Submission No 8

PROSECUTIONS ARISING FROM INDEPENDENT COMMISSION AGAINST CORRUPTION INVESTIGATIONS

Organisation: Independent Commission Against Corruption

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Submission from the Independent Commission Against Corruption to the Inquiry into Prosecutions Arising from ICAC Investigations

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SUBMISSION TO THE INQUIRY INTO PROSECUTIONS ARISING FROM ICAC INVESTIGATIONS

Introduction

The Commission welcomes the opportunity to make this submission to the *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations*, announced on 19 June 2014.

It is pertinent to note at the outset that a number of successful prosecutions have resulted from the Commission's investigations.

As at 20 June 2014, the Commission stated that there were 22 people before courts in NSW as a result of referrals to the Director of Public Prosecutions ("the DPP") from the ICAC. At that time, the Commission stated that in the last 30 months 35 people had pleaded guilty or been found guilty of charges arising from Commission investigations. Six of those people were sentenced to full-time imprisonment, five have been sentenced to imprisonment to be served by way of home detention, and eight have been sentenced to imprisonment but had the execution of that sentence suspended on condition they enter into a good behaviour bond.

The Commission acknowledges that easily accessible information on the status of such prosecutions has not been readily available. In order to address that shortcoming, the Commission is now publishing on its website a summary of the status of all prosecutions undertaken by the DPP following referral by the Commission. This summary is regularly updated and can be easily accessed via the Commission's website homepage.

Despite some media statements to the contrary, the Commission does not consider that there has been any loss of public confidence in its work as a result of a perceived lack of prosecutions arising out of Commission investigations. The public generally appreciates that the work of the Commission is focused on the investigation and exposure of corrupt practices and that the Commission's public inquiries effectively achieve that purpose. Public inquiries also fulfil an educative purpose. These features of public inquiries are, in many respects, much more instrumental in addressing the causes and effects of corruption, and therefore contributing to its deterrence, than prosecution through the courts of offences that often fail to adequately represent the nature and scope of the relevant conduct. The most recent survey of community attitudes to ICAC bears out these observations:

> *The NSW public has a positive perception of the ICAC. Almost all respondents who were aware of the ICAC indicated that it was a good thing for the people of NSW, and this has increased significantly over 20 years.*
>
> *More than two-thirds indicated that the ICAC had been successful at exposing corruption and more than half indicated that the ICAC had been successful at reducing corruption. While the percentage of respondents who indicated that the ICAC had been successful at exposing corruption has decreased since post-2000, the percentage who thought that the ICAC had been successful does not appear to have markedly changed and the percentage who thought that the ICAC is a good thing for the people of NSW appears to have increased from an already high starting point.*

> *Survey results from the past 20 years indicate that public officials have held a significantly more positive view of the ICAC's effectiveness than private citizens. They are also more likely to indicate that having the ICAC is a good thing for the people of NSW.*
>
> *Respondents' reasons for their ratings of ICAC effectiveness tended to fall into three sets of categories. Respondents who indicated that the ICAC had been successful at exposing or reducing corruption most frequently focused on successful investigations and media coverage of them. In contrast, reasons why the ICAC was a good thing for the people of NSW tended to focus on the need to have an organisation that was an independent oversight body that tackled corruption.*
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> *Community Attitudes to Corruption and to the ICAC, Report on the 2012 Survey*, ICAC 2013, page 19.

It is also worthy of note that other proceedings, such as confiscation proceedings instituted under the *Criminal Assets Recovery Act 1990* and proceedings for taxation offences, constitute additional and effective methods of ensuring accountability for corrupt behaviour.

Moreover, the Commission has previously recommended that the current prohibition on the use of evidence adduced at a public inquiry under objection in subsequent civil proceedings ought be removed. The privilege against self incrimination that underpins the prohibition against use of answers given under objection in subsequent criminal proceedings has no place in civil proceedings. The removal of the prohibition for the purposes of civil proceedings could facilitate the recovery of funds acquired through corrupt conduct.

The Commission makes the following specific submissions on the terms of reference.

Whether gathering and assembling evidence that may be admissible in prosecutions should be a principal function of ICAC.

