Submission No 11

INQUIRY INTO PROPOSED AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

Organisation:

Name: Mr Donald McKenzie

Telephone:

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The Chairperson
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Chairperson,

Thank you for this opportunity to make submissions on this important subject. Please note that, although I am a Principal Lawyer at the NSW Independent Commission Against Corruption (ICAC), these submissions are made in a private capacity, and the views expressed do not represent the views of the Commission that employs me.

I have some significant experience as a legal practitioner involved in the conduct of commissions of inquiry in NSW:

- I was a senior lawyer in the team led by Counsel Assisting John Agius SC at the Royal Commission into the NSW Police Service between 1994 and 1997.

- I have been a Principal Lawyer at the NSW ICAC since October 2002.

- I have recently completed my Executive Masters of Public Administration (EMPA) through the Australian and New Zealand School of Government (ANZSOG) and the University of Sydney, Graduate School of Government (USyd GSG). I used these studies, where I could, to examine more closely the operations of my own agency and anti-corruption agencies generally.

I hope that these submissions provide a useful practitioner perspective to the issues that the Committee is inquiring into.

The Committee is currently considering three possible amendments to the *Independent Commission Against Corruption Act* 1988 (the Act), as follows:

- An amendment to remove the restriction in s 37 which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the ICAC (the first proposed amendment)

- An amendment to remove the restriction in s 37 which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, of compulsorily obtained evidence provided under objection to the ICAC (the second proposed amendment)

- An amendment to make the ICAC's current function of assembling evidence for criminal proceedings a primary function (the third proposed amendment).

In this submission I argue against any of the proposed changes being made. In particular, I argue with respect to the first and second proposed amendment:

- the amendments are likely to upset a delicate balance that currently exists in the legislation between allowing the ICAC to drive at the truth through compelling witnesses to give evidence, and showing appropriate recognition for the community's concern at people being compelled to give evidence adverse to their own legal interests; and

- the amendments are likely to have adverse operational ramifications, reducing the capacity of the ICAC to expose the circumstances in which corrupt conduct has taken place.

Finally I argue that the third proposed amendment would inappropriately move the emphasis for the organisation away from promoting integrity through corruption exposure and other means, towards law enforcement administration.

ARGUMENTS AGAINST THE FIRST AND SECOND PROPOSED AMENDMENTS

The ICAC is an outcomes focused organization

It is clear that from its outset the ICAC was established to achieve outcomes in terms of improving public sector integrity, rather than merely processing suspected offenders.

Premier Greiner emphasized this in his second reading speech to the Legislative Assembly:

> *The Commission has a very specific purpose, which is to prevent corruption and enhance integrity in the public sector*.

The ICAC Act specifies its primary objective as promoting "the integrity and accountability of public administration".

Exposing corruption is a primary means of achieving integrity outcomes

Central to its role of promoting integrity has been its capacity to expose corruption when it occurs. Exposing corruption and the circumstances in which it occurs has consistently been a conduit to integrity enhancing change.

Arguably the primary example of this in the last twenty years has been the Royal Commission into the NSW Police Service (the Royal Commission) and its impact on policing in this State. Although this was not the ICAC, the Royal Commission assumed the powers of the ICAC through the *Royal Commissions (Police Powers) Act* 1994. It also adopted the approach of promoting integrity through corruption exposure. The graphic exposures of the Royal Commission led to a major reform

process and enormous change within NSW Police in terms of enhanced professionalism and integrity. The ICAC has also achieved significant pro-integrity outcomes through successful exposure initiatives. Improved licencing systems, executive recruitment systems and property development systems have all been driven by successful ICAC corruption exposure initiatives.

Enhanced legislative authority has enhanced the ICAC's corruption exposure capacity

Prior to the ICAC, corruption exposure took place primarily through the State's mainstream criminal justice processes. The ICAC emerged partially out of community concern about the capacity of these mainstream processes to deal with this difficult form of criminal type activity, appropriately described by Premier Greiner, in his second reading speech, as "secretive and difficult to elicit. It is a crime of the powerful. It is a consensual crime, with no obvious victim willing to complain."

As the ICAC was established as a separate mechanism to achieve improved corruption exposure, to enhance its capacity to do so it was relieved of critical restraints that operate within mainstream criminal justice processes. In particular:

- it was given the power to compel witnesses to give evidence, even if this tends to be of an incriminating or otherwise adverse nature;

- it was authorized to inform itself in whatever way it sees fit (the normal rules of evidence do not apply); and

- procedural rules that apply within mainstream processes, requiring a person facing an adverse outcome to be apprised of the evidence that will be led against them, were heavily scaled back.

This relief from traditional procedural requirements has substantially enhanced the ICAC's corruption exposure capacity.

Concerns about the abrogation of traditional process requirements

In 1988 these changes did not come without controversy. There was substantial unease about whether these changes involved inappropriate attenuation of civil liberties. As Commissioner Cripps said on March 2009, at a function to mark the ICAC's twentieth year, commenting on debate that took place in Parliament when the bill was introduced:

> *If you read those debates you will see people saying that this legislation was to bring into existence another arm of the KGB, (those are the actual words used). It was said that this would end up being worse than the South African Police Force and someone got so excited he said he thought that the institution would make Colonel Pinochet of Chile blush.*

These concerns may have been a bit extreme, however, as Commissioner Cripps duly acknowledged, general unease about the civil libertarian impact of this legislation was understandable and appropriate. One of the great achievements of the ICAC over its twenty years has been the acceptance its processes have gained. This is a testament to the balance that the legislation has achieved and the responsible way in which the ICAC has used it.

