



New South Wales

# Independent Commission Against Corruption Amendment Bill 2005

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* (the **Principal Act**) to give effect to certain recommendations contained in the Final Report of the independent review of that Act presented by Bruce McClintock SC to the Governor on 31 January 2005 and to make certain other changes. The Bill:

- (a) sets out the principal objects of the Principal Act,
- (b) provides for the establishment of an independent Inspector of the Independent Commission Against Corruption (the **Inspector**) to deal with complaints about the Independent Commission Against Corruption (**ICAC**) and its officers and to oversee the exercise of ICAC's powers,
- (c) alters the nomenclature of the Act relating to hearings so as to better reflect the fact that ICAC exercises administrative investigative, not judicial, functions and to distinguish investigations in private from public inquiries,
- (d) requires ICAC to be satisfied before holding a public inquiry that, after taking specified factors into account, it is in the public interest to hold the inquiry,

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\* Amended in committee—see table at end of volume.

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- (e) requires ICAC to direct its attention, so far as practicable, to corrupt conduct that is serious or systemic and to have regard to the role of other public authorities and public officials in preventing corrupt conduct,
- (f) requires ICAC to include additional information about its investigations and the time taken to complete them in its annual report,
- (g) expressly requires ICAC to provide reasons to complainants and reporting officials for not investigating allegations of corruption,
- (h) restricts the power of ICAC to refer to the Supreme Court contempts of ICAC to contempts in the face or hearing of ICAC and clarifies the procedures for punishing such contempts,
- (i) creates offences of threatening counsel assisting ICAC or legal practitioners or witnesses appearing before ICAC,
- (j) clarifies the powers of ICAC to make findings of corrupt conduct,
- (k) clarifies the power of ICAC to make recommendations concerning the suspension of councillors under the *Local Government Act 1993*,
- (l) prevents ICAC from commencing criminal prosecutions arising from its investigations unless the Director of Public Prosecutions has advised it that it is appropriate to do so,
- (m) requires ICAC to consult with the Ombudsman in exercising its corruption prevention and education functions,
- (n) enables ICAC to apply to courts for orders relating to the disposal of seized property,
- (o) extends the offence under section 87 of the Principal Act of giving false and misleading evidence to ICAC so that it applies where a person gives evidence not believing it to be true,
- (p) applies the provisions of sections 331 and 332 of the *Crimes Act 1900* to prosecutions for giving false or misleading evidence, so that it is not necessary to show which of two contradictory statements is true to convict the person who made the statements and to deny a person a right of acquittal merely because a false or misleading statement is contained in a document that contains a technical defect,
- (q) extends from 6 months to 2 years the limitation period within which a prosecution may be brought under section 112 (Restriction on publication of evidence) of the Principal Act.

The Bill also amends the *Police Integrity Commission Act 1996* to extend the provisions of that Act relating to police officers to other members of NSW Police and to omit a provision making a person ineligible for appointment as the inspector of the Police Integrity Commission unless the person has special legal qualifications within the meaning of that Act.

The Bill also makes various other amendments to Acts and a regulation that are consequential or related to the amendments made to the *Independent Commission Against Corruption Act 1988*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Independent Commission Against Corruption Act 1988* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *Protected Disclosures Act 1994* and other Acts and a regulation set out in Schedule 2.

## **Schedule 1      Amendment of Independent Commission Against Corruption Act 1988**

### **Clarification of the role of the ICAC**

#### **Objectives of Act**

**Schedule 1 [1]** inserts a new section 2A into the Principal Act to specify the objectives of the Act and so to confirm the role of ICAC as an independent and accountable body with special powers to inquire into allegations of corruption.

#### **Focus of ICAC's attention**

**Schedule 1 [7]** inserts a new section 12A into the Principal Act. Section 12A requires ICAC, in exercising its functions, to as far as practicable direct its attention to serious and systemic corrupt conduct.

#### **Hearings**

**Schedule 1 [18]** repeals and re-enacts (as sections 30–31A) sections 30 and 31 of the Act to alter the nomenclature of the Act relating to hearings so as to better reflect the fact that ICAC exercises administrative investigative, not judicial, functions and to distinguish investigations in private from public inquiries. The distinction is drawn between compulsory examinations, which must be conducted in private and public inquiries (part of which may be conducted in private but which are generally conducted in public). Under proposed sections 30 (3) and 31 (6), a person required to attend a compulsory examination or public inquiry, respectively, must be informed of the nature of the allegation or complaint being investigated.

Proposed section 31 provides that ICAC may conduct a public inquiry only if satisfied that it is in the public interest to do so and specifies certain factors it must take into account in deciding whether or not the conduct of a public inquiry is in the public interest. 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 an inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

A number of amendments to the Principal Act are made as a consequence (**Schedule 1** [2], [3], [5], [13], [14], [16], [17], [19], [20], [22], [28], [29], [34], [39], [40], [41], [43], [56] and [62]).

