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Our Ref: 9688/259

Hon Nick Goiran, MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Legislative Assembly Committee Office
WA Parliament
Level 1, 11 Harvest Tce
West Perth WA 6005

Email: jscccc@parliament.wa.gov.au

Dear Chairman

Re Joint Standing Committee inquiry into the Corruption and Crime Commission

Thank you for your letter to Commissioner James dated 18 August 2016, regarding the Committee's inquiry into prosecution powers of the Corruption and Crime Commission ('CCC')

Due to a number of staff absences during the week the Committee will be visiting Sydney, it will not be possible for the Commission to meet with the Committee however I am pleased to provide the following information, which I hope will be of some assistance to your inquiry.

History of PIC Prosecution Practices

When the *Police Integrity Commission Act 1996* commenced, the new Police Integrity Commission ('PIC') entered into a Memorandum of Understanding with the NSW Office of the Director of Public Prosecutions ('DPP') for the purposes of prosecutions arising out of PIC investigations. In accordance with s 15(1)(a) of the *Police Integrity Commission Act 1996* ('PIC Act'), the Memorandum provided that the PIC would furnish briefs of evidence to the DPP:

15 Other functions regarding evidence and information collected

- (1) *Other functions of the Commission include the following:*
- (a) *To assemble evidence that maybe admissible in the prosecution of a person for a criminal offence against the law of the State and to furnish any such evidence to the Director of Public Prosecutions*
 - (b)
 - (c) ...

The MOU further provided that if the DPP considered that the evidence supported one or more charges it would advise the PIC in writing and provide the wording for each charge. The PIC would then obtain a return date from the Local Court, prepare a Court Attendance Notice ('CAN') displaying the return date and the charge and serve the CAN on the accused. The PIC would advise the DPP of the return date and provide the DPP with a copy of each CAN. A lawyer from the DPP would appear at the Local Court on the return date and advise the Court that it was taking over the prosecution. The power to do so was provided by s 9 of the *Director of Public Prosecutions Act 1986*:

9 Taking over prosecutions or proceedings

- (1) *If a prosecution or proceeding in respect of an offence (whether it is an indictable offence or a summary offence) has been instituted by a person other than the Director, the Director may take over the matter and:*
 - (a) *carry on the prosecution or proceeding,*
 - (b) *carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the offence,*
 - (c) *institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the offence, and*
 - (d) *conduct, as respondent, an appeal in any court in respect of the offence.*
- (2) *The Director may not take over a matter under this section involving a summary offence, unless:*
 - (a) *the offence is a prescribed summary offence, or*
 - (b) *a person otherwise responsible for the matter has consented in writing.*
- (3) *Except as provided by subsection (2), the Director may take over a matter under this section whether or not the person otherwise responsible for the matter consents.*
- (4) *If the Director takes over a matter under this section:*
 - (a) *the Director shall, as from the time when the Director complies with section 10 (1) in relation to the matter, be deemed to be the prosecutor in connection with the prosecution or proceeding concerned, and*
 - (b) *the Director may decline to proceed further in the prosecution or to carry the proceeding further.*
- (5) *For the purposes of this section, "proceeding" includes any application, appeal or other proceeding commenced under Division 1A of Part 3 of the Confiscation of Proceeds of Crime Act 1989.*

The arrangements between the PIC and the DPP was similar to those between the NSW Independent Commission Against Corruption ('ICAC') and the ODPP. Neither the *Independent Commission Against Corruption Act 1989* ('the ICAC Act') nor the PIC Act contained an express provision conferring on the respective Commissions a power to commence prosecutions. The power to commence prosecutions was provided by the *Criminal Procedure Act 1986*:

Criminal Procedure Act 1986

14 Common informer

A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of persons.

...

48 Commencement of proceedings by police officer or public officer

If a police officer or public officer is authorised under section 14 of this Act or under any other law to commence committal proceedings, the officer may commence committal proceedings for an offence against a person by issuing a court attendance notice and filing the notice in accordance with this Division.

...

173 Commencement of proceedings by police officer or public officer

If a police officer or public officer is authorised under section 14 of this Act or under any other law to commence proceedings for an offence against a person, the officer may commence the proceedings by issuing a court attendance notice and filing the notice in accordance with this Division.