The principal functions of the Commission, set out in s13(1) of the *Independent Commission Against Corruption Act 1988* ("the Act"), reflect the principal objects of the Act itself (see s 2A). The gathering and assembling of evidence appears as another function under s 14(1)(a). It complements the restriction on a finding of corrupt conduct under s 9(1)(a) and the power to form an opinion as to whether the advice of the DPP should be sought pursuant to s 13(5)(b). It is apparent that, if the Commission is required in some cases to determine that the conduct constitutes or involves a criminal offence, then it is appropriate in those cases that the matter ought be referred to the DPP, together with the evidence in the possession of the Commission which justifies that referral.

There are compelling reasons for maintaining the status quo in this respect. First and foremost is the fact that the Commission's investigative processes are not concerned with the admissibility of evidence in judicial proceedings (deliberately so). It is imperative to the work of the Commission that lines of inquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis which required Commission staff to assess the potential admissibility of evidence might well influence a decision to follow a particular line of inquiry in circumstances where the resources of the Commission have to be allocated in accordance with its principal functions. Such a constraint could compromise the capacity of the Commission to fully expose corruption.

The Commission's investigations are highly resource intensive. There are three investigative teams of between eight and 12 people, supported by a preliminary investigations team and a surveillance and technical unit. All teams are occupied at any given time with a number of inquiries at different stages. From a practical perspective, an investigations team assigned to a given inquiry will be fully engaged at every stage of the inquiry, including during the public inquiry. The evolving nature of an inquiry and the potential for new developments to significantly impact upon the course of public inquiries cannot be underestimated. Increasingly, investigations involve the analysis of voluminous electronic data (emails, SMS and telephone records) and financial records, even while the public inquiries are on foot. The effectiveness of an investigation and, correspondingly, the results of a public inquiry, will inevitably be compromised if equal weight is to be given to the gathering and assembly of admissible evidence.

The powers of the Commission to compel production of documents and the attendance of witnesses, the availability of covert forms of surveillance, the absence of any rules of evidence, and the abrogation of the right to silence and the right against self incrimination for the purposes of an inquiry under the Act are all hallmarks of an investigative body with coercive powers. There is a sharp divide which is recognised in theory and in practice between investigative proceedings and judicial proceedings. The powers of the Commission derive firmly from the former, whereas the rules of evidence and procedure that are critical to a fair trial are definitive of the latter. Increased reliance upon coercive investigatory bodies in order to get to the heart of otherwise covert illegal activities has not diminished the law's observance of this distinction: (see *Lee v The Queen* [2014] HCA 20 (21 May 2014) and *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2013)). While the present ancillary function in s 14(1)(a) of the Act does not dilute the essential character of the Commission, it is arguable that the elevation of that ancillary function to a principal one will do so.

For these reasons, it is the view of the Commission that it is both undesirable and unnecessary to change or supplement the current focus of the Commission's activities.

The effectiveness of relevant ICAC and Director of Public Prosecutions processes and procedures, including alternative methods of brief preparation.

The Commission acknowledges that there have been unsatisfactory delays in the provision of briefs to the DPP. However, the practices contributing to those delays have been addressed and the Commission is now meeting the time frames established by a Memorandum of Understanding between the Commission and the DPP.

The Commissioner met with the Director of Public Prosecutions in April this year to discuss further improvements to the preparation of briefs that might assist the process of referral. Solicitors from the DPP serve as Commission officers from time-to-time by way of secondment. The assistance of those solicitors in the preparation of a brief at the end of an investigation is an attractive prospect, but the need to ensure that any future prosecution is not compromised by direct or derivative use of material known to the seconded solicitor (although not disclosed to the DPP), once that solicitor has completed the secondment and returned to the DPP, presents practical problems in adopting that approach. Nonetheless, a more formalised system of secondments between the DPP and the Commission, and between the Crown Solicitor's Office and the Commission, is capable of improving

the quality and timeliness of brief preparation, provided that care is taken to "quarantine" the seconded solicitor from any subsequent prosecution.

The Commission would draw to the attention of the Committee that, whilst Commission officers take statements on occasions from prospective witnesses, those statements are invariably overtaken by the evidence adduced at an inquiry. A public inquiry often substantially changes or undermines the utility of a statement which was taken at a preliminary stage. The Commission does not always receive the fullest cooperation from individuals who may be asked to make a further statement at the end of an inquiry.

