Submission No 4

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

Organisation: Police Integrity Commission

Name: Mr John Pritchard

Position: Commissioner

Telephone:

Date received: 30/03/2009

ABN 22 870 745 340

Our ref: 7314/61

27 March 2009

Mr Frank Terenzini MP
Chair
Committee on the Independent Commission Against Corruption
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Terenzini

Re: Submission on proposed amendments to the *Independent Commission Against Corruption Act 1988*

Thank you for you inviting the Commission's views on the amendments to the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") proposed by the Independent Commission Against Corruption ("the ICAC").

It is apparent the proposed amendments would significantly reduce the scope of the protection afforded to witnesses compelled to answer questions without the benefit of the established privileges in ICAC hearings. I note it is specifically proposed to permit the use of self incriminating evidence against the witness in the following circumstances:

- disciplinary proceedings;
- civil proceedings generally or, in the alternative, specific classes of civil proceedings with the object of recovering monies defrauded from the State

1. Exception for use in disciplinary proceedings

As was indicated by the ICAC in its letter to the Committee dated 14 August 2008, evidence obtained under compulsion in hearings of the Police Integrity Commission ("the PIC") can be used in proceedings under the *Police Act 1990*, including proceedings to remove an officer for loss of the confidence of the Commissioner of Police, as well as in any other disciplinary proceedings. Section 40(3) of the *Police Integrity Commission Act 1996* ("the PIC Act") provides:

> *An answer made, or document or other thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or*

> *criminal proceedings, but may be used in deciding whether to make an order under section 173 or 181D of the Police Act 1990 and is admissible in any proceedings under Division 1A or 1C of Part 9 of that Act, an order under section 183A of that Act or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to an order under section 183A of that Act and in any disciplinary proceedings (including for the purposes of taking disciplinary action under Part 2.7 of the Public Sector Employment and Management Act 2002). [Emphasis added]*

To date, the use of evidence taken by the PIC against an administrative officer has arisen for consideration on one occasion only. The matter arose before the amendment of s 40(3) inserting the underlined words above,[1] that is, when section 40(3) provided for the use of such evidence in relation to "disciplinary proceedings" only. The PIC understands that prior to the amendment the NSW Police Force considered there was some doubt as to whether "disciplinary proceedings" encompassed the "disciplinary action" contemplated under Part 2.7 of the PSEM Act.

In this respect, the NSW Police Force might be of further assistance in informing the Committee whether and to what extent the NSW Police Force considers that evidence of admissions given before the PIC might practically be able to be used in action against administrative officers of the NSW Police Force under Part 2.7 of the *Public Sector Employment and Management Act 2002* ("the PSEM Act") (such officers being subject to that Part by reason of s 184 of the *Police Act 1990*).

In considering the ICAC proposal, it may be of some assistance for the Committee to consider the legislative history leading to the provision of an exception in s 40(3) for managerial action under the *Police Act 1990* and disciplinary proceedings elsewhere.

The PIC was established as a purpose built body with a specific focus upon the investigation of serious police misconduct and corruption on the recommendation of the Royal Commission into the NSW Police Service ("the Police Royal Commission").[2] To carry out its function of detecting and investigating serious police misconduct, the PIC was vested with the full range of coercive powers, those powers being consistent with those already held by the ICAC, the New South Wales Crime Commission and the Police Royal Commission.

There were, however some notable differences. In relation to the Police Royal Commission, there was no provision similar to s 40(3) of the PIC Act permitting evidence given to it to be used in other proceedings. Section 17(2) of the *Royal Commissions Act 1923* provided:

> *An answer made, or document or other thing produced by a witness to or before the [Royal Commission] shall not, except as otherwise provided in this section, be admissible in evidence against that person in any civil or criminal proceedings.*

As will be noted, the subsection is not materially different from subs 37(3) of the ICAC Act nor subs 18B(2) of the *New South Wales Crime Commission Act 1985.*

---

[1] *Police Integrity Commission Amendment (Crime Commission) Act 2008*, Sch 1 [10].
[2] *Interim Report of the Royal Commission into the NSW Police Service*, February 1996.