...

3 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

...

"public officer" means any of the following persons, if acting in an official capacity:

- (a) an employee in the Public Service or the NSW Police Force,*
- (b) an officer or employee of a statutory body representing the Crown,*
- (c) an employee of a council*
- (d) a member of staff of Local Land Services,*
- (e) the Director of Public Prosecutions*
- (f) an officer or employee of a body declared by the regulations to be a public body for the purposes of this definition.*

...

The relevant clause of the Regulation was cl 101:

Criminal Procedure Regulation 2010

101 Public officers

(1) For the purposes of paragraph (f) of the definition of "public officer" in section 3 (1) of the Act, the following bodies are declared to be public bodies:

- (a) the Independent Commission Against Corruption,*
- (b) the RSPCA, New South Wales*
- (c) The Animal Welfare League NSW*
- (d) the Australian Federal Police,*
- (e) the Australian Securities and Investments Commission,*
- (f) the Australian Health Practitioner Regulation Agency,*
- (g) the Office of the Commonwealth Director of Public Prosecutions,*
- (h) the Police Integrity Commission.*

The above practice, whereby the ICAC and PIC would obtain advice from the DPP as to available charges, initiate proceedings based on the DPP advice and thereafter relinquish the carriage of those proceedings to the DPP continued until 2015.

In 2015 a Review of the Jurisdiction of the Independent Commission Against Corruption (the 2015 Review) recommended that consideration be given to the question of whether ICAC should have express power to commence court proceedings.¹ The purpose of the recommendation was to give legislative effect to what was happening in practice. The Attorney General introduced amendments to the CPA in November 2015 in response to that recommendation. It was proposed that the amendments apply equally to the PIC. However the Parliament only agreed to an amendment for the ICAC.

A new section was inserted into the *Criminal Procedure Act 1986*:

Section 14A

Insert after section 14:

14A Proceedings for offences commenced by officers of ICAC or PIC

- (1) *An officer of ICAC does not have the power to commence proceedings for an offence unless the Director of Public Prosecutions has advised the Independent Commission Against Corruption in writing that the proceedings may be commenced by an officer of ICAC.*
- (2) *For that purpose, the Director of Public Prosecutions may liaise with the Independent Commission Against Corruption, but is to act independently in deciding to advise that proceedings for the offence may be commenced.*
- (3) *The Commissioner, an Assistant Commissioner and an officer of the Police Integrity Commission do not have the power to commence proceedings for an offence.*
- (4) *In this section:*
Officer of ICAC *means a person acting in the capacity of the Commissioner, an Assistant Commissioner or officer of the Independent Commission Against Corruption.*

Because of the unexpected nature of this outcome for PIC, which meant that alternative arrangements had to be made for the commencement of criminal proceedings in PIC matters, some detail about the evolution of the amendment is set out below.

2005 Review of the ICAC Act

In a Review of the ICAC Act conducted in 2005 by Mr Bruce McClintock SC ('the 2005 Review') Mr McClintock noted that the ICAC Act did not confer any function or power on ICAC to initiate

¹ The Hon. Murray Gleeson AC and Bruce McClintock SC, Report of the Independent Panel on the Review of the Jurisdiction of the Independent Commission Against Corruption, 30 July 2015, (online) http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/173235/Independent_Panel_Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption_Report.pdf, 79.

or conduct criminal prosecutions.² He suggested that the statutory regime, arising from the combined operation of the provisions in the CPA, the Criminal Procedure Regulation, and the Director of Public Prosecutions Act, *'does not recognise, in an open and transparent manner, the actual position in relation to the criminal prosecutions arising from ICAC investigations'*.³ Mr McClintock recommended that the ICAC Act should be amended to expressly provide that ICAC may, after considering the advice of the DPP, institute criminal proceedings arising from its investigations.⁴

The Independent Commission Against Corruption Amendment Bill 2005 was introduced to Parliament to give effect to recommendations in the Final Report of the 2005 Review. Clause 116A of the bill conferred a power on the ICAC to commence criminal prosecutions but included a provision to prevent the ICAC from commencing criminal prosecutions unless the DPP advised that it was appropriate to do so.⁵ The provision was intended to confirm the practice whereby ICAC commenced proceedings for a criminal offence following the receipt of advice from the DPP.⁶