It may be appropriate in such cases to seek relief from the strict requirements applying to the reception of evidence by way of written statements under the *Criminal Procedure Act 1986* (see generally sections 77 to 87). If the transcript of the evidence of a witness at a public inquiry was admissible in local courts, a significant barrier to the preparation of briefs might be removed.

Adequacy of resourcing.

The Legal Division comprises the Executive Director, four principal lawyers and four senior lawyers. Two temporary principal lawyer positions were funded for the purpose of undertaking a review of Part 3A determinations. It was considered essential to extend those two secondments given the scope and complexity of the operations Cyrus, Meeka, Cabot and Credo investigations. It is unlikely that the Commission could have completed those inquiries and their respective reports within the appropriate time frames without that complement.

Between December 2013 and May 2014, Emman Farroukh, a lawyer from ASIC, was seconded to work at the Commission for the purpose of assisting in the preparation of the operations Jasper and Acacia briefs of evidence for the consideration of the DPP. Ms Farroukh is an experienced investigative lawyer with considerable expertise in the preparation of complex criminal briefs. Ms Farroukh worked extensively on the preparation of the Jasper and Acacia briefs, including preparing and obtaining statements from various witnesses and liaising with officers from the DPP. The Commission furnished partially completed briefs of evidence to the DPP in late March 2014. Ms Farroukh's work in contributing to the preparation of the Jasper and Acacia briefs of evidence was highly regarded by the Commission and the DPP.

The work of the Commission has not, in fact, reduced or changed substantially since those inquiries. It is now apparent that the scope and complexity of the investigations being undertaken, and the length of public inquiries arising out of those investigations, will continue to place heavy demands upon the Legal Division. It is more than reasonable to assume that the success of the Commission's work over the last four years will encourage the ongoing disclosure of serious and systemic corruption by individuals who might otherwise have remained silent.

There has been no real increase in the Legal Division's staff since January 2010. Commission lawyers are engaged at any given time in the investigation of a complaint or allegation, instructing counsel at public inquiries, report writing and brief preparation. They participate in the planning and conduct of investigations, draft statutory notices and advise the Investigation Division as required. The loss of

the two temporary positions (one in June 2014 and the other in November 2014) will significantly impact upon the efficiency of the Legal Division.

At the very least, the continuation on a permanent basis of the secondment of two solicitors from other suitable agencies is required to maintain the current level of work. The formalisation of such an arrangement would assist the Commission in the preparation of briefs, contribute to skill sharing across agencies and to the professional development of the relevant personnel.

Whether there is a need to create new criminal offences that capture corrupt conduct.

Misconduct in public office

The Commission recommends that the *Crimes Act 1900* (NSW) ("the Crimes Act") be amended to make provision for a new offence of misconduct in public office.

Misconduct in public office is a common law offence that has existed for more than two hundred years.[1] The specific elements of the offence have recently been considered by the Victorian Court of Appeal in *R v Quach.*[2] In that case, the court found that the offence is committed where:

(1) a public official;

(2) in the course of or connected to his public office;

(3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

The offence is increasingly prosecuted in NSW[3] but there has been no authoritative adoption of the Victorian formulation of the offence in this State, or otherwise, an authoritative formulation of the offence binding upon a NSW court.

The Commission regularly recommends the advice of the DPP be obtained with respect to prosecuting persons for the offence and it is highly likely that Commission investigations will continue to result in evidence being obtained that is capable of forming the basis for such recommendations in future.

In NSW, the common law offence of misconduct in public office is punishable by fine and/or imprisonment but there is no fixed limit for the term of imprisonment. In practice, the sentencing court may have regard to the maximum penalty imposed by an analogous statutory offence, where one is available, as a reference point for the imposition of penalty.[4] By way of comparison, the

[1] See Nicholls, Daniel, Polaine and Hatchard, *Corruption and Misuse of Public Office* (2006), [3.01]
[2] *R v Quach* [2010] VSCA 106; 27 VR 310
[3] See, eg, *R v Jaturawong* [2011] NSWCCA 168, *Blackstock v Regina* [2013] NSWCCA 172, *Jansen v Regina* [2013] NSWCCA 301
[4] See *Blackstock v Regina* [2013] NSWCCA 172 at [8] and [10]-[11]

