



Submission to the Select Committee relating to the establishment of a National Integrity Commission

Simon Breheny
Director of Policy

Morgan Begg
Research Scholar, Legal Rights Project

April, 2016

www.ipa.org.au

ABOUT THE INSTITUTE OF PUBLIC AFFAIRS

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

ABOUT THE AUTHORS

Simon Breheny is Director of Policy at the Institute of Public Affairs.

Simon has been published in *The Australian*, the *Australian Financial Review*, the *Sydney Morning Herald*, *The Age*, the *Daily Telegraph*, the *Herald Sun*, the *Courier Mail*, the *Canberra Times*, the *Sunday Tasmanian* and *The Punch*. He is regularly interviewed on radio around the country in relation to legal rights, the rule of law, civil liberties and the nanny state, and has appeared on ABC's *Q&A*, *Lateline*, *News Breakfast* and *ABC News 24*, Channel 7's *Weekend Sunrise* and Sky News' *The Nation*, *AM Agenda*, *Lunchtime Agenda* and *PM Agenda*.

Simon has also appeared as a witness to give expert evidence before the Senate Standing Committee on Environment and Communications, NSW Legislative Council Standing Committee on Law and Justice, Senate Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security.

Morgan Begg is a Research Scholar in the Legal Rights Project and Editor of *FreedomWatch* at the Institute of Public Affairs. Morgan is currently completing a Bachelor of Laws at La Trobe University.

Contents

Introduction	4
Anti-corruption agencies typically breach fundamental legal rights.....	5
The independence dilemma	6
Abuses of power	8
Appendix: Legal rights breaches identified in state anti-corruption agency legislation	10

Introduction

On 24 February 2016, the Australian Senate resolved to establish a *Select Committee relating to the establishment of a National Integrity Commission*. The proposed National Integrity Commissioner has been likened to a “federal ICAC”,¹ in reference to the Independent Commission against Corruption, which operates in New South Wales as an anti-corruption and misconduct regulator at the state level.

This submission argues that, based on the historical experience with state level anti-corruption agencies, a federal National Integrity Commission would not be appropriate or desirable, and would invite abuses of power.

This submission also argues that state level anti-corruption agencies wield coercive powers which violate the legal rights of individuals, and play by a different set of rules than the traditional system of justice. A federal agency – necessarily modelled on state agencies – would likewise be lacking in the rigour which produces more just outcomes. This is inconsistent with democratic principles and the rule of law.

¹ Jane Lee “Prime Minister Malcolm Turnbull ‘rules out federal ICAC in exchange for ABCC win’” *Sydney Morning Herald*, 3 April 2016, accessed online <<http://www.smh.com.au/federal-politics/federal-election-2016/prime-minister-malcolm-turnbull-rules-out-federal-icac-in-exchange-for-abcc-win-20160403-gnx6mf.html>>.

Anti-corruption agencies typically breach fundamental legal rights

Fundamental legal rights, such as the right to silence and the presumption of innocence, are essential to a legal system achieving justice, and should be afforded to everyone – even those suspected of corruption.

In 2014, the Institute of Public Affairs audited all Commonwealth legislation to reveal the extent that key legal rights – the presumption of innocence, natural justice, the right to silence, and the privilege against self-incrimination – were undermined in federal legislation. An update of that report released in April 2016 found that at least 290 such legal rights breaches existed in Commonwealth legislation in force at the end of 2015.

Legal right	Breaches at end of 2015
Reversals of the presumption of innocence	47
Natural justice	94
Right to silence	33
Privilege against self-incrimination	116
TOTAL	290

A new National Integrity Commission would inevitably add to that tally. Without considering regulations and other legislation, an audit of state legislation which enables similar bodies reveals that they are particularly prone to containing legal rights breaches. In particular, this area of law contains numerous restrictions of the right to silence, and provisions which abrogate the privilege against self-incrimination. These provisions have been listed and extracted in an appendix to this submission.

State legislation	Presumption of innocence	Natural justice	Right to silence	Self-incrimination	Total
<i>Independent Commission against Corruption Act 1988 (NSW)</i>	1	0	2	1	4
<i>Crime and Corruption Commission Act 2001 (Qld)</i>	0	0	3	2	5
<i>Corruption, Crime and Misconduct Act 2003 (WA)</i>	0	0	1	1	2
<i>Independent Broad-based Anti-corruption Commission Act 2011 (Vic)</i>	0	0	3	1	4
<i>Independent Commissioner Against Corruption Act 2012 (SA)</i>	0	0	3	1	4
<i>Integrity Commission Act 2013 (Tas)</i>	0	0	2	0	2

No person should be compelled to speak or produce evidence, particularly where that evidence would incriminate them. The traditions of the common law legal system are valuable not for the ease with which it secures adverse findings, but for the rigour in which it resolves disputes.