During parliamentary debate on the bill it was pointed out that the ability to initiate prosecutions existed for officers of ICAC at common law, and the provisions in the bill ensured that this could not happen without DPP approval.⁷ However, some Members of Parliament argued that ICAC was an investigative agency and should not be permitted to also bring prosecutions.⁸ An amendment to permit this was suggested to be *'inappropriate, unnecessary and unwise'*.⁹

In response to this argument, the Attorney General explained that ICAC sought the advice of the DPP as to whether a prosecution should be commenced. Following the receipt of advice from the DPP that a particular charge was available an officer of ICAC would file a court attendance notice for the recommended charge. The prosecution would be taken over by the DPP on the first court date. It was also explained that the bill was intended to restrict, rather than expand, ICAC's power with respect to commencing prosecutions, because without the amendment the ICAC had the power to institute proceedings without obtaining the advice of the DPP.¹⁰

The bill passed the Legislative Assembly without amendment to the proposed provision. In the Legislative Council, an amendment was introduced by the Hon. Michael Gallacher, Leader of the Opposition, to remove cl 116A from the bill.¹¹ Concerns were again raised about the proposal that an investigative body could undertake a prosecution function.¹² The Minister for

² Bruce McClintock SC, Independent Review of the *Independent Commission Against Corruption Act 1988* – Final Report, January 2005 (online) http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0020/11369/icac.pdf, 35.

³ Ibid, 37.

⁴ Ibid, 38.

⁵ Independent Commission Against Corruption Amendment Bill 2005, schedule 1 item 64; Explanatory Notes, Independent Commission Against Corruption Amendment Bill 2005.

⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 February 2005, 14134 (Mr Frank Sartor).

⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14363 (Mr Kim Yeadon).

⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14369 (Mr Anthony Roberts); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14372 (Mr Brad Hazzard); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14373 (Mr Andrew Tink).

⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14372 (Mr Brad Hazzard).

¹⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 March 2005, 14374 (Mr Bob Debus).

¹¹ New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15066 (Mr Michael Gallacher).

¹² New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15066 (Mr Michael Gallacher);

Justice, the Hon. John Hatzistergos, clarified the intention of the proposed provision, indicating that there was at that time no requirement in the ICAC Act that the DPP must consent to a prosecution being brought by the ICAC. The amendment was therefore intended to 'tidy up' the situation and make it clear that no prosecution could be launched by the ICAC without the consent of the DPP.¹³ However, an amendment to the bill to remove s 116A was passed in the Legislative Council, and the bill ultimately passed both houses of Parliament without the proposed provision directed to prosecutions commenced by ICAC.

The practice of ICAC and PIC officers initiating prosecutions following advice from the DPP, with proceedings subsequently taken over by the DPP at the first mention, continued until the amendments to the CPA in 2015.

2015 Review of the ICAC Act

There was a further review of the ICAC Act in 2015 conducted by the Hon. Murray Gleeson QC and Mr Bruce McClintock. In their Report Mr Gleeson and Mr McClintock noted the recommendation of the 2005 Review regarding the commencement of criminal proceedings by ICAC, and observed that it had not been adopted in amendments to the ICAC Act.¹⁴ They also noted that the Director of Public Prosecutions had made a submission to the 2015 review in which he recommended that it be expressly stated within the ICAC Act that the ICAC may, after considering advice of the DPP, institute criminal proceedings arising from its investigations.

The Report on the 2015 Review supported the Director's position, and suggested that if Parliament thought it appropriate to make such a change '*it might also consider it appropriate to include common law offences within the criminal proceedings in respect of which the ICAC can institute proceedings*'.¹⁵ The comments in the 2015 Review were referred to in the Attorney General's second reading speech for the bill, where it was also noted that prosecutions are only commenced on the advice of the DPP.¹⁶ The Attorney General noted that PIC and ICAC followed the same procedure and the amendments would apply to both agencies.