## **Accountability of ICAC**

### **Inspector of the Independent Commission Against Corruption**

**Schedule 1** [23] and [65] insert new Part 5A (proposed sections 57A–57F) and Schedule 1A into the Principal Act to provide for the appointment of an Inspector of the Independent Commission Against Corruption. The provisions are similar to those in the *Police Integrity Commission Act 1996* relating to the Inspector of the Police Integrity Commission.

Proposed section 57B provides that the principal functions of the Inspector are:

- (a) to audit the operations of ICAC for the purpose of monitoring compliance with the law of the State, and
- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of ICAC or officers of ICAC, and
- (c) to deal with (by reports and recommendations) complaints of conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by ICAC or officers of ICAC, and
- (d) to assess the effectiveness and appropriateness of the procedures of ICAC relating to the legality or propriety of its activities.

**Schedule 1** [24]–[27] amend sections 64 and 64A of the Principal Act to provide for the Joint Committee on the Independent Commission Against Corruption constituted under the Act to (among other things) monitor and review the exercise by the Inspector of the Inspector's functions and to enable it to veto the appointment of a person as the Inspector.

**Schedule 1 [33]** inserts a new Division 2 (new sections 77A and 77B) into Part 8 of the Principal Act. Section 77A provides that the Inspector may make a special report to Parliament at any time about matters affecting ICAC. Section 77B requires the Inspector to prepare an annual report for submission to Parliament. **Schedule 1 [35] and [36]** amend section 78 of the Principal Act to enable the Inspector to include a recommendation in a report that the report be made public forthwith and to enable the Presiding Officer of a House of Parliament to make it public whether or not the House is in session.

**Schedule 1 [61]** inserts new sections 111C and 111D into the Principal Act. Under section 111C, conduct of the Commissioner of ICAC or an officer of ICAC will not be able to be made the subject of a complaint, inquiry, investigation or other action by the Ombudsman unless the matter is referred to the Ombudsman by the Inspector. Section 111D provides for public officials to make complaints to the Inspector about the conduct of ICAC, an officer of ICAC or an officer of the Inspector. Section 111D is linked to the amendments to the *Protected Disclosures Act 1994* to insert proposed section 12C into that Act (**Schedule 2.10 [3]**). These ensure that disclosures to the Inspector are protected by that Act and also provide for disclosures concerning corrupt conduct, maladministration and other matters engaged in by the Inspector to the Ombudsman.

**Schedule 1 [2],[38],[54], [57], [58], [59] and [60]** make consequential amendments to extend various sections of the Principal Act relating to the exercise by ICAC and its officers of their functions to the exercise of functions by the Inspector and the Inspector's officers (for example, to make it an offence under section 80 to obstruct the Inspector, to protect the Inspector from liability under section 109 for matters or things done in good faith for the purposes of the Principal Act and to require the Inspector to keep secret certain information acquired in the exercise of functions under the Act).

**Schedule 2** contains a number of amendments to Acts and a regulation relating to functions exercised by the Inspector. These amendments are more fully explained below.

### **Annual reports by ICAC**

**Schedule 1 [32]** amends section 76 of the Principal Act to require ICAC to provide greater details of certain matters relating to its investigations (such as the average time taken to deal with complaints and the actual time taken to investigate any matter the subject of a report).

### **Advice to complainants of decision not to investigate or to discontinue investigation**

**Schedule 1 [15]** amends section 20 of the Principal Act to require ICAC to inform a complainant or an officer who has made a report if it decides not to investigate the matter or to discontinue such an investigation and of the reasons for its decision.

### **Reform of contempt laws**

**Schedule 1 [45]–[47]** amend section 98 of the Principal Act so as to restrict ICAC’s power to refer contempts of ICAC to contempts in the face or hearing of ICAC (so removing its power to refer contempts by publication to the Supreme Court). ICAC will retain its powers to make orders restricting publication of various matters under section 112 of the Principal Act and it will continue to be an offence to contravene such a direction.

**Schedule 1 [48]–[53]** amend sections 99 and 100 of the Principal Act to clarify the procedure for certifying and referring an alleged contempt to the Supreme Court. Provision is also made to ensure that a person who is alleged to have committed a contempt is advised of the details of the alleged contempt.

