Submission
No 17

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

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New South Wales Government
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The Hon Frank Terenzini MP
Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie St
Sydney NSW 2000

Dear Mr Terenzini

NSW Government submission to the Parliamentary Committee on the Independent Commission Against Corruption regarding potential amendments to the *Independent Commission Against Corruption Act 1988*

Please find enclosed a NSW Government submission in response to the Committee's call for submissions regarding its inquiry into potential amendments to the *Independent Commission Against Corruption Act 1988.*

Yours sincerely

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New South Wales Government

SUBMISSION TO THE PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION REGARDING POTENTIAL AMENDMENTS TO THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988*

INTRODUCTION

The NSW Government welcomes the opportunity to make a submission to the Committee regarding its inquiry into potential amendments to section 37 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) and a potential related amendment to the functions of the ICAC.

POTENTIAL AMENDMENTS TO SECTION 37 OF THE ICAC ACT

Disciplinary proceedings

Item 1 of the Terms of Reference for this inquiry relates to whether the ICAC Act should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the ICAC in disciplinary proceedings.

Obviously, this is an issue that only affects officers of government agencies and departments.

There are significant arguments for and against removing the restriction on the use of compulsory obtained evidence in disciplinary proceedings.

On the one hand, removing the restriction would provide significant benefits for agencies in terms of their ability to manage and discipline staff, and in deterring corrupt behaviour. There is a strong argument that officers of government agencies and departments who have admitted to engaging in corrupt conduct, albeit under compulsion, should not be able to avoid disciplinary action on the basis that evidence given to the ICAC under objection is not admissible in disciplinary proceedings. On this view, if corrupt conduct is admitted by an officer, even under compulsion to answer, this admission should be able to be used in disciplinary proceedings to remove the corrupt official from office.

In terms of managing the public sector, the fact that admissions obtained by the ICAC under compulsion would be able to be used in disciplinary proceedings would have an important deterrent effect on corrupt behaviour.

Use of such evidence obtained by the ICAC would also avoid the need to reinvestigate the matter and reduce the financial cost to the State of the reinvestigation. In this regard, one Government agency has advised the Department of Premier and Cabinet of an instance where a disciplinary process commenced by the agency was unsuccessful because evidence obtained by the ICAC was not admissible in the disciplinary proceedings. Taking prompt action against admittedly corrupt officers is important to protect the reputation of the public service.

On the other hand, such an amendment would undermine the privilege against self-incrimination. The privilege against self-incrimination is a well established principle of due process in the accusatorial system of justice. The principle requires those who allege the commission of a transgression – whether criminal, civil or disciplinary – to prove that such a transgression has taken place, rather than simply compel the accused under threat of punishment to provide proof against him or herself.

On this view, to abrogate that right in disciplinary proceedings, and to allow evidence that was acquired from the officer by coercion would give a significant advantage to the employer when conducting disciplinary proceedings. At the time the officer gives evidence before ICAC, they may not actually know of any other proceedings, including disciplinary proceedings, in which the evidence may be used. It is, however, likely that, in the case of public sector employers who appear before ICAC, the prospect of disciplinary proceedings would be contemplated.

There is also an argument that a witness will be disadvantaged in facing subsequent proceedings where the evidence was obtained using ICAC's coercive powers without any of the warnings that would normally apply to the investigation of the conduct of the officer.

It might be argued that such a proposal places the officer in the position of being forced, in the subsequent proceedings, to challenge his or her own evidence to ICAC, again under threat of punishment if they are found to have lied to ICAC. Obviously, this concern needs to be balanced against the fact that the person has actually admitted to engaging in corrupt conduct, albeit under compulsion.

The rationale behind allowing the Commission to go behind the privilege against self-incrimination is to ensure that all possible information regarding corruption in the public sector is brought to light, with the primary objective of revealing and addressing systemic corruption. It is argued that the importance of this goal justifies the otherwise extraordinary power to compel individuals to give evidence that may place them in jeopardy, and the restrictions on the subsequent use of that information provide some protection to those who are accused of engaging in corrupt conduct.

While the Act, both now and when it was introduced, gives ICAC the primary functions of investigating and exposing corruption, ICAC also has as one of its functions the gathering of admissible evidence in criminal proceedings. The Act also provides for ICAC to recommend that consideration be given to

taking disciplinary action, and to refer matters and any evidence obtained to other agencies.

Further, one of the stated objectives of the Act is to prevent corrupt conduct, and deterrence is an important part of this goal. Achieving this objective does not fall solely to the ICAC. It is an issue for the whole public sector. It is not ICAC's role to pursue disciplinary action and the proposed amendment would not change this, although the ability of government agencies to effectively and efficiently take disciplinary action against officers who have engaged in corrupt conduct, and who have admitted to that conduct, is an important deterrent to corrupt conduct by other officers in the public sector. The Commissioner of the ICAC has outlined his concerns in this regard before the Committee.