Victorian parliament has legislated that the common law offence of misconduct in public office is punishable by up to 10 years imprisonment.[5]

Arguments in favour of regulating common law criminal offences in statute are well known.[6] The rationale of most relevance to the objects and work of the Commission is that members of the public should readily have available, via legislation, a succinct and clear statement of the offence of misconduct in public office and the maximum penalty that may be imposed where the offence is found to be committed. This is consistent with the notion that the criminal law should be accessible and comprehensible, and that members of the public (and in this particular case, public officials) are informed of the seriousness with which society regards breaches of public duty and are able regulate their conduct accordingly.

By legislating a form of the offence in the Crimes Act, Parliament is provided the opportunity to revise and modernise the elements of the offence and a framework for ensuring its continuing relevance and application to the structures and arrangements of modern government and public service. For example, while the expression "public official" in the context of the common law offence "has a wide application"[7] it is unclear whether the offence covers private individuals who, temporarily, perform traditional public functions, such as those to whom work is outsourced by government.

Other states and the Commonwealth have specific statutory offences dealing with misconduct by public officials. For example, under s 142.2 of the *Criminal Code Act 1995* (Cth) it is an offence, punishable by up to five years imprisonment, for Commonwealth public officials to exercise their official duties or use the influence they possess by reason of their office either to benefit or to harm someone dishonestly.[8] Section 359 of the *Criminal Code 2002* (ACT) and s 92A of the *Criminal Code Act 1899* (Qld) create offences in similar terms. The Queensland offence, however, carries a penalty of seven years imprisonment and 14 years for an aggravated form of the offence.

Section 251 of the *Criminal Law Consolidation Act 1935* (SA) requires proof of a public officer acting "improperly" rather than "dishonestly". Acting "improperly" in relation to a public officer is defined to include acting "contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community".[9] The South Australian offence also carries a penalty of imprisonment for seven years but 10 years for an aggravated form of the offence.

Queensland[10] and the Northern Territory[11] also have a separate offence titled, "abuse of office". This offence appears to apply to a public officer who abuses his or her office in the absence of a dishonest intention.

Commonwealth and other state jurisdictions have expanded the definition of "public official" or "public officer" in connection with the statutory offence of misconduct in public office to extend liability to contractors. For example, the *Criminal Code Act 1995* (Cth) defines a "Commonwealth

[5] *Crimes Act 1958* (Vic), s.320.

[6] See, for example, the arguments set out by Mr Justice John Hedigan, 'Codification of the Criminal Law and the European Convention on Human Rights' (2008) <http://www.isrcl.org/Papers/2008/Hedigan.pdf> 9–10: paper submitted at the 22nd International Conference of the International Society for the Reform of Criminal Law held in Dublin, Ireland 11 July – 15 July 2008.

[7] *Shum Kwok Sher v HKSAR* [2002] HKCFA 30 at [99].

[8] See the discussion in Peter Hall *Investigation Corruption and Misconduct in Public Office* (2004) where it is noted that this offence reflects the common law distinction between an abuse of official position as such and an abuse in the exercise of official duties, [2.140].

[9] Section 238 of the *Criminal Law Consolidation Act 1935* (SA)

[10] Section 92 *Criminal Code Act 1899 (Qld)*

[11] *Criminal Code Act 1983* (NT) s 82

public official" to include "*an individual who performs work for the Commonwealth, or for a State or Territory, under a contract*". The *Criminal Code 2002* (ACT) adopts a similar definition. Section 237 of the *Criminal Law Consolidation Act 1935* (SA) appears to extend the scope of the definition of "public officer" even further. It provides that a "public officer" includes a person who personally performs work for the Crown, a state instrumentality or a local government body as a contractor or as an employee of a contractor or otherwise directly or indirectly on behalf of a contractor.

The common law offences of bribery and conspiring to defraud a public authority or public official

The common law offences of bribery and conspiring to defraud a public authority or public official, recognised in NSW,[12] are also offences that the Commission recommends be regulated as part of the Crimes Act.

