

Submission 24 - Independent Commission Against Corruption NSW -

Mr A J MacSporran
Chairperson
Crime & Corruption Commission
GPO Box 3123
BRISBANE QLD 4001

28 June 2016

Dear Mr MacSporran

Re: Publicising allegations of corrupt conduct

This is the submission of the NSW Independent Commission Against Corruption (ICAC) in response to the discussion paper on publicising allegations of corrupt conduct (the discussion paper) produced by the Crime and Corruption Commission (CCC).

I note that the CCC is examining whether, on balance, it is in the public interest to make allegations of corrupt conduct public and, if not, what legislative and other options are available to prevent making such allegations public. The discussion paper has been produced to promote discussion about this issue.

The discussion paper correctly notes that publicising allegations of corrupt conduct may adversely impact upon an investigation by alerting the subject(s) of the allegations that their conduct may be the subject of investigation and affording them an opportunity to destroy evidence, fabricate false evidence or interfere with potential witnesses. Publicising allegations of corrupt conduct can damage the reputations of those allegedly involved in the corrupt conduct. In some circumstances publication of allegations may affect a person's right to a fair trial. These considerations must be balanced against the implied right to freedom of speech within current legal constraints and the need for transparency in the operation of investigative agencies such as the ICAC and CCC.

There are provisions in the *Independent Commission Against Corruption Act 1988* (the ICAC Act) which govern what information can be released by ICAC officers and the circumstances in which that information can be released. These provisions assist in

achieving a balance between ensuring confidentiality of information concerning complaints and the need for transparency.

Section 111 of the ICAC Act restrains ICAC officers and others from divulging information, including information about complainants and matters under investigation. The section makes it an offence for an ICAC officer to divulge to any person any information acquired by reason of the exercise by the officer of his or her functions under the ICAC Act. This provision may also be extended by the ICAC to persons to whom it furnishes evidence under s 14 of the ICAC Act, disseminates information under s 16 of the ICAC Act or refers matters for investigation or other action under s 53 of the ICAC Act. The principal exceptions to this secrecy provision are where the communication is for the purposes of and in accordance with the ICAC Act or in accordance with a direction of the ICAC Commissioner where the ICAC Commissioner certifies that it is necessary in the public interest to divulge the information.

The ICAC does not generally publish allegations of corrupt conduct except in the context of its public inquiries and its reports on those investigations.

Section 31 of the ICAC Act provides that the ICAC must be satisfied it is in the public interest to conduct a public inquiry. Section 31(2) of the ICAC Act sets out the factors the ICAC must take into account in determining whether or not it is in the public interest to conduct a public inquiry. These are:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- (b) the seriousness of the allegation or complaint being investigated,
- (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding a public inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The risk of undue prejudice to a person's reputation is one of the factors the ICAC must take into account in determining whether to conduct a public inquiry. It is not the sole consideration and must be balanced with other public interest considerations.

The ICAC also protects against unnecessary reputational damage by only commencing a public inquiry where an investigation has obtained probative evidence to suggest corrupt conduct has occurred or is occurring.

The ICAC Act recognises that care must be taken to ensure that a person's right to a fair trial should not be compromised by publicising allegations of corruption. Section 18 of the ICAC Act provides:

- (1) The Commission may do any or all of the following:
 - (a) commence, continue, discontinue or complete any investigation,
 - (b) furnish reports in connection with any investigation,
 - (c) do all such acts and things as are necessary or expedient for those purposes, despite any proceedings that may be in or before any court, tribunal, coroner, Magistrate or other person.

- (2) If the proceedings are proceedings for an indictable offence and are conducted by or on behalf of the Crown, the Commission must, to the extent to which the Commission thinks it necessary to do so to ensure that the accused's right to a fair trial is not prejudiced:
 - (a) ensure that, as far as practicable, the investigation is conducted in private during the currency of the proceedings, and
 - (b) give directions under section 112, having effect during the currency of the proceedings, and
 - (c) defer making a report to Parliament in relation to the investigation during the currency of the proceedings.
- (2A) Subsection (2) does not apply:
 - (a) (in the case of committal proceedings) before the commencement of the committal hearing, that is, the commencement of the taking of the evidence for the prosecution in the committal proceedings, and
 - (b) (in any other case) after the proceedings cease to be proceedings for the trial of a person before a jury.
- (3) This section has effect whether or not the proceedings commenced before or after the relevant investigation commenced and has effect whether or not the Commission or an officer of the Commission is a party to the proceedings.

The ICAC also publishes allegations of corrupt conduct in its reports on its investigations. Under s 74 of the ICAC Act the ICAC must prepare a report for matters that have been the subject of a public inquiry and for matters referred to the ICAC by both Houses of Parliament (unless directed otherwise by those Houses).

A complainant may publicise the fact that the complainant has made an allegation of corruption to the ICAC. There is currently no provision in the ICAC Act to prevent such an occurrence and the ICAC has not sought any amendment to the ICAC Act to prevent a complainant from so acting. It is however an offence under s 81 of the ICAC Act for a person making a complaint to the ICAC to wilfully make a false statement or mislead or attempt to mislead the ICAC. The penalty is a fine of \$2,200 or imprisonment for six months or both. There have been no prosecutions under this section.

While complainants may publicise the fact that they have made a complaint to the ICAC, it has not been the ICAC's experience that any such publication has adversely affected its investigations. The limited cases where people do publish the fact they have made a complaint to the ICAC usually involve matters that the ICAC has decided not to investigate. The ICAC's experience is that the more serious and substantial the complaint, the less likely it is that the complainant will risk prejudicing any investigation by publishing the complaint. In many cases complainants may be concerned that they will suffer reprisals if it becomes known they have made complaints. This concern acts as a natural constraint against disclosure.

The ICAC notes that the CCC's experience is that allegations of corrupt conduct are made public by complainants particularly in the lead-up to elections. The ICAC has not had any recent experience of this in New South Wales. Some years ago there were instances of some candidates or their supporters making public statements that they had

referred certain matters to the ICAC. In some cases these matters involved opposing candidates. The ICAC was concerned in these cases that it was being used for political purposes or that there might be a perception that it was being so used.

In some cases persons publicly claimed to have reported matters to the ICAC but had not in fact done so. I understand the ICAC dealt with these matters by making a timely public statement prior to the election to the effect that it had not received any complaint from the person.

In other cases matters were reported to the ICAC but the allegations lacked substance. In some of these cases the ICAC was able to assess the complaints as not requiring investigation and publish that fact before the election.

The undesirability of candidates seeking to use the ICAC in this way resulted in the then ICAC Commissioner writing to the presiding officers of both Houses of Parliament, all members of Parliament and registered political parties prior to the March 1999 NSW State election. The letters requested that information and complaints be submitted to the ICAC on a confidential basis. The letters noted that "*[r]eal harm can result from the publicising of allegations of corruption before, during or immediately after their submission to the Commission. This harm may occur in two main ways. The first is that people's reputations may be unfairly damaged. The second is that, if there is any basis to the complaint, such publicity may lead to the disappearance of important evidence*". The letters advised that if unfair use was made of the complaint referral process the ICAC might depart from its usual practice of not publicly commenting on the receipt of a complaint.

ICAC records show that in the lead-up to the 2004 NSW local government elections the ICAC issued a brochure urging local government candidates to act fairly during the election campaign and not to misuse the ICAC for political purposes.

It does not appear from ICAC records that there has been a need to repeat these exercises for subsequent State or local government elections.

If you require any further information concerning these matters please contact [REDACTED]

Yours sincerely,

[REDACTED]
The Hon Megan Latham
Commissioner