### **Clarification of findings that ICAC may make**

The definition of corrupt conduct in sections 8 and 9 of the Principal Act is crucial to the effectiveness of ICAC as it defines the scope of its power to investigate corrupt conduct that has occurred, is occurring or is about to occur. **Schedule 1 [9]** inserts proposed section 13 (3A) into the Principal Act to make it clear that ICAC may make a finding that conduct is of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

**Schedule 1 [6]** makes a consequential amendment to section 9 (5).

**Schedule [10]** makes an amendment to section 13 (4) to further clarify the relationship between sections 9 and 13.

**Schedule 1 [8]** amends section 13 of the Principal Act to confirm the power of ICAC to make no finding.

**Schedule 1 [31]** amends section 74C of the Principal Act to clarify ICAC’s power to recommend that consideration be given to a councillor’s suspension under Division 3 (Misbehaviour) of Part 1 of Chapter 14 of the *Local Government Act 1993*.

**Schedule 2.6** makes a consequential amendment to the *Local Government Act 1993*.

### **Threatening counsel assisting ICAC, witnesses and others**

Section 80 (a) of the Principal Act makes it an offence to threaten ICAC or an officer of ICAC in the exercise of functions under the Act. **Schedule 1 [37]** amends section 80 to also make it an offence to threaten the Inspector or an officer of the Inspector, a legal practitioner appointed by ICAC to assist it or a legal practitioner or other person authorised to appear before ICAC.

**Schedule 1 [44]** amends section 93 of the Principal Act to make it an offence to threaten to use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage to a person on account of his or her assisting ICAC or giving evidence to ICAC.

### **False or misleading evidence**

Section 87 of the Principal Act makes it an offence for a person to give evidence that to the knowledge of the person is false or misleading at a hearing before ICAC. This section is analogous to section 330 of the *Crimes Act 1900* which deals with false or misleading evidence that does not amount to perjury and which also makes it an offence to give false or misleading evidence not believing it to be true.

Section 331 of the *Crimes Act 1900* permits a jury to find a person guilty of an offence under section 330 with respect to the making of contradictory statements of which one (but the jury cannot determine which) must have been made by the person in the knowledge it was false. Section 332 of the *Crimes Act 1900* denies a person the right to acquittal merely because a false or misleading statement is contained in an affidavit or other document in respect of which there is a technical defect.

**Schedule 1 [42]** recasts section 87 to make it an offence to give false or misleading evidence not believing it to be true and applies sections 331 and 332 to proceedings under section 87 of the Principal Act.

### **Criminal prosecutions**

Under section 179 of the *Criminal Procedure Act 1986* proceedings for a summary offence must be commenced not later than 6 months after the offence is alleged to have been committed. The section does not apply to an offence for which an Act specifies another period. **Schedule 1 [63]** amends section 116 to provide that proceedings for an offence under section 112 (Restriction on publication of evidence) may be commenced within 2 years after the commission of the alleged offence.

**Schedule 1 [64]** inserts new section 116A into the Principal Act to prevent ICAC from commencing criminal prosecutions arising from its investigations unless the Director of Public Prosecutions has advised ICAC that it is appropriate to do so. This confirms existing practice that ICAC commences proceedings for a criminal offence only with the advice of the Director of Public Prosecutions. **Schedule 1 [11] and [30]** make consequential amendments to sections 13 and 74A, respectively.

### **Disposal of property**

ICAC has power under section 47 of the Principal Act to dispose of property seized under a search warrant but no general powers to dispose of unclaimed property. **Schedule 1 [21]** inserts proposed sections 48A–48D into the Principal Act to enable ICAC to apply to a court for an order as to how property in its possession that is not required for the purposes of a criminal prosecution or a disciplinary or other proceeding and to which no person appears to be lawfully entitled is to be dealt with. The court may, for example, order that the property be forfeited to the Crown and the proceeds of its sale be paid to the Consolidated Fund.

### **Consultation**

**Schedule 1 [12]** amends section 16 of the Principal Act to require ICAC to consult with the Ombudsman in exercising its principal functions other than those relating to investigation of conduct.

### **Delegation**

**Schedule 1 [55]** amends section 107 of the Principal Act to prevent ICAC from delegating its powers to certify that a person should in the public interest be permitted to divulge information acquired in exercising any function under the Act.

### **Savings, transitional and other provisions**

**Schedule 1 [66] and [67]** insert a power to make savings and transitional regulations and a Part containing savings and transitional provisions into Schedule 4 to the Principal Act.

**Schedule 1 [4]** amends section 3 of the Principal Act to provide that notes do not form part of the Act.

## **Schedule 2      Amendment of other Acts and regulation**

### **Criminal Records Regulation 2004**

Section 12 of the *Criminal Records Act 1991* sets out the consequences of a conviction becoming spent under the Act. These include that an offender is not required to disclose a spent conviction to another person. **Schedule 2.1** contains an amendment to exclude applicants for appointment or employment as an officer of the Inspector (which as defined in the Principal Act includes the Inspector) from the consequences of convictions becoming spent.