The model used for anti-corruption agencies undermines this rigour, and would further undermine the rule of law and democratic principles at the Commonwealth level.

The independence dilemma

Independent statutory authorities are government agencies which are not subject to the oversight that ordinarily applies to other government bodies. Putting distance between the parliament and “independent” arms of the state makes them less accountable, and inherently undemocratic.

“Independent” law enforcement agencies and quasi-judicial bodies *outside* of the orthodox justice system are always in danger of losing sight of their original mission, objectivity and the values and traditions of the common law justice system. This view was encapsulated by the former Chief Justice of the High Court of Australia, Dyson Heydon, who commented on the nature of specialist bodies in a 2010 case (the Kirk case):

[A] major difficulty in setting up a particular court... to deal with specific categories of work... is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up... [Courts] set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. ... [To say all this is] to raise a caveat about accepting too readily the validity of what specialist courts do – for there are general and fundamental legal principles which it can be even be more important to apply than specialist skills.²

Problematically, independent agencies are less accountable and are more resistant to oversight and criticism.

This problem is also true of the most prominent state anti-corruption agency; the Independent Commission against Corruption in New South Wales. ICAC was introduced in 1988 under the Coalition state government led by Nick Greiner. In the second reading speech to the *Independent Commission Against Corruption Bill 1988*, Mr Greiner noted:

The third fundamental point I want to make is that the independent commission will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation, and it was made clear in the statements I made prior to the election.

By 1992, the ICAC was already found to have acted beyond its jurisdiction by the NSW Supreme Court. Mr Greiner himself and another minister became the target of significant criticism when it came to light that the other minister had enticed a crossbench MP to resign from parliament with the offer of a position in the public service. The matter was referred to the ICAC, who then reported to parliament in April 1992, in which the Commission determined that Mr Greiner and the other Minister both engaged in corrupt conduct.

Whether one views this as a typical political manoeuvre, or genuinely corrupt in the general sense of the word, the determination of the Commissioner’s report was wrong according to the law. As Chief Justice Gleeson held:

[I]t is for the Commission to identify and apply the relevant standards, not to create them. Just as the courts cannot create new criminal offences so the Commission cannot create new grounds for the dismissal of public officials. The observance and application by the Commission of objective standards, established and recognised by law, in the performance of its task of applying [the Act] to

² *Kirk v Industrial Relations Commission (NSW)* (2010) 262 ALR 569, 609.

cases before it is essential. It is what was intended by Parliament, it is required by the statute, and it is necessary for the maintenance of the rule of law.

The publication of findings of Royal Commissions or Commissions such as the present defendant, or the Criminal Justice Commission of Queensland, although they do not affect or create legal rights or obligations, can have the most far-reaching consequences for the reputation of citizens. ...

The Commissioner, in reaching his conclusion that the conduct found by him could constitute reasonable grounds for dismissal, did not enunciate and apply objective standards to the facts of the case. Although the Commissioner recognised that the concept of dismissal of a Premier or a Minister is attended by sensitive constitutional implications and difficulties, he never identified any objective criteria for dismissal by reference to which his conclusion could be tested. He approached the question as though the matter was to be determined by his personal and subjective opinion. In this respect he exceeded his jurisdiction and failed to apply the correct test...³

Mr Greiner did resign after the report became public, falling afoul of the Commission that essentially wrote its own rules. That the Commission would depart from its legislated boundaries so soon after its establishment is telling, and was not an exceptional case. More recently, the ICAC was found to have exceeded its jurisdiction by the High Court of Australia. This case relates to accusations that a senior prosecutor, Margaret Cunneen SC, advised her son's girlfriend to fake chest pains in order to avoid a breathalyser test following an automobile accident (which she was not responsible for).

The investigation that followed was rightly found to have exceeded its jurisdiction to only investigate "corrupt conduct" under the Act that "adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official". This is obvious: the alleged event had no bearing on Ms Cunneen's position as a prosecutor. As the majority noted, a finding of corrupt conduct on the part of Ms Cunneen would "result in the inclusion in the definition of 'corrupt conduct' of a wide variety of offences having nothing to do with corruption in public administration as that concept is commonly understood."⁴ This would make the Commission resemble a "Crime Commission", something Mr Greiner explicitly rejected in 1988.

