Supplementary Submission No 5a

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

Organisation: Independent Commission Against Corruption

Name: The Hon Jerrold Cripps QC

Position: Commissioner

Telephone:

Date received: 29/05/2009

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

26 May 2009

Mr Frank Terenzini
Chair
Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 2000

Our Ref:Z05/0057

Dear Mr Terenzini,

RE: PROPOSED AMENDMENTS TO THE ICAC ACT

I have now had an opportunity to consider the following submissions published by the Committee on the ICAC as part of its inquiry into proposed amendments to the ICAC Act.

- Office of the Director of Public Prosecutions
- Inspector of the Police Integrity Commission
- Crime and Misconduct Commission
- Police Integrity Commission
- Inspector of the ICAC
- Corruption and Crime Commission
- Law Society of NSW
- NSW Crime Commission
- Mr Bruce McClintock SC
- Mr Donald McKenzie
- Civil Liberties Australia
- Australian Commission for Law Enforcement Integrity
- NSW Fire Brigades
- NSW Police Association
- NSW Bar Association
- Department of Premier and Cabinet
- Public Interest Advocacy Centre
- Mr Evan Whitton.

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Having considered these submissions I remain of the opinion that the ICAC Act should be amended so that:

- the restriction in section 37 of the ICAC Act, which prohibits the use, in disciplinary proceedings, of evidence given under objection is removed,

- the restriction in section 37 of the ICAC Act, which prohibits the use, in civil proceedings, of evidence given under objection is removed, and

- the Commission's current function of assembling evidence for criminal proceedings should be made a primary function.

I note that while some submissions received by the Committee are supportive of either some or all of the proposed amendments, other submissions are entirely opposed to the proposed amendments. I do not propose to address each of the submissions made to the Committee but will make some general comments.

A number of the submissions opposed to the proposed amendments to section 37 of the ICAC Act raised the possibility that the changes may discourage witnesses from giving truthful evidence to the Commission if they know any admissions may be used against them in subsequent disciplinary or civil proceedings. The opposing submissions include a submission made in a private capacity by Mr McKenzie who is a Commission lawyer.

As I advised in my letter to the Committee of 23 March, the Commission's experience does not support this argument. The argument pre-supposes that witnesses are more likely to make admissions knowing that they have some protection from disciplinary or civil proceedings. This has not been the Commission's experience. Generally, most witnesses deny any involvement in wrongdoing (despite being reminded of the criminal consequences of giving false or misleading evidence) and only make admissions when presented with clear and compelling evidence of their conduct. The existence of the protections under section 37 of the ICAC Act does not appear to have any relevance to a decision by a witness whether or not to give truthful evidence to the Commission.

I note that those opposing the amendments to section 37 on this ground, including Mr McKenzie, have not provided any evidence to support their suppositions.

One of the Commission's principal reasons for recommending evidence be available in disciplinary and civil proceedings is to improve the efficiency and timeliness with which such proceedings are conducted. Some of the other submissions to the Committee have addressed this issue.

At present, if a public official or other person admits to conduct which may constitute a disciplinary offence or grounds for taking civil action it is necessary for the relevant public

authority to spend time and other resources in gathering other evidence which it can use in any proceedings. This causes obvious inefficiencies. It may result in a corrupt public official continuing to receive payment until such time as the disciplinary proceedings have concluded. In some cases public sector agencies may decide to allow a public official to resign rather than to embark upon a disciplinary process. The Commission notes that two of the public officials involved in its recent RailCorp inquiry were allowed to resign. An additional concern is that any delay or inability to take effective civil action to recover corrupt payments or rescind a contract may not only adversely affect the operations of the relevant public authority but allow those who have engaged in corrupt conduct to retain some of the fruits of their corruption.

The other issue addressed in the submissions is whether the Commission's current function of assembling evidence for criminal proceedings should be made a primary function. It should be clear from the ICAC Act that the Commission is able to continue to obtain and assemble evidence that may be admissible in a criminal prosecution even though the Commission has completed its investigation into whether or not corrupt conduct has occurred. Such an amendment would merely recognise what is already the case and not result in any changes to the way in which the Commission operates.

A further issue is whether the Commission should be able to exercise its coercive powers under the ICAC Act, once it has completed its investigation into corrupt conduct, in order to obtain further evidence which would be admissible in a criminal prosecution. This issue was raised by Mr Greg Smith MP at my appearance before the Committee on 4 May 2009.

At present the Commission is limited to exercising its coercive powers under the ICAC Act for the purposes of an investigation. Section 13(1) of the ICAC Act makes it clear that an investigation must relate to corrupt conduct. Once a Commission investigation into corrupt conduct has ended it would not be open to the Commission to continue to use its coercive powers to obtain evidence for the purpose of a criminal prosecution.

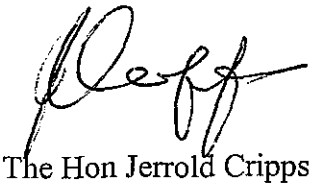
I note that section 49(4) of the Queensland *Crime and Misconduct Act 2001* provides that the Crime and Misconduct Commission (the CMC) must take all reasonable steps to further investigate a matter or provide further information if required to do so by the Director of Public Prosecutions for the purpose of a prosecution. In her evidence to the Committee Deputy Commissioner Hamilton advised that she thought the CMC did not use its coercive powers when gathering further information at the request of the DPP. She has since ascertained that the CMC does, on occasion, use its coercive powers to gather evidence at the request of the DPP.

The question of whether the Commission should be able to continue to exercise its coercive powers is one which requires careful consideration and which may fundamentally affect the Commission's operations. I do not wish to make any submission on this question other than to

note it is ultimately a matter for the Parliament to determine whether the Commission should exercise its coercive powers in such circumstances.

I ask that the Committee treat this letter as my response to the various submissions. If, however, the Committee wishes me to provide any additional information or address any particular submission I would be happy to do so.

Yours sincerely



The Hon Jerrold Cripps QC
Commissioner