Balanced and durable legislation

Usually, in legal proceedings, a person is entitled to refrain from giving evidence that tends to incriminate them or expose them to civil penalty. Under the ICAC Act a person can be compelled by the Commission to give evidence that would normally attract these privileges. However, they can avail themselves of the protection provided by section 37 of the Act. This is currently a general protection that means the witness' evidence cannot be used in civil or criminal legal proceedings, or any disciplinary proceedings.

This arguably gives a witness greater protection than they have through the aforementioned privileges in mainstream legal proceedings as they are, through this legislation, protected from any civil law ramifications that otherwise might arise as a result of their evidence. However, in other ways their circumstances are arguably worse, as they are required to give evidence of matters they may prefer not to divulge, and this evidence may culminate in a "corrupt conduct" finding being made against them, although this has not formal legal significance. This arrangement, with its effect of enhancing the Commission's corruption exposure capacity, is something that the community has found to be acceptable over the twenty years of the Commission's existence. In my view its durability, in part, arises from its easy balance between people being compelled to give evidence, to support corruption exposure, in circumstances where they normally have access to privileges, and their ability to access a blanket protection against the use of their evidence in civil or criminal proceedings or disciplinary proceedings.

The second proposed amendment arguably put a witness in a worse position than they are exposed to in other proceedings, as they could be compelled to give evidence that can expose them to civil penalty. But irrespective of this, the first and second proposed amendments have the potential to upset an existing balance that has operated successfully in support of corruption exposure, found acceptance and proven durable. In addition, a witness' circumstances will become more complicated. They will need more detailed advice to understand the legal implications of their evidence. Unrepresented witnesses will be more vulnerable.

Operational ramifications of the second proposed amendment

As discussed above, corruption is generally "a consensual crime, with no obvious victim willing to complain". To gain a comprehensive exposure of how corrupt conduct has taken place, an exposure that can be a catalyst to real change, it is generally necessary to gain some meaningful account from people complicit in the corrupt conduct. Where a person might be inclined to give false evidence to the Commission to conceal their involvement in corrupt conduct, or for any other reason, there are two key considerations that should weigh heavily on their mind.

1. Giving false evidence in the face of the Commission is awful. You have no idea what material the Commission has and its capacity to expose your false assertions at a moment's notice. You must answer every question. You have no time to develop plausible falsehoods. The case law says that a person convicted of giving false or misleading evidence to the Commission should receive a jail sentence except in very particular circumstances.

2. If you tell the truth to the Commission, under objection, your evidence cannot be used in any criminal or civil legal proceedings, or any disciplinary proceedings. The Commission may or may not already have a brief of evidence to support criminal proceedings against you, or material that can support adverse civil proceedings. However, these circumstances will not be made worse as you give a truthful account, cocooned in the existing protections.

These are matters that I have discussed many many times with witnesses and their legal representatives. They have led many witnesses to provide the ICAC and similarly structured inquiries with details about how corrupt conduct came about. This has assisted our understanding of corrupt circumstances and aided efforts to enhance public sector integrity.

There are other considerations that can weigh on a witness' mind, including the embarrassment of publically acknowledging their wrong doing, or conversely, the humiliation of being publically exposed as a liar. However the two considerations canvassed above are the most pervading and, in my view, the most influential when witnesses are well advised and have an effective understanding of their circumstances.

The first and second amendment could undermine the impact of the second consideration canvassed above. Witnesses will no longer be cocooned in a blanket protection that ensures that their truthful evidence will not make their legal circumstances worse. They will need to be looking more carefully over their shoulder trying to assess the adverse legal ramifications of their compelled evidence.

The message that cooperation is inherently logical will be blurred. This will impact on witnesses, those who advise them, and the Commission operatives who seek their cooperation, and may threaten the flow of meaningful information from complicit witnesses.

In my view, this is an inappropriate direction for the Parliament to take and is likely to inhibit the Commission's corruption exposure capacity and its ability to impact on public sector integrity.

ARGUMENTS AGAINST THE THIRD PROPOSED AMENDMENT

The terms of reference make the third proposed amendment contingent on one of both of the first two proposed amendments being accepted. On this basis alone I oppose the amendment, for reasons canvassed above.

Even if the third proposed amendment were not contingent on one or both of these amendments being accepted, I would still oppose it.

Under the Act in its current form, the emphasis is on the Commission impacting on public sector corruption through corruption exposure and other means. Supporting the administration of the criminal justice process is a secondary function. In my view this emphasis should remain. The State of NSW is best served by having a Commission whose primary focus is improving the integrity of its public sector. Just because support for the administration of the criminal justice process, in relation to matters that flow from the Commission's inquiries, is a secondary function does not mean it is not necessary and should not be performed effectively and efficiently.

Don McKenzie