However evidence of police corruption emerging during the course of the Police Royal Commission prompted legislative action to enable the Commissioner of Police to take internal action in respect of that evidence. It was considered the Police Royal Commission was a unique experience in the history of policing in NSW, and a unique response over and above the normal disciplinary processes was necessary.[3]

On 12 December 1995, s 181B of the then *Police Service Act 1990* commenced.[4] That section provided the Commissioner of Police might:

> *... dismiss a police officer from the Police Service if the Commissioner has formed the opinion, based on information arising out of the Police Royal Commission, that the officer:*
> *(a) has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and*
> *(b) is no longer a fit and proper person to hold a position in the Police Service.*

That provision permitted the Commissioner of Police to remove unsuitable police officers in a process that was "shorter, more efficient and more certain in its outcomes",[5] and qualitatively different from then-current disciplinary processes.[6] The provision was later amended to permit the Commissioner of Police to have regard to information arising from investigations of the PIC for the same purpose.[7]

The protection afforded to witnesses under s 17(2) of the *Royal Commissions Act* did not apply to use of such evidence in action under the new process established by s 181B of the *Police Service Act*.[8] Accordingly, the Commissioner could and, in some cases, was bound to, take account of evidence given under the shield of s 17(2).

In his Second Reading speech on the Bill inserting s 181B, the then Minister for Police said of proposed s 181B that it was intended to introduce:

> *"... an alternative dismissal process reserved exclusively for use against officers against whom there is overwhelming evidence of corruption arising out of the royal commission into the Police Service."*

The section was considered to "provide a fast track method of dismissal to deal with 'exceptional circumstances' of police corruption revealed in the Police Royal Commission, because a view was taken that the existing dismissal mechanisms were inappropriate to deal with [the] situation."[9]

The *Police Legislation Further Amendment Act 1996* introduced new s 181D, a provision which remains central in the management of sworn police officers of the NSW Police Force. (As noted above, administrative officers were dealt with under the

---

[3] The Hon Mr Paul Whelan, Minster for Police, *Hansard,* NSW Legislative Assembly, 2nd Reading Speech on the *Police Service Amendment Bill*, 20 September 1995.
[4] inserted by *Police Service Amendment Act 1995*.
[5] The Hon Mr Paul Whelan, Minster for Police, *Hansard,* NSW Legislative Assembly, 2nd Reading Speech on the *Police Service Amendment Bill*, 20 September 1995.
[6] *Oswald v NSW Police Service,* unreported, IRC Full Bench, 11 March 1999; *Bigg and Anor v NSW Police Service,* unreported, IRC Full Bench, 31 March 1998.
[7] *Police Legislation Amendment Act 1996.*
[8] *Oswald v NSW Police Service,* unreported, IRC Full Bench, 11 March 1999; *Bigg and Anor v NSW Police Service,* unreported, IRC Full Bench, 31 March 1998.
[9] *Bigg and Anor v NSW Police Service,* unreported, IRC Full Bench, 31 March 1998.

PSEM Act and its predecessor). That section provides the Commissioner of Police with broader power to remove officers on the basis that he or she has lost confidence in the officer in question. With the concurrent passage and commencement of the PIC Act, and s 181D, s 181B was consequently repealed.

In consultations on the draft bill that was eventually passed as the PIC Act, the Police Royal Commission suggested that answers given under compulsion before the Commission should be admissible in disciplinary proceedings, and the bill was amended to take account of that suggestion.

The NSW Police occupies a special position of public trust requiring the highest level of integrity in its members, not least because of the powers able to be exercised by its members. Consequently the NSW Police Force has been and is subject to far more stringent standards of integrity than might otherwise be expected of those in the Public Service generally. In *Bigg and Anor v NSW Police Service*, it was observed that:

> *The Police Service as a disciplined force with statutory duties, powers and capacities has been subject to industrial procedures different to those applying to the general public and to those who were otherwise employed in the public service.*[10]

It is on that basis primarily, in combination with the exposures occurring in the Police Royal Commission, that the broad protection from the use of self incriminating evidence obtained under compulsion was limited.

