to provide that it is an offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC'.

Amendment put and agreed to.

Resolved, on the motion of Revd Nile, seconded by Mr Provest:

That the Committee adopt the Chair's draft report as amended and that it be signed by the Chair and presented to both Houses.

Resolved, on the motion of Mr Lynch, seconded by Mr Taylor:

That the Committee authorise the Secretariat to make appropriate final editing and stylistic changes as required.

Resolved, on the motion of Mr Taylor, seconded by Mr Lynch:

That once tabled the report be published on the Committee's webpage.

Resolved, on the motion of Mr Provest, seconded by Mr Khan:

That the Chair issue a media release announcing the tabling of the Committee's report, for dissemination by the Committee Secretariat.

6. \*\*\*

#### **7. Next meeting**

The Committee adjourned at 1:23pm until Monday 20 November 2017 at 10am.