It is clear that the most prominent state anti-corruption agency has a track record of exceeding its jurisdiction in its over-enthusiastic pursuit of its objectives. The NSW state government's decision to retrospectively legalise ICAC's unlawful investigation into Ms Cunneen only confirms the view that agencies such as ICAC have the potential to become a force unto itself, who dare not be opposed by the democratically elected parliament.

³ *Greiner v Independent Commission Against Corruption (ICAC)* (1992) 28 NSWLR 125, 147-8.

⁴ *Cunneen v Independent Commission Against Corruption* [2015] HCA 14, [52].

Abuses of power

State anti-corruption agencies are given a wide scope to conduct their proceedings as they see fit, ostensibly so they can fearlessly achieve their objectives. This means provisions of state legislation explicitly reject that the agencies themselves or the hearings they conduct are bound by the rules of evidence.⁵

Quasi-judicial independent agencies, being less accountable in nature, are prone to abuse this power. As Justice Heydon identified in the *Kirk* case, quasi-judicial bodies can become over-enthusiastic in their pursuit of their objectives, leading them to “exalt that purpose above all other considerations, and pursue it in too absolute a way”.

No institution better illustrates this point than the NSW ICAC. That its pursuit against Ms Cunneen had no logical basis in law is obvious. However, the manner in which ICAC conducted its pursuit of Ms Cunneen is indicative of an agency that abused the generous powers granted to them by the parliament. In one instance, ICAC officers re-enacted a seizure of Ms Cunneen’s mobile phone from her residence in order to cover up a flawed raid a week earlier when they took her phone without a search warrant.⁶ ICAC Inspector David Levine was scathing in his review of the agency in a report tabled in NSW parliament in December 2015:

... it is of concern that the Commissioner issued the Notices... “to attend and produce forthwith” [mobile phones already in the agency’s possession] given that **this in fact rendered them unlawful**. This amounts to an **abuse of power and serious maladministration**.⁷ [Emphasis added]

Mr Levine also described correspondence he received from the Commissioner Megan Latham as “insulting, condescending and to border on insolent”, and reinforced his view of “the breathtaking arrogance of the Commission.”⁸

The methods of ICAC barrister Geoffrey Watson SC in questioning witnesses has also been the subject of debate. The questioning of former Premier Barry O’Farrell over his recollection of an expensive bottle of wine was a side issue to the inquiry into Australian Water Holdings. At no stage has it been suggested that the bottle of wine had any substantive link to any other issue of relevance to the ICAC inquiry. Yet, the inquiry caused the Premier to resign for the thinnest of reasons – a likely memory lapse regarding an irrelevant event. The inescapable conclusion remains that the hearing was used merely as a medium to cause irreparable damage to the reputation of a sitting Premier.

More recently, Mr Watson faces the prospect of a formal finding of “unsatisfactory professional conduct” for hostile comments he gave to the *Australian Financial Review Magazine* regarding the Liberal Party – while an inquiry into alleged unlawful donations to the NSW Liberal Party was ongoing.⁹

⁵ *Independent Commission against Corruption Act 1988* (NSW) s 17; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 116; *Crime and Corruption Act 2001* (Qld) s 180; *Corruption, Crime and Misconduct Act 2003* (WA) s 135; *Integrity Commissioner Act 2009* (Tas) s 9.

⁶ Sharri Markson “Mobile cover-up claims hit NSW ICAC”, *The Australian*, 22 October 2015.

⁷ David Levine, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988 re Margaret Cunneen SC & Ors* (4 December 2015) 18

<<http://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/S.77A-REPORT-in-Operation-Hale-.pdf>>.

⁸ *Ibid* 34.

⁹ Sharri Markson “Remarks land ICAC silk Geoffrey Watson in hot water” *The Australian*, 9 April 2016, accessed online <<http://www.theaustralian.com.au/national-affairs/state-politics/remarks-land-hostile-icac-silk-geoffrey-watson-in-hot-water/news-story/d5f4ba3bb9484af1d11315ca552fc811>>.

The ICAC's desperate and illegitimate public call for greater powers, and to retrospectively approve their Cunneen investigation¹⁰ is further proof of what Justice Heydon identified in the *Kirk* case. Specialist bodies (such as anti-corruption agencies) will likely "become over-enthusiastic about vindicating the purposes for which they were set up". In so doing, these bodies give no regard to the rules of evidence and the rule of law.

A federal anti-corruption commission has every danger of following the same path, and should be avoided.

¹⁰ Independent Commission Against Corruption, "Public statement regarding ICAC v Cunneen" (Media release) 20 April 2015, since removed from the ICAC's website, archived at <<https://web.archive.org/web/20150623073448/http://www.icac.nsw.gov.au/media-centre/media-releases/article/4782>>.