### **Defamation Act 1974**

**Schedule 2.2 [1]** replaces section 17K of the *Defamation Act 1974* so as to extend to the Inspector of the ICAC as Inspector and to an officer of the Inspector the defence of absolute privilege to a publication by or to the Inspector or officer.

**Schedule 2.2 [2]** replaces clause 2 (18) of Schedule 2 to that Act to make proceedings of the Inspector protected reports for the purposes of section 24 of that Act. There is a defence under section 24 for the publication of a fair protected report.

### **Freedom of Information Act 1989**

Schedule 2 to the *Freedom of Information Act 1989* lists various bodies and offices that are exempt, either wholly or partially, from the operation of that Act. **Schedule 2.3** amends that Schedule to exempt the Inspector from the operation of the Act in relation to operational auditing, complaint handling, investigative and report functions.

### **Greyhound and Harness Racing Administration Act 2004**

Section 42 of the *Greyhound and Harness Racing Administration Act 2004* makes it an offence to disclose information obtained in the administration of that and certain related Acts, except in certain circumstances or to certain persons. **Schedule 2.4** includes the Inspector within the excepted persons.

### **Health Records and Information Privacy Act 2002**

Section 17 of the *Health Records and Information Privacy Act 2002* provides for the exemption of certain persons, authorities and activities from the operation of the Act. **Schedule 2.5 [3]** includes the Inspector within that exemption except in relation to the exercise of administrative and educative functions.

Sections 60 and 63 of the Act confer functions on the Privacy Commissioner with respect to the conduct of inquiries and investigations and requiring organisations to provide information concerning arrangements made by the organisations to comply with Health Privacy Principles and other things. **Schedule 2.5 [4] and [5]** amend the sections to exclude the Inspector from the conferral of functions.

**Schedule 2.5 [1] and [2]** are consequential amendments to amend and insert definitions.

### **Local Government Act 1993**

**Schedule 2.6** contains an amendment that is consequential on the amendment to section 74C of the Principal Act made by **Schedule 1 [31]**.

### **Police Act 1990**

Section 167A of the *Police Act 1990* makes it an offence to provide false or misleading information to various persons and bodies in the course of an investigation under Part 8A (Complaints about conduct of police officers) of that Act. **Schedule 2.7** includes the Inspector as one of those persons.

### **Police Integrity Commission Act 1996**

The Police Integrity Commission (*PIC*) has functions including the detection, investigation and prevention of police corruption and other serious police misconduct. At present it exercises its functions in general in relation to those members of NSW Police who hold positions designated under the *Police Act 1990* as positions to be held by police officers. **Schedule 2.8 [1]** provides for references to police officers in the *Police Integrity Commission Act 1996* to be read so as to include all other members of NSW Police so that PIC may exercise its functions in respect of all such members.

Clause 1 (1) of Schedule 2 to the *Police Integrity Commission Act 1996* provides that a person is not eligible to be appointed as Inspector of PIC or to act in that office unless the person has special legal qualifications (that is, the person is qualified to be appointed as a Judge of the Supreme Court of the State or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of

Australia or is a former judge of any court of the State or elsewhere in Australia or a former justice of the High Court). **Schedule 2.8 [2]** omits that requirement.

### **Privacy and Personal Information Protection Act 1998**

Section 27 of the *Privacy and Personal Information Protection Act 1998* provides for the exemption of certain persons, authorities and activities from the operation of the Act. **Schedule 2.9 [3]** includes the Inspector within that exemption except in relation to the exercise of administrative and educative functions.

Sections 38, 40 and 42 of the Act confer functions on the Privacy Commissioner with respect to the conduct of inquiries and investigations and requiring public sector agencies to provide certain information about personal information held by them and about their privacy protection compliance arrangements. **Schedule 2.9 [4], [5] and [6]** amend the sections to exclude the Inspector from the conferral of functions.

**Schedule 2.9 [1] and [2]** are consequential amendments to amend and insert definitions.

### **Protected Disclosures Act 1994**

**Schedule 2.10 [3]** inserts new section 12C into the *Protected Disclosures Act 1994* as a consequence of the amendments described above inserting sections 111C and 111D into the Principal Act (**Schedule 1 [61]**) so as to confer functions relating to complaints about the conduct of ICAC, an officer of ICAC or an officer of the Inspector on the Inspector and referring to the Ombudsman complaints about the Inspector.

**Schedule 2.10 [4]** is a consequential amendment.

**Schedule 2.10 [1] and [2]** are consequential amendments to amend and insert definitions.

**Schedule 2.10 [5]** inserts a power to make savings and transitional regulations.

### **Totalizator Act 1997**

Section 105 of the *Totalizator Act 1997* makes it an offence to disclose information obtained in the administration of that Act, except in certain circumstances or to certain persons. **Schedule 2.11** includes the Inspector within the excepted persons.