The common law offence of bribery has been described as:

> *receiving or offering of an undue reward by or to any person in a public office, in order to influence that person's behaviour in that office and to incline that person to act contrary to the known rules of honesty and integrity.*[13]

To prove the offence of conspiracy to defraud, the prosecution must establish that two or more persons agree to use dishonest means to bring about a situation prejudicing or imperilling the rights or interests of another or the performance of a public duty.[14]

Similar considerations as those referred to in connection with the Commission's recommendation to legislate the common law offence of misconduct in public office also favour the regulation in NSW of common law bribery and conspiring to defraud a public authority or public official.

At common law, bribery and conspiracy to defraud have no specified penalty and the exact limits of the offences are difficult to establish.[15] For example, questions can arise about whether the payment of money constitutes the common law offence of bribery when it is intended to induce the public official to wield influence arising from his or her office rather than to exercise their public official functions in a particular way.[16] The importance of legislating the offence of bribery is heightened by uncertainty around whether the statutory corrupt commission offences found in Part 4A of the Crimes Act apply to members of parliament who are not ministers of the Crown.[17]

The Commonwealth Criminal Code provides a comprehensive statement of the law that is analogous to these common law offences. Under s 141.1 of the *Criminal Code Act 1995* (Cth), an offence analogous to common law bribery is committed where a person dishonestly provides or promises (or

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[12] See, for example, *R v Redfern and Wells* [1827] NSWSC 47 (3 August 1827); *R v Hughes and others* [1837] NSWSupC 59 (16 September 1837); *R v Kidman* (1915) 20 CLR 425 at 435-437; *Connor v Sankey* [1976] 2 NSWLR 570 at 597-599; (1978) 21 ALR 317 at 339-342 per Street CJ (NSW CA); *R v Horsington* [1983] 2 NSWLR 72; (1983) 14 A Crim R 118 (NSW CA). Also see *Crimes Act 1900 (NSW)*: s.341 and schedule 10, paragraph (1)(e).

[13] *R v Allen* (1992) 27 NSWLR 398

[14] *Peters v The Queen* (1998) 192 CLR 493; *Spies v R* (2000) 201 CLR 603.

[15] Peter Hall *Investigating Corruption and Misconduct in Public Office* (2004), [2.145].

[16] Peter Hall *Investigating Corruption and Misconduct in Public Office* (2004), [1.85], [2.40].

[17] The definition of "agent" found in section 249A of the Crimes Act includes "any person serving under the Crown." It is doubtful, however, whether this definition includes members of parliament. In *Sneddon v State of New South Wales* [2012] NSWCA 351 the Court of Appeal held that a Member of the Legislative Assembly in discharging his or her legislative and parliamentary duties is not "a person in the service of the Crown" for the purposes of s 8(1) of the *Law Reform (Vicarious Liability) Act 1983*.

offers to do so or cause it to occur) a benefit to another person (including the public official) and the person does so with the intention of influencing the public official to exercise their duties as a public official. Whilst the person must intend to influence the performance of duties, it is not necessary that the person knew the public official was in fact a public official or that the duties were public official duties. It is also an offence under the same section for a public official to ask, receive or agree to receive a benefit with either the intention that the exercise of their public official duties will be influenced or of inducing, fostering or sustaining a belief (in another person) that the exercise of public official duties will be influenced. The offence is punishable by up to 10 years imprisonment.

The offence created by subsection (3)(a)(iii) of section 141.1 *Criminal Code act 1995* (Cth) is sufficiently wide to apply to a public official who dishonestly enters into an agreement to obtain a benefit for another person.[18] Further, section 135.4 of the *Criminal Code Act 1995* (Cth) provides for various conspiracy offences including conspiracy to defraud the Commonwealth and an additional offence of conspiring to defraud a public official. For example, section 135.4(1) provides for an offence where a person conspires with another with the intention of dishonestly obtaining a gain from a Commonwealth entity.

Public Officials having a pecuniary interest in a government contract

The Commission recommends that the Crimes Act be amended to make provision for a new offence to specifically deal with public officials who have a personal interest in a contract with the public authority by which they are employed or engaged.