These competing public policy priorities need to be balanced.

There are a number of circumstances where the privilege against self incrimination has been abrogated because of other competing public policy objectives. For example, the *Police Integrity Commission Act 1996* allows evidence given under compulsion to the Police Integrity Commission, a body with similar functions and powers to the ICAC, to be used in subsequent disciplinary proceedings involving police officers.

In considering this amendment, it may be appropriate to consider whether any of the concerns outlined above in relation to the privilege against self incrimination could be addressed by adopting additional safeguards such as:

- limiting the use of the evidence obtained under compulsion to disciplinary proceedings relating to the actions which are the subject of the inquiry, and
- ensuring that the person must be notified that their disclosures may be used against them in disciplinary proceedings.

Civil proceedings

Item 2 of the Terms of Reference for this inquiry relates to whether the ICAC Act should be amended to remove the restriction in section 37 which prohibits the use of compulsorily obtained evidence provided under objection to the ICAC in civil proceedings generally or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained.

It is important to distinguish between civil proceedings relating to the recovery of corruptly obtained public funds or assets and other types of civil proceedings.

There are a number of strong arguments in support of an amendment to allow compulsorily obtained evidence to be used in civil proceedings for the recovery of corruptly obtained public funds or assets, as set out below.

First, officials who have admitted to engaging in corrupt conduct should not be able to retain money or assets that they have admitted defrauding from the State on the basis that the admission is inadmissible in civil proceedings as it was made to the ICAC under compulsion.

Second, the State should be able to use all appropriate means to recover public money which has been defrauded from it, including relying on evidence given under compulsion to the ICAC.

Third, such an amendment, in conjunction with the potential amendment relating to use of such evidence in disciplinary proceedings, would be an important deterrent to corrupt behaviour. If individuals know that they may suffer serious consequences (in terms of both disciplinary action and civil proceedings to recover money defrauded from the State), then they are less likely to engage in corrupt conduct.

This potential amendment, however, also raises the same important issues in relation to the privilege against self-incrimination as were discussed above in relation to disciplinary proceedings.

There are, however, additional considerations which may address some of the concerns in relation to the privilege against self-incrimination. In particular, courts which hear civil proceedings have a discretion to refuse to admit unfair evidence. While a court may not find evidence to be unfair solely on the basis that the evidence was compulsorily acquired, particularly in circumstances where that is sanctioned by the ICAC Act, it would remain open to a court to do so, where the court considers that it would be unfair to use the evidence having regard to the circumstances in which the admission was made. The *Criminal Assets Recovery Act 1990* allows the NSW Crime Commission to use evidence obtained under compulsion in confiscation applications. It is of course open to government agencies to work with the NSW Crime Commission to take over eligible matters, or to undertake certain examinations, to assist in recovering public money.

In light of the public interest in ensuring that public money is not kept by those who engage in corrupt conduct and the need to avoid distracting the NSW Crime Commission from its important work in pursuing major criminal activity, enabling agencies to rely on admissions made under compulsion to ICAC in recovery proceedings may be a more efficient approach.

In relation to civil proceedings for the recovery of public funds and assets, the NSW Government considers that the potential benefits of the amendment in terms of managing public sector agencies set out above are finely balanced with the concerns regarding the impact on the privilege against self-incrimination.

The NSW Government does not consider that the arguments set out above in favour of an amendment for civil proceedings for the recovery of funds would apply to a broader amendment in relation to civil proceedings generally. For example, it is difficult to see why compulsorily obtained evidence should be able to be used in litigation unrelated to the officer's employment (for

example, evidence of facts given under compulsion to the ICAC which could be of use to a third party in unrelated civil litigation against the officer, such as divorce proceedings).

POTENTIAL AMENDMENT RELATING TO FUNCTIONS OF THE ICAC

Division 1 of Part 4 of the ICAC Act sets out the functions of the ICAC. The main functions of the ICAC set out in Division 1 of Part 4 are referred to as "principal functions" of the ICAC. The function of assembling evidence for criminal proceedings is not currently a principal function and is described as an additional function of the ICAC.

It has been suggested that if amendments of the kind referred to in Items 1 and 2 of the Committee's Terms of Reference were made, there would be a risk that the ICAC would use its powers to obtain evidence under compulsion to a greater extent (as such evidence would then be able to be used in disciplinary and civil proceedings) because ICAC would be more certain that consequences will flow from the use of that information. This may be to the detriment of obtaining admissible evidence for possible criminal proceedings.

Therefore if those amendments were made as outlined in Items 1 and 2 of the Terms of Reference, one solution to this problem would be to make an amendment to the ICAC Act to make the ICAC's current function of assembling evidence for criminal proceedings a "principal function".