Appendix: Legal rights breaches identified in state anti-corruption agency legislation

<i>Independent Commission against Corruption Act 1998 (NSW)</i>		
<u>Section 26</u> Self-incrimination	Privilege against self-incrimination	The Commission has the power to compel the production of self-incriminating documents, statements and other things, which can be used for the purposes of the investigation concerned.
<u>Section 37</u> Privilege as regards answers, documents etc	Right to silence	A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse to answer any question or produce any document relevant to the investigation.
<u>Section 86</u> Failure to attend etc	Right to silence	A person summoned to attend or appearing before the Commission shall not without reasonable excuse fail to answer any question or produce any document relevant to the investigation.
<u>Section 88</u> Offences relating to documents or other things	Burden of proof	<p>A person who, with intent to delay or obstruct the carrying out by the Commission of any investigation:</p> <ul style="list-style-type: none"> • Destroys or alters any document or other thing relating to the subject-matter of the investigation, or • Sends or attempts to send or conspires with any other person to send, out of New South Wales any such document or other thing, or any property of any description belong to or in the disposition of or under the control of any person whose affairs are the subject-matter of the investigation, <p>Is guilty of an indictable offence [Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.] If in any prosecution for this offence it is proved that the person charged with the offence has destroyed or altered any document or other thing, or has sent or attempted to send, or conspired to send, out of New South Wales any such document or other thing, the onus of proving that in so doing the person had not acted in contravention of this section is on the person.</p>

<i>Independent Broad-based Anti-corruption Commission Act 2011 (Vic)</i>		
<u>Section 136</u> Offence for summoned witness to refuse or fail to answer question	Right to silence	A person who is duly served with a witness summons to attend as a witness to give evidence at an examination before IBAC, must not, without reasonable excuse, refuse or fail to answer a question as required by the IBAC.
<u>Section 137</u> Offence for summoned witness to fail to produce document or other thing	Right to silence	A person who is duly served with a witness summons to attend as a witness before the IBAC, must not, without reasonable excuse, refuse or fail to produce a document or other thing that he or she was required to produce by the witness summons.
<u>Section 144</u> Privilege against self-incrimination abrogated – witness summons	Privilege against self-incrimination	A person is not excused from answering a question or giving information or from producing a document or other thing in accordance with a witness summons, on the ground that the answer to the question, the information, or the production of the document or other thing, might tend to incriminate the person or make the person liable to a penalty.
<u>Section 152</u> Contempt of the IBAC	Right to silence	A person who has been served with a witness summons by the IBAC is guilty of contempt of the IBAC if the person, without

		reasonable excuse fails to produce documents or answer questions relevant to the subject matter of the examination.
--	--	---

<i>Independent Commissioner Against Corruption Act 2012 (SA)</i>		
<u>Section 33</u> Obstruction	Right to silence	A person must not refuse or fail to provide a statement of information as required by the person heading the investigation. (Maximum penalty is \$10,000 or 2 years imprisonment.)
<u>Schedule 2 Section 5</u> Power to obtain document	Right to silence	(1) An examiner may, by notice in writing served on a person, require the person – a) To attend, at a time and place specified in the notice, before a person specified in the notice, being the examiner or a member of the staff of the Commissioner; and b) To produce at that time and place to the person so specified a document or other thing specified in the notice, being a document or other thing that is relevant to an investigation into corruption in public administration. (2) ... (5) A person must not refuse or fail to comply with a notice served on the person under this clause. (Maximum penalty: \$20 000 or imprisonment for 4 years imprisonment.)
<u>Schedule 2 Section 8</u> Failure of witnesses to attend and answer questions	Right to silence	A person compelled to appear as a witness before an examiner must not refuse or fail to answer a question as required by the examiner, or to produce a document or thing as required to produce by the summons as prescribed.
<u>Schedule 2 Section 8</u> Failure of witnesses to attend and answer questions	Privilege against self-incrimination	Section 8(4) merely limits the use of self-incriminating information.