Procurement in the public sector is inherently a high-risk activity that can be particularly vulnerable to corrupt conduct. There are numerous recent examples of investigations undertaken by the Commission where a public official, through a direct pecuniary interest in a company or business, has exercised their public official functions to award contracts to that company or business. The Commission also regularly receives complaints of conduct that is more insidious but no less an abuse of official position and no less financially beneficial to the public official. This occurs when a public official, without disclosing the nature of their interest in the matter, uses their position to influence another public official to unwittingly award a contract to the former public official's company or business. It may also occur where a public official uses inside or commercially privileged information to obtain an advantage in the process for awarding the contract. Some examples of investigations conducted by the Commission demonstrate the serious nature of this type of conduct and difficulty prosecuting that conduct for the lack of an appropriate offence.

In 2010, the Commission conducted an investigation (Operation Kanda) into the undisclosed conflicts of interest of a University of Sydney employee, Deborah Yandell. Between 2007 and 2009 she awarded university contracts worth more than $350,000 to Razorback Services Pty Ltd and approved its claims for payment without disclosing to the university that she and her husband jointly owned the company. Of the money the university paid to the company, nearly $154,000 was transferred to accounts held jointly by her and her husband and subsequently expended for their benefit. Although the Commission found that Ms Yandell had engaged in corrupt conduct, it was not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to her prosecution for any criminal offence because the Commission considered there was no obvious criminal offence that covered her husband's conduct, and Ms Yandell was not a "public official", at common law, for the purpose of a misconduct in public office offence.

[18] A person is taken to have obtained a benefit for another person by inducing a third person to do something that results in the other person obtaining a benefit: s 140.2 of *Criminal Code Act 1995* (Cth).

In 2012, the Commission investigated the recruitment of contractors and other staff by a University of Sydney IT manager (Operation Citrus). The Commission found that Atilla Demiralay, the manager of a university information technology unit, had awarded work to a private recruitment business in which he and his wife had an interest. That business received over $1.5 million from the university as a result of Mr Demiralay's conduct. For the same reasons as in the case of Ms Yandall, the Commission was not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for any criminal offence (except for providing false and misleading evidence to the Commission).

Each week the Commission receives complaints involving persons employed by large public sector departments who are alleged to be fully employed by the department concerned, yet also have a direct pecuniary interest in a private business that has a substantial contract with the department, the most common example of which is for the supply of specialist labour. There can be no justification for a public official being allowed to benefit from their public official position in this way. Departmental codes of conduct appear only concerned that the secondary employment is declared and, in many cases, the conflict is dismissed by both the public official and the department on the basis that the public official's partner or close family member is said to be operating the business. There appears to be little comprehension by public official supervisors of the actual and perceived conflict of interest and inherent misuse of the public official's position.

At present there is no criminal offence in NSW that is specifically directed to this type of conduct; conduct that ordinary, reasonable members of the public would consider of a criminal nature and appropriate for the law to recognise as such as has occurred in other Australian jurisdictions.

For example, in Queensland s 89 of the *Criminal Code Act 1899* provides for a three-year imprisonment offence where a public official knowingly acquires or holds, other than as a member of a "registered join stock company" of more than 20 persons, a private interest in any contract or agreement with respect to a matter concerning a department in which the public official is employed.[19]

The same offence existed in Western Australia under s 84 of the *Criminal Code Act 1902* until a new regime of corruption offences was enacted in 1988. The offence of "corruption" in s 83 of the *Criminal Code Compilation Act 1913* (WA) is wider in scope and provides an offence in circumstances where any public officer, without lawful authority or a reasonable excuse, and so as to gain a benefit or cause a detriment, pecuniary or otherwise:

> *(a) acts upon any knowledge or information obtained by reason of his office or employment; or*
> *(b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
> *(c) acts corruptly in the performance or discharge of the functions of his office or employment.*

<u>*Corrupt Commissions – Onus of proof and protection of witnesses*</u>

The Commission recommends that the Crimes Act be amended to make provision to reverse the onus of proof for the offence of "corrupt commissions or rewards" under s 249B of the Crimes Act and provide protection against self incrimination for witnesses who give evidence in respect of prosecutions for the offence.

[19] There is a similar offence under s 85 of the *Criminal Code Act 1924* (Tas) and in the Northern Territory, under s 89 of the *Criminal Code Act* (NT).