Progress of the Proposed Changes to the Criminal Procedure Act 1986 following the 2015 Review

The proposed changes to the CPA were set out in Schedule 1.8 to the Courts and Other Justice Portfolio Legislation Amendment Bill 2015. Schedule 1.8 included provisions which amended the definition of 'offence' in the CPA to include a common law offence, and made further amendments to s 48 with respect to the commencement of proceedings for committal proceedings, and s 173 with respect to summary proceedings. The amendments altered the

New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15066 (Mr Fred Nile); New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15067 (Mr Peter Wong); New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15067 (Mr Arthur Chesterfield-Evans).

¹³ New South Wales, *Parliamentary Debates*, Legislative Council, 6 April 2005, 15067-15068 (Mr John Hatzistergos).

¹⁴ Submission of Mr Lloyd Babb SC to the Independent Panel on the Review of the Jurisdiction of the Independent Commission Against Corruption, quoted in the Report of the Independent Panel, above n 13, 79.

¹⁵ Report of the Independent Panel, above n 13, 79.

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, 4618 (Ms Gabrielle Upton).

wording of ss 48 and 173 relating to commencement of proceedings by police officers and public officers by removing the reference to s 14 in those provisions.

The bill was introduced in the Legislative Assembly by the Attorney General on 20 October 2015. The second reading speech referred to the intention of schedule 1.8 to amend the CPA to clarify the powers of police officers and public officers to issue a CAN to commence proceedings for an offence. It was noted that:

As a matter of practice ICAC and PIC have commenced criminal prosecutions for statutory and common law offences arising out of their investigations by issuing a CAN to the accused person. A recent local court judgement questioned the power of an ICAC officer to commence a prosecution for a common law offence by issuing a CAN... Rather than relying on the common law power to commence prosecutions, the amendments create a clear statutory power for police officers and public officers, like ICAC and PIC officers, to commence criminal prosecutions for all New South Wales offences by issuing a court attendance notice. In relation to ICAC and PIC, these prosecutions are only commenced on the advice of the Director of Public Prosecutions [DPP]. After the prosecution is underway the DPP will take over the matter. The redrafted provisions adopt a more plain English approach to the system that will make it easier for all to understand. This clarification is supported by the Law Society, the Bar Association and the DPP.¹⁷

When debate on the bill resumed on 21 October 2015, Ms Jenny Leong for The Greens advised that an amendment relating to the powers of PIC and ICAC would be proposed in the Legislative Council, noting:

The Independent Commission Against Corruption and Police Integrity Commission are investigative not prosecutorial bodies. In circumstances when those agencies have made serious findings, it is appropriate for the Director of Public Prosecutions or the police to commence criminal proceedings via the court attendance notice process.¹⁸

In response, the Attorney General noted that the purpose of the amendment was to make the existing common law powers of a public officer to commence proceedings into a statutory power to get rid of uncertainty. She also explained that the amendment had been suggested in the report on the 2015 Review of the ICAC Act and the amendments had been formulated 'by people who understand our justice system well'.¹⁹ The bill passed in the Legislative Assembly without amendment.

The bill was introduced in the Legislative Council on 21 October 2015. The Greens proposed an amendment to the bill which amended the definition of 'public officer' in the CPA to specifically exclude officers of the PIC and the ICAC, and to prevent PIC or ICAC from being declared a 'public body' by the regulations for the purposes of the definition. On 29 October 2015, the Opposition proposed an amendment which omitted the entire Schedule 1.8 from the bill.

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, 4618 (Ms Gabrielle Upton).

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2015, 4823 (Ms Jenny Leong).

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 October 2015, 4826 (Ms Gabrielle Upton).

On 9 November 2015, the Government proposed an amendment to include a new s 14A which permitted officers of both ICAC and PIC to commence proceedings for an offence where the DPP had advised in writing that proceedings may be commenced.²⁰

When the bill was debated in the Legislative Council on 12 November 2015, the Leader of the Opposition, the Hon. Adam Searle, raised two concerns the Opposition had with Schedule 1.8. Rather than clarifying existing practice, he argued that the bill effected '*a substantive change*' in giving all public officers the power to bring criminal prosecutions.²¹ However, it was also noted that while those changes should be removed from the bill, the party could also '*see the good sense of the Gleeson-McClintock review in urging that some consideration be given to the ICAC having some new authority in this area.*'²² Secondly, the Leader of the Opposition referred to the importance of a separation between a body that investigates and a body that prosecutes. As a result, if ICAC were to undertake a '*limited new role in this area*' it should only do so with the supervision of the DPP.