2. Exception for use in civil proceedings generally or in recovery proceedings

As a matter of broad public policy, there can be little doubt that the recovery of money or assets fraudulently obtained from the State by corrupt or criminal activity is an issue of significant public interest.

It is not altogether clear whether the impetus for the submission of the ICAC in this respect lies in evidentiary difficulties that may have arisen in relation to civil claims for recovery. In the PIC's investigations, it has rarely been the case that witnesses are examined without there being significant evidence obtained from other sources pointing to misconduct by a witness such as would support any recovery action arising from its investigations.

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

The limiting of any exception to s 37(3) of the ICAC Act to civil proceedings of a certain description, such as "civil proceedings taken by [a] public sector agency to recover the monies it lost as a result of the fraud", would certainly appear to be less objectionable.

---

[10] unreported, IRC Full Bench, 31 March 1998.

However there may be some doubt as to whether the civil actions likely to result from an ICAC investigation for such purposes are able to be so easily classified, and in particular what actions are encompassed by recovery actions. Civil proceedings arising from an ICAC investigation may involve actions in contract, breaches of trusts by agents and employees, claims for restitution and such like, with the form of action necessarily varying according to the particular misconduct.

It can be anticipated that it would be open for a number of simultaneous claims arising on different legal grounds to be brought even in respect of the one person, some of which may be difficult to class as strictly recovery action, such as requiring a public official, as an employee, to account for money paid by way of bribe or secret commission. One practical consideration that arises is that legal costs involved in bringing such proceedings could well be prohibitive.

But if the fundamental policy objective is the recovery of corruptly obtained money or assets, then making evidence taken by the ICAC available in civil recovery proceedings seems to address only part of what may need to be considered. In particular, the Committee may wish to consider what forms of civil action may be available, or the extent to which corrupt benefits are in fact open to recovery under established civil actions. For example, while many of the matters examined in the recent ICAC Operation Monto involve straightforward cases of theft and false claims, many others may not be so susceptible of effective resolution within the established civil actions, such as in relation to contracts corruptly directed to associated companies in circumstances where the corrupt public official is authorised to approve the contract.

It may be instructive for the Committee to consider the position in relation to recovery action arising from investigations of the PIC. Recovery action in respect of police misconduct or criminal activity investigated by to the PIC is taken under either the *Criminal Assets Recovery Act 1990* (see s 19 of the PIC Act) or the *Confiscation of Proceeds of Crime Act 1989*. The touchstone in both cases is criminal conduct, with the key difference being that the former are civil proceedings whilst the latter occur within the context of criminal proceedings.

In neither case is it open to use evidence taken by the PIC under objection against the witness who gave the evidence.

That bar has not given rise to any significant difficulties in the cases brought by the PIC to date, which have all been under the provisions of the *Criminal Assets Recovery Act 1990*. It is not anticipated that any difficulty would arise in any event given the extensive information gathering powers under that Act, including the power to examine a defendant about his/her affairs without the privilege against self incrimination.

Given the established nature of proceedings under the *Criminal Assets Recovery Act 1990* and the powers of information gathering able to be exercised under that Act, it might be more appropriate to consider permitting the ICAC to commence proceedings under that Act in preference to amendment of s 37(3) of the ICAC Act.

3. Amendment of ICAC functions to specify assembling of evidence for criminal proceedings as a primary function

It is not entirely clear why, if the amendments proposed in paragraphs 1 and 2 of the terms of reference were made, this further amendment would be necessary. To the extent that the changes in 1 and 2 would enhance the admissible evidence collection capability of the ICAC that would not extend to admissible evidence available for criminal proceedings beyond those provisions already available that allow for coerced evidence given under objection to be used in proceedings for offences under the ICAC Act.

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

Whether or not the proposed changes in paragraphs 1 and 2 were made, in the PIC's view, the proposed further amendment would be unnecessary.

The PIC does not consider that there is any information referred to in this submission that requires it be treated as confidential.

Yours faithfully,

John Pritchard
Commissioner