

**Supplementary  
Submission  
No 18a**

**REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST  
CORRUPTION ACT 1988**

**Name:** The Hon. Adjunct Professor Joseph Campbell KC

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## Supplementary Submission to Parliamentary Committee

This submission seeks to expand on and give references for the evidence I gave orally this morning.

### Reputational damage

The extent to which it is appropriate for ICAC to take steps to protect reputations is limited by s 12 **ICAC Act** which requires that “protection of the public interest and prevention of breaches of public trust” be its “paramount concerns”. In the field of child custody, where there is a long history of a requirement that the welfare of the child be the paramount consideration<sup>1</sup>, courts have considered how such a “paramount consideration” provision works.

First, “the paramount consideration is not the same as the “sole” or “only” consideration”<sup>2</sup>.

Second, the relationship of the paramount consideration to any other considerations that might be taken into account is that

“it is only if welfare factors be evenly balanced that secondary considerations - such as the policy of discouraging abduction of children across national borders or the desirability of permanent custody being made in the child’s ordinary place of residence – can have any weight in guiding the exercise of the Family Court’s powers.”<sup>3</sup>

In determining the orders a court should make in a child custody dispute,

“considerations which are secondary to the paramount consideration of the child’s welfare may be taken into account if that paramount interest does not itself indicate the orders to be made”<sup>4</sup>.

Similarly, the desirability of protecting reputations can be a factor taken into account by ICAC in deciding whether or not to have a public hearing, but only if and to the extent that the public interest and the prevention of breaches of public trust do not themselves indicate what should be done. The “paramount consideration” provision in s 12 is one that governs and has precedence over the “balancing of factors” approach that s 31 provides for whether to hold a public hearing.

If a complaint is made to ICAC that there are, or ICAC comes across circumstances which imply that, conduct

“liable to allow, encourage or cause corrupt conduct” (s 13(1) (a) (ii) **ICAC Act**), or  
“connected with corrupt conduct” (s 13 (1) (a) (iii) **ICAC Act**)

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<sup>1</sup> This was a principle applied when the Chancery court was exercising its *parens patriae* jurisdiction, and has been included in modern legislation on the topic.

<sup>2</sup> **AMS v AIF** [1999] HCA 26, 199 CLR 160 at [143] per Kirby J, agreeing (at [200]) with the orders proposed by the plurality judgment. Hayne J at [212] made a similar remark.

<sup>3</sup> **ZP v PS** (1994) 122 ALR 1 at 19 – 20 per Brennan and Dawson JJ

<sup>4</sup> **ZP v PS** (1994) 122 ALR 1 at 22 per Brennan and Dawson JJ

may have occurred, may be occurring, or may be about to occur , ICAC can investigate those circumstances. Reputational damage could arise from evidence given in an inquiry concerning, or a report about, those circumstances even if the Commission does not find they amount to corrupt conduct.

### **Evidence in private**

Mr McClintock has given evidence, with which I agree, about the risk that taking evidence in private could encourage unfair or overweening questioning, and that the taking of evidence in public provides a control on the Commissioner presiding, or counsel assisting, overstepping the mark. But in any event taking of evidence in private is not a guarantee that no reputational harm will result, because if the evidence is relevant to a report it will be included in the report, and s 74 requires that the report be tabled and thus made public.

### **The scope of s 9 (1) (c)**

One of the alternative seriousness thresholds provided by s 9 (1), before conduct is corrupt, is that it

“could constitute or involve... reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official”.

The definition of “public official” covers an extremely wide range of employees and office-holders. Many of these will owe a contractual duty of loyalty and fidelity<sup>5</sup>, and many, particularly those in more senior positions, will owe a fiduciary duty arising from occupying a position of trust and confidence<sup>6</sup>. The fiduciary duty prevents the fiduciary from being in a position where there is a conflict between his duty and his interest, and prevents the fiduciary from deriving any profit or benefit from his fiduciary position if that benefit has not been consented to by the person or people to whom the duty is owed<sup>7</sup>. Many of the cases where a public official derives some personal benefit from his or her position, or uses a discretionary power other than for the purpose for which it was conferred, will involve a breach of one or both of these duties, of sufficient seriousness to warrant dismissal. In those cases, the seriousness threshold is passed.

J C Campbell  
4 November 2022

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<sup>5</sup> *Robb v Green* [1895] 2 QB 315.

<sup>6</sup> *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [17]

<sup>7</sup> *Chan v Zacharia* (1984) 154 CLR 178 at 199; *Breen v Williams* (1996) 186 CLR 71 at 113 (Gaudron & McHugh JJ); *Pilmer v Duke Group Ltd (In Liquidation)* [2001] HCA 31; (2001) 207 CLR 165 at [74]. *Youyang v Minter Ellison* [2003] HCA 15; 212 CLR 484 at [41].