

29 January 2019

Attorney General's Department
3-5 National Circuit
Barton ACT 2600

By Email: anticorruption@ag.gov.au

Dear Sir/Madam

Submission to Attorney General's Department: Commonwealth Integrity Commission

1. We act for Mr Charif Kazal.
2. We are instructed to write to you, on behalf of Mr Kazal, in response to your call for submissions concerning the establishment of a Commonwealth Integrity Commission (**CIC**).
3. This submission generally supports Consultation Paper A's proposed jurisdictional framework, functions and powers for the CIC. It is made with particular reference to Mr Kazal's interactions with, and treatment by, the New South Wales Independent Corruption Against Commission (**ICAC**).

Background

ICAC Investigation and Findings

4. In 2010-11, ICAC investigated an undisclosed conflict of interest of Mr Andrew Kelly, a Senior Executive Officer of the Sydney Harbour Foreshore Authority. In the course of the investigation, a public hearing was conducted.
5. In December 2011, ICAC made the following findings against Mr Kazal (**ICAC Findings**):
 - a. That Mr Kazal could have sought to improperly influence the exercise of Mr Andrew Kelly's official functions, or could have placed himself in a position to do so, by holding out to Mr Kelly the prospect that he might be involved in Kazal family private business; and
 - b. That Mr Kazal could have committed a criminal offence of:

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- i. Giving corrupt commissions or rewards, in breach of the *Crimes Act 1900* (NSW) s 249B; or
 - ii. Giving false or misleading evidence at a compulsory examination or public inquiry conducted by ICAC, in breach of the *ICAC Act 1988* (NSW) s 87.
6. These findings were made on the basis of the ‘could’ test contained in ss 8, 9 of the *ICAC Act 1988* (NSW), which establishes a different (and arguably lesser) standard of proof than that of the balance of probabilities. Under this standard, ICAC can make a finding so long as a person’s conduct:
 - a. *Could* adversely affect (directly or indirectly) the impartial exercise of an official’s functions; and
 - b. *Could* constitute or involve a criminal offence.

Communications with DPP

7. Following the publication of the ICAC Findings, a referral to prosecute Mr Kazal was made to the NSW Department of Public Prosecutions (**DPP**). On 28 August 2012, the Solicitor for Public Prosecutions refused to commence proceedings, as there was insufficient evidence to merit reasonable prospects of success.
8. On 2 November 2012, ICAC sought reasons from the DPP as to its decision. In response, on 4 December 2012, the Deputy Director of Public Prosecutions provided reasons particularising the lack of evidence.
9. On 17 December 2012, ICAC sought a review of the Deputy Director of Public Prosecution’s decision. On 20 February 2012, the Director of Public Prosecutions personally reviewed and affirmed the decision that there was insufficient evidence to commence any criminal proceedings against Mr Kazal.

Appeals

10. In March 2012, Mr Kazal challenged the jurisdictional validity of the ICAC Findings (*Kazal v Independent Commission Against Corruption* [2013] NSWSC 53). This appeal was rejected, in light of the wide discretion, lack of evidentiary procedures, and width of the ‘could’ standard of proof.
11. On 12 May 2016, a Report was published by the Honourable David Levine, Inspector of ICAC (**2016 Report**). The Inspector of ICAC is an independent statutory officer under the *ICAC Act*, whose role and functions are to hold ICAC accountable in the way it carries out its functions.
12. The 2016 Report was critical of ICAC’s workings, and made recommendations including the following:
 - a. That ICAC examinations be conducted in private rather than in public; and
 - b. That an exoneration protocol be implemented.

13. On 28 June 2017, a Report was published by Mr John Nicholson SC, the Acting Inspector of ICAC (**2017 Report**). The 2017 Report was written with specific reference to the investigation under which the ICAC Findings were made against Mr Kazal.
14. The 2017 Report substantially endorsed the 2016 Report's criticisms and recommendations. It further recommended that the 'could' test be replaced by an objective 'reasonableness' test, whereby findings should be based upon a reasonable expectation that a properly instructed tribunal of fact would come to the same conclusion on the admissible evidence.

Consequences of ICAC Findings

15. Mr Kazal has never been charged with criminal proceedings, let alone proven guilty of any illegal conduct in a court of law. Notwithstanding this, in the words of the 2017 Report:

[Mr Kazal] has been stigmatised and shamed by a finding that has not been made, and cannot be tested in an environment that has rules of evidence and procedures established over the centuries to ensure a fair and impartial hearing to them and to their opponents ... That finding having been made, however, leaves Charif Kazal with a stain upon his honour, reputation and his right to be considered as a person of good character with no means at law of being able to retrieve or recapture those qualities through recourse to the law or to have the findings of the Commission expunged from the records of ICAC and its publishing on the internet.

16. As a result of ICAC's quasi-criminal finding against him, Mr Kazal has experienced both personal and financial loss.
17. Firstly, the damage to his reputation resulting from the publication of the ICAC Findings, and their subsequent republication in the media, has been of significant financial detriment.
18. Secondly, Mr Kazal has experienced personal vilification in both his local community and the business community, owing to the perception that he is corrupt and of bad character. This vilification has been extended to his family, including his wife and children, as well as his extended family and business interests, all unfairly tarnished by the negative publicity arising from the findings.
19. We note that Mr Kazal's experience is presently the subject of proceedings in the Supreme Court of New South Wales, and (albeit deferred pending the finalisation of those proceedings) before the United Nations Office of the High Commissioner for Human Rights.

Submissions

20. In light of the above, we are instructed to express the following views on behalf of Mr Kazal, concerning Submission Paper A's proposal concerning the CIC.