In Victoria, Queensland and Western Australia, there is an equivalent of the "corrupt commissions or rewards" offence found in s 249B of the Crimes Act[20] except that in those jurisdictions there are two important additional provisions to facilitate the prosecution of the offence. First, witnesses who testify in proceedings for such an offence are, subject to certain conditions, given protection against self incrimination.[21] Secondly, where it is proven that a benefit was received or solicited by, or offered to an agent without the assent of the principal, the onus of proof is on the agent to show that the offence was not committed.[22]

These provisions recognise the highly secretive conduct of persons involved in this type offence, that evidence of it is unlikely to be found in any document or other tangible thing, and the most useful witnesses will be unwilling to testify or otherwise assist the prosecution of such offences because they have themselves been involved in some aspect of aiding or facilitating the offence. Further, it flows from the very nature of the offence, that if true, the illicit character of a benefit received by a person is a matter wholly within that person's own knowledge and the person who gave that benefit.

While reversal of the onus of proof represents a departure from fundamental principles that recognise the presumption of innocence and the privilege against self incrimination, the NSW legislature has supported that departure for similar reasons as the Commission has given above, for example, in the unexplained wealth[23] and the restraining order[24] provisions respectively, of the *Criminal Assets Recovery Act 1990*.

Amendment sought to the ICAC Act

Protection for the voluntary supply of information to the ICAC

The Commission recommends that the ICAC Act be amended to include a provision that protects persons from any criminal, civil or disciplinary liability for the voluntary disclosure of information to the Commission where the disclosure was made for the purpose of the Commission's functions.

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.[25] A large number of complaints and information accepted by the Commission each year are received directly from public officials who are not required or authorised by law to report or provide that information and in circumstances where the voluntary disclosure of that information is prohibited by a secrecy or confidentiality 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.

Section 109 of the ICAC Act gives limited protection to persons providing information to the Commission, and then only in circumstances where the Commission has exercised its power to

[20] s 176 *Crimes Act 1958* (Vic), s 442B and s 442C *Criminal Code Act 1899* (Qld) and s 529 and s 530 *Criminal Code Compilation Act 2013* (WA).
[21] s 184 *Crimes Act 1958* (Vic), s 442K *Criminal Code Act 1899* (Qld) and s 540 *Criminal Code Compilation Act 2013* (WA).
[22] s 186(2) *Crimes Act 1958* (Vic), s 442M *Criminal Code Act 1899* (Qld) and s 543 *Criminal Code Compilation Act 2013* (WA).
[23] Section 28B(3) *Criminal Assets Recovery Act 1990*
[24] Sections 12 and 13A *Criminal Assets Recovery Act 1990*
[25] See, for example, s 30 *Road Transport Act 2013*, s 71 *Housing Act 2001* or s 257 of the *Crimes (Administration of Sentences) Act 1999*

require or obtain that information.[26] This protection is not useful where persons have voluntarily disclosed information to the Commission about corrupt conduct of which the Commission is unaware and not at that time investigating.

Other Australian corruption commissions, to varying degrees, have legislative protection for voluntary provision of information for the purpose of a complaint, report or investigation.[27] For example, s 343 of the *Crime and Corruption Commission Act 2001* (Qld) relevantly provides:

> ***343 Information disclosure and privilege***
> *(1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to a person, whether imposed by any Act or by a rule of law, applies to the disclosure of information to the commission for the performance of the commission's functions.*
> *(2) A person who discloses information under subsection (1) does not, only because of the disclosure—*
> > *(a) contravene a provision of an Act requiring the person to maintain confidentiality in relation to the disclosure of information; or*
> > *(b) incur any civil liability, including liability for defamation; or*
> > *(c) become liable to disciplinary action.*

This type of provision is not enacted for the benefit of the Commission in the sense that it cannot be used by the Commission to *require* information from a public official or other person. The benefit of such a provision is entirely for the protection of the person disclosing the information to the Commission.

Arrangements for the prosecution of corrupt conduct in other jurisdictions.

The Commission does not propose to comment upon the practice in other jurisdictions, other than to observe that it remains opposed in principle to the prosecution of those found to have engaged in corrupt conduct by the very agency that has undertaken the investigation, as is the case in Hong Kong.

[26] See for example s 93, s 94 and s 109 of the ICAC Act
[27] See for example s 220 and s 221 *Corruption and Crime Commission Act 2003* (WA), s 50 *Independent Commissioner Against Corruption Act 2012* (SA)