On 12 November 2015 the Opposition withdrew its previous amendment, and proposed new amendments to achieve its dual objectives of removing '*undiscussed and unwarranted*' changes for other public bodies, and giving ICAC limited power under the supervision of the DPP.²³ The amendments created the new section 14A which permitted ICAC to commence proceedings following written advice from the DPP, removed the power of officers of PIC to commence proceedings for an offence, and removed all other amendments to ss 48, 49, 173 and 174 from the bill.²⁴

Member for The Greens, Mr David Shoebridge, was critical of the amendments to the CPA which were perceived to be incorporated into the bill without proper notification of their effect in giving statutory prosecution powers to bodies with standing royal commission powers.²⁵ He stated that the office of the DPP provides an independent check on the commencement of criminal proceedings arising from evidence produced before ICAC, PIC or the Ombudsman, and it should be the only body with the power to commence proceedings.²⁶ The Greens therefore proposed an amendment to the definition of '*public officer*' to prevent officers of bodies with royal commission powers from commencing criminal prosecutions.²⁷

Reverend the Hon. Fred Nile, on behalf of the Christian Democratic Party, referred to issues raised with him by the Police Association of New South Wales.²⁸ The Association had written

²⁰ See proposed amendment by the Government received in the Legislative Council on 10 November 2015, c2015-144D:

<[http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/D5E294EF6AA466C9CA257EE40018E9BB/\\$file/c2015-144D.pdf](http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/D5E294EF6AA466C9CA257EE40018E9BB/$file/c2015-144D.pdf)>.

²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5772 (Mr Adam Searle).

²² New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5773 (Mr Adam Searle).

²³ *Ibid.*

²⁴ See proposed amendment by the Opposition received in the Legislative Council on 12 November 2015, c2015-162B:

<[http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/D5E294EF6AA466C9CA257EE40018E9BB/\\$file/ATTJUBMD.pdf](http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/D5E294EF6AA466C9CA257EE40018E9BB/$file/ATTJUBMD.pdf)>.

²⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5774 (Mr David Shoebridge).

²⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5775 (Mr David Shoebridge).

²⁷ Above n 38; New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5776 (Mr David Shoebridge).

²⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5777 (Reverend Fred Nile).

to Reverend Nile raising concerns that PIC was acting outside its jurisdiction when it commenced private prosecutions in Queensland in 2014 against current and former NSW police officers. He noted that the amendments proposed by the Opposition addressed these concerns, and the Christian Democratic Party therefore supported the amendments.²⁹

Later on 12 November 2015, the Legislative Council debated the specific amendments that had been proposed by the Opposition and The Greens. The Leader of the Opposition supported the notion *'that there should be proper separation of investigatory and prosecution functions at most senior levels.'*³⁰ He recognised, however, that at the lower levels of the criminal justice system police investigate and bring lower level charges. The Opposition was also conscious of the discussion in the Gleeson and McClintock review, and noted that the amendments codified the power of ICAC officers, making them subordinate to the discretion of the DPP, and as such the amendments were *'an appropriate balancing of the different public interests at play.'*³¹

Reverend Fred Nile confirmed that the concerns of the Police Association were in part alleviated by the Opposition's proposed amendment, however the Association remained opposed to inquisitorial bodies such as ICAC and PIC commencing prosecutions in their own right rather than handing matters over to the DPP.³² The Christian Democratic Party supported the Opposition amendment and indicated an intention to vote in favour of the bill. Both The Greens and the Christian Democratic Party maintained their opposition in principle to an investigative body such as ICAC being given the power to commence proceedings for a criminal offence.³³ Reverend Fred Nile concluded by saying:

*We accept that to try to resolve this situation we have come to this agreement at this stage. But I urge the Government to maintain a strong watching brief on how this operates to make sure there is no abuse by the ICAC of its powers. It should not exceed its powers.*³⁴

The Opposition amendments were agreed to, and the bill was read for a third time and returned to the Legislative Assembly.³⁵ The Legislative Assembly considered the amendments by the Legislative Council on 18 November 2015 and the Attorney General moved that the House agree to the amendments.³⁶ The Attorney General noted that:

A great deal of ill-informed debate has taken place on this issue, which was based on a clear misunderstanding of the law and current practice. The bill does not – and never did – alter or change the current law and practice between ICAC and the DPP. The bill, alternatively, merely seeks to clarify the law as represented by Mr Bruce McClintock, SC, in his 2005 review of the ICAC, where he noted at paragraph 3.2.20: "These amendments will recognise the current practice

²⁹ Ibid.

³⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5791 (Mr Adam Searle).

³¹ Ibid.

³² New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5794 (Reverend Fred Nile).

³³ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5796, 5798 (Mr David Shoebridge); New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5797 (Reverend Fred Nile).

³⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5797 (Reverend Fred Nile).

³⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2015, 5798.

³⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 2015, 6111 (Ms Gabrielle Upton).

adopted by the ICAC and the DPP" ... The suggestion that the Government is trying to surreptitiously drop a contentious amendment into an innocuous bill is plain nonsense and mischief. I invite members to reread my second reading speech, which clearly sets out the reasons for the amendment and references to two independent reports where the proposal is discussed at length. Corruption prosecutions are too important to our community in New South Wales to be plagued by challenges based on arguments on how the common law should be interpreted. These prosecutions are also too important to be the subject of political point-scoring and deliberate misinformation campaigns.³⁷

The Labor Member for Liverpool, Mr Paul Lynch, stated that the amendments to Schedule 1.8 were settled on 12 November 2015 at a meeting he attended with the Hon. Adam Searle (Leader of the Opposition in the Legislative Council), Parliamentary Counsel, a representative of the Department of Premier and Cabinet, and representatives of the office of the Premier and the office of the Leader of the Opposition. The agreed amendments restricted the original provision to limit its application to ICAC only, rather than to all public officers, and clarified that the ICAC can commence criminal proceedings with the DPP as the 'gatekeeper'.³⁸ There was no further mention in the Legislative Assembly of the decision to exclude PIC officers from the power to commence proceedings for an offence under the CPA.

The bill passed on 18 November 2015. The amendments commenced on 24 November 2015.

Whereas the first print had proposed amendments to the wording of ss 48, 49, 173 and 174 of the CPA, these amendments were entirely removed, and replaced by the new s 14A which gave officers of ICAC (but expressly not PIC) the power to commence proceedings for an offence only where written advice was received from the DPP that proceedings may be commenced.

Effect of the Amendments on PIC Prosecutions

Prior to the amendments to the CPA in November 2015, the PIC's practice had been to submit an advisory brief to the DPP and, upon receipt of advice that there was sufficient evidence to support a charge, a Commission investigator would create a new CAN using the NSWPF template and insert the wording of the charge which had been drafted by the DPP. The PIC investigator would obtain a return date from the court and insert that date in the CAN. The investigator would then print numerous copies of the CAN and serve one on the defendant, file a copy at court and give one to the DPP.

Following the amendments to the CPA in November 2015, the PIC continued to furnish advisory briefs to the ODPP but requested the ODPP to commence the criminal proceedings in those matters where it had approved charges. The ODPP agreed to do so but because it did not have access to the police database ('COPS') it had to request the assistance of the NSWPF to create the CANS in COPS.

³⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 2015, 6111-6112 (Ms Gabrielle Upton).

³⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 2015, 6112 (Mr Paul Lynch).

Under the new arrangements, once a CAN has been created by a NSWPF officer on behalf of the DPP, the PIC investigator is notified by the DPP. The PIC investigator then prints the CAN from COPS, serves the accused and provides the court and DPP with copies.

Replacement of PIC by Law Enforcement Conduct Commission

On 13 September 2016 the Minister for Police introduced a bill to the NSW Parliament to abolish the PIC and replace it with the Law Enforcement Conduct Commission ('LECC'), a new agency with similar powers to PIC and additional powers to oversight the police investigation of critical incidents. The bill provides for an amendment to s 14A of the *Criminal Procedure Act 1986* so that the new agency will have the same power as the ICAC for the purposes of commencing prosecutions. At the time of writing debate on the bill had not commenced.

It is anticipated that the LECC will commence operation in 2017.

Please contact me if I can be of any further assistance.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'M M O'Brien', with a long horizontal flourish extending to the right.

M M O'Brien
Assistant Commissioner