Issue 1: Jurisdiction

21. The risks of an investigative corruption body with an uncertain and overly wide jurisdiction are exemplified in Mr Kazal's case. ICAC was developed for the purpose of investigating and prosecuting corrupt public officials, but the spill-over effect of its investigation into Mr

Andrew Kelly resulted in the public vilification of a private businessman, Mr Kazal, notwithstanding that no criminal charges were ever laid against him.

22. Submission Paper A proposes that the CIC be divided into:
 - a. A law enforcement division containing wider powers, with a more limited jurisdiction focused upon specified public agencies and bodies; and
 - b. A public sector division containing lesser powers, with a wider jurisdiction.
23. We are instructed that Mr Kazal is of the view that this division (if effectively executed) will prevent the use of extensive powers, granted for the purpose of investigating senior public officials, being made available against members of the public.
24. In order to ensure this division is effective however, it is submitted that the following must take place:
 - a. The limits of the public sector division's jurisdiction should be clearly delineated, so as to prevent uncertainty and ensure that appropriate resources are devoted to investigations against members of the public as opposed to senior public officials. This includes the creation of unambiguous rules concerning the extent to which referrals can be accepted by the CIC; and
 - b. The range of criminal offences enlivening investigative jurisdiction should also be clearly set out. In particular, ICAC's ability to make a factual finding that a person lied in the course of its investigations, and to then ground its ultimate findings of culpability in that factual finding, should be noted. The circularity of the jurisdiction to make such a finding is obviously problematic, and must be avoided by limiting the jurisdiction of the CIC to specified offences. It goes without saying that the offences enlivening its jurisdiction should not include conduct occurring in the course of those very investigations.
25. Additionally, it is submitted that the extent to which the jurisdiction of both the law enforcement division and public sector division may extend to investigating members of the public should be carefully considered. To the extent that such individuals are at risk of suffering negative publicity due to the CIC's investigations, it should be borne in mind that:
 - a. The fact that such individuals are not frequently featured in the media likely means that any negative publicity associated with them will have a stronger impact than the equivalent negative publicity would have on a public figure, such as an elected representative; and
 - b. Such individuals also usually have less opportunities to make their voices publicly heard, which leaves them less able to defend their reputation to the public at large.
26. It is noted that these factors should be borne in mind in determining both the scope of the CIC's jurisdiction, and the creation of any new offences which may enliven this jurisdiction (as contemplated in Submission Paper A).

27. The nature of investigative bodies, and the ability for the focus of their investigations to shift as they proceed, raises inherent issues concerning procedural fairness for those being investigated. These issues are also highlighted by Mr Kazal's case: in an investigation which Mr Kazal understood to be focused on Mr Andrew Kelly's conduct (as identified in the initial terms of reference for the inquiry), adverse findings were made against Mr Kazal personally. This is a matter presently in issue in the Supreme Court proceedings, and no finding has yet been made regarding whether Mr Kazal was afforded procedural fairness.
28. It is submitted that the proposed division of the CIC into two divisions, whereby the public sector division has significantly lesser powers, is a significant step towards mitigating this issue, and striking a more appropriate balance between the flexibility required by the investigative process, and the affording of those being investigated with procedural fairness.
29. Additionally, we are instructed to add the following suggestions with respect to this issue:
 - a. The CIC should be required to afford the same standards of procedural fairness to persons under investigation, as those persons would receive in a court of law;
 - b. The CIC should not have coercive powers to adduce evidence beyond what would be allowed in a court of law;
 - c. In determining whether to conduct a private or public inquiry, the law enforcement division should be required to consider the potentially significant adverse impacts of a public hearing on members of the public. This should include a right for such members of the public to make submissions concerning the issue prior to the decision to conduct a public hearing; and
 - d. The public sector division should not be allowed to hold public hearings, as is currently proposed in Submission Paper A.

Issue 3: Findings

30. As is clearly observable in Mr Kazal's case, any power granted to an investigative corruption body to make public adverse findings creates what is probably the most significant risk of harm to members of the public.
31. We are instructed that Mr Kazal entirely endorse Submission Paper A's proposal that the CIC not be granted such a power to make findings. This mitigates the risk of harm flowing from:
 - a. The quasi-criminal nature of such findings, which can have a particularly significant impact when made against members of the public; and
 - b. The inherent tension between the functions of:
 - i. Undertaking investigations; and
 - ii. Publicly determining culpability.
32. In the event the CIC was granted the power to make findings, which is strongly opposed, it is essential that:

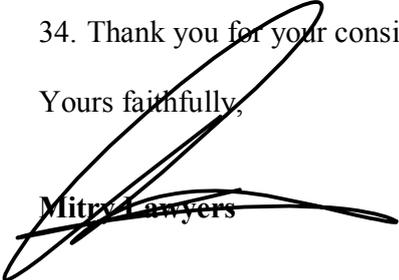
- a. An appropriate standard of proof is required to make such findings, preferably being the criminal standard of beyond reasonable doubt, or at least the reasonableness standard suggested by the 2017 Report (see above);
- b. Given the public nature of any findings, final submissions of the parties should not be sealed (and protected by the cloak of confidentiality), so that the full position stated in response to allegations leading to those findings can be revealed; and
- c. An exoneration process be implemented.

Concluding Comments

33. Mr Kazal is grateful for the opportunity to make submissions, based upon his experiences with ICAC, in order to ensure the creation of an anti-corruption body balancing the needs of robustness and fairness.

34. Thank you for your consideration.

Yours faithfully,


Mitry Lawyers