<i>Crime and Corruption Commission Act 2001 (Qld)</i>		
<u>Section 72</u> Power to require information or documents	Right to silence	(1) This section applies only for a crime investigation or specific intelligence operation (crime) (2) The chairman may, by notice given to a person holding an appointment in a unit of public administration, require the person, within the reasonable time and in the way stated in the notice to give an identified commission officer – a) an oral or written statement of information of a stated type relevant to a crime investigation or specific intelligence operation (crime) that is in the possession of the unit; or b) a stated document or other stated thing, or a copy of a stated document, relevant to a crime investigation or specific intelligence operation (crime) that is in the unit's possession: or c) all documents of a stated type, or copies of documents of the stated type, containing information relevant to a crime investigation or specific intelligence operation (crime) that are in the unit's possession. (3) The chairman may, by notice given to a person holding an appointment in a unit of public administration, require the person –

		<p>a) to attend before an identified commission officer at a reasonable time and place stated in the notice; and</p> <p>b) at the time and place stated in the notice, to give to the officer a document or thing stated in the notice that –</p> <ol style="list-style-type: none"> i. relates to the performance by the unit of the unit’s functions; and ii. is relevant to a crime investigation or specific intelligence operation (crime) <p>(4) The person must comply with a notice under subsection (2) or (3), unless the person has a reasonable excuse. (Maximum penalty – 85 penalty units or 1 year’s imprisonment.)</p>
<p><u>Section 74</u> Notice to produce for crime investigation, specific intelligence operation (crime) or witness production function</p>	Right to silence	<p>The chairman may, by notice (notice to produce) given to a person, require the person, within the reasonable time and in the way stated in the notice, to give an identified commission officer a stated document or thing that the chairman believes on reasonable grounds, is relevant to crime investigation, a specific intelligence operation (crime) or the witness protection function.</p> <p>The person must comply with the notice to produce, unless the person has a reasonable excuse. (Maximum penalty: 85 penalty units or 1 year’s imprisonment.)</p>
<p><u>Section 75</u> Notice to discover information</p>	Right to silence	<p>(2) The chairman may, by notice (notice to discover) given to the person, require the person, within the reasonable time and in the way stated in the notice, to give an identified commission officer –</p> <ol style="list-style-type: none"> a) an oral or written statement of information of a stated type relevant to the investigation or operation that is in the person’s possession; or b) a stated document or other stated thing, or a copy of a stated document, relevant to the investigation or operation that is in the person’s possession; or c) all document of a stated type, or copied of documents of the stated type, containing information relevant to the investigation or operation that in the person’s possession. <p>(3) The person must comply with the notice. (Maximum penalty – 85 penalty units or 1 year’s imprisonment.)</p>
<p><u>Section 188</u> Refusal to produce – claim of reasonable excuse</p>	Privilege against self-incrimination	<p>It is not a reasonable excuse to refuse to produce a document or thing under as required under sections 75, 75B or at a commission hearing under an attendance notice because the document or thing might tend to incriminate the person. (Maximum penalty: 200 penalty units or 5 years imprisonment.)</p>
<p><u>Section 192</u> Refusal to answer question</p>	Right to silence & privilege against self-incrimination	<p>A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer. (Maximum penalty – 200 penalty units or 5 years imprisonment.) The person is not entitled to remain silent or to refuse to answer to answer on the ground of the self-incrimination privilege or the ground of confidentiality.</p>

Corruption, Crime and Misconduct Act 2003 (WA)

<p><u>Section 95</u></p>	Right to silence	The Commission may, by written notice served on a person, require the person to attend before the Commission, and to
--------------------------	------------------	--

Power to obtain documents and other things		produce at a specified time and place a record or other thing specified in the notice.
<u>Section 160</u> Failing to be sworn or to give evidence when summonsed	Privilege against self-incrimination	(1) A person served with a summons under section 96 requiring the person to attend and give evidence who – a) refuses or fails to be sworn or make an affirmation; or b) fails to answer any question relevant to the investigation that the Commission requires the person to answer, is in contempt of the Commission. (2) Despite sections 147(3) and 163(6), a person required by the Commission to answer a question relevant to the investigation is not excused from the requirement to answer the question on the ground that the answer might incriminate or tend to incriminate the person or render the person liable to a penalty.

<i>Integrity Commission Act 2009</i>		
<u>Section 54</u> Offences relating to investigations	Right to silence	A person who, without reasonable excuse, fails to comply with a requirement or direction under section 47 within 14 days of receiving it commits an offence.
<u>Section 80</u> Offences relating to Integrity Tribunal	Right to silence	(5) A person who fails without reasonable excuse to – a) attend an inquiry of the Integrity Tribunal as required by the Integrity Tribunal; or b) take an oath or make an affirmation at an inquiry of the Integrity Tribunal; or c) produce or authorise another person to produce any record, information, material or thing when required by the Integrity Tribunal to do so; or d) answer any question when required by the Integrity Tribunal to do so; or e) assist in the course of an inquiry of the Integrity Tribunal – is guilty of an offence. (Maximum penalty: 5,000 penalty units.)