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9 April 2009

Mr Terenzini MP
The Chair
Committee on the Independent Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Terenzini,

Re: Proposed amendments to the Independent Commission Against Corruption Act 1988

Thank you for inviting the Law Society to make a submission to the inquiry into proposed amendments to the *Independent Commission Against Corruption Act 1988* (Act).

As provided in the terms of reference, the proposed amendments involve amending s 37 of the Act to remove the restriction on the use, in civil and disciplinary proceedings, of evidence obtained under objection by the ICAC. A further proposal is to amend the Act to make the assembling of admissible evidence for criminal prosecutions a primary function of the ICAC.

The Law Society's Criminal Law Committee (Committee) has serious concerns with the proposed amendments as outlined below.

Position summary

Section 37(2) provides that a witness is not excused from answering any questions, or producing any documents, on the basis of self incrimination (s 37(2)). The proposed amendments would allow this evidence to be used in subsequent civil and disciplinary proceedings, even if given under objection. In the existing legislation the taking of an objection offsets the loss of the right to silence, as the evidence cannot be used except for proceedings against the Act and for contempt. If the amendments proceed that right would be lost in subsequent civil and disciplinary proceedings, many of which have grave consequences.

Where the fundamental right to silence is infringed as it is in s 37 a clear policy reason exists for protections to remain in place. Such protections for individuals are important when Government agencies are investigating criminal matters.



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Additionally, the proposed amendments would be inconsistent with the self incrimination protections provided in s 26(2) where a statement or document is produced that tends to incriminate the person and the person objects to the production at the time.

The Committee is very concerned that if one of ICAC's primary functions is to assemble admissible evidence for criminal prosecutions the next amendment to the Act will be to allow the evidence to be used in subsequent criminal prosecutions (assuming that such is not already intended). If this occurs the right to silence is lost completely.

The right to silence is an integral part of criminal law in Australia. The onus is on the Crown to prove beyond a reasonable doubt that the accused person has committed the offence charged. The whole purpose of the right to remain silent is to protect the accused from arbitrary, overbearing domination by superior forces. This proposal would remove that right and is contrary to the rule of law and the original legislative intent of the Act.

For these reasons the Committee is completely opposed to the proposed amendments.

Detailed commentary

ICAC Functions

The proposal to amend s 37 of the Act and to make the assembling of admissible evidence for criminal prosecutions a primary function of ICAC would substantially widen ICAC's existing functions and powers in its operating Act. The amendments would involve ICAC more in the administration of justice rather than the impartial discovery of truth surrounding allegations of corruption.

As part of its principal functions ICAC is to investigate any allegation or complaint, or any circumstances, which in the Commission's opinion may imply that corrupt conduct may have occurred, may be occurring, or may be about to occur (s13). In exercising its primary functions ICAC is to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct (s12A).

To make the assembling of admissible evidence for criminal proceedings a primary function may result in ICAC responding to evidence as a court might. This would detract ICAC from its charter of preventing corruption, enhancing integrity in the public service and discover the truth surrounding allegations of corrupt conduct. The principal objects of the Act contained in s 2A would also be changed to make preparing material for a criminal investigation a primary focus of the Act. The current principal objects of the Act are to investigate, expose and prevent corruption, as well as to encourage education about corruption.

As former Premier Greiner stressed in his Second Reading Speech on 26 May 1988:

"... 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 the integrity in the public service..."

The independent commission is not a purely investigatory body. The commission also has a clear charter to play a constructive role in developing sound management practices and making public officials more aware of what it means

to hold an office of public trust and more aware of the detrimental effects of corrupt practices....."

Amendments to section 37

Section 37 removes the entitlement of a witness to refuse to answer a question or produce a document on any ground of privilege, or on the ground of secrecy, or other restriction on disclosure, or any other ground. If compulsorily obtained evidence provided under objection was to become accessible in civil or disciplinary proceedings generally, this may place a witness in a situation where they are potentially unfairly exposed to litigation for assisting with an inquiry. A witness may have put information into the public domain that could result in them facing adverse consequence such as:

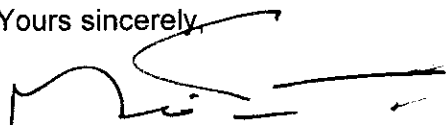
- Civil actions.
- Penalties.
- Disciplinary action for disclosing trade secrets or breaching policies.
- Costs and consequences for disclosing terms in a deed (where terms were previously agreed not to be disclosed).
- Civil actions by other parties to a matter where legal professional privilege is exposed (as the only exception in the Act in respect of legal professional privilege is communications passing between a legal practitioner and a person for the purpose of providing or receiving legal advice in relation to the appearance or the anticipated appearance at ICAC).
- Official receivers in bankruptcy being able to access information given under objection.
- Commissioner of Taxation being able to access information given under objection.

ICAC already has extremely wide powers under the Act which are similar to the coercive powers of a Royal Commission. As noted above, the Committee is very concerned that if the amendments proceed it will soon follow that evidence obtained under objection could be used in criminal proceedings.

The proposed amendments would unfairly alter the rights of witnesses to such an extent that it may discourage or obstruct witnesses from coming forward or volunteering information to ICAC investigators. It would further detract ICAC from its charter to play a constructive role in developing sound management practices, and making public officials more aware of what it means to hold an office of public trust and the detrimental effects of corrupt practices.

I trust this submission is of assistance. Please do not hesitate to contact the Law Society if you require further information or elaboration on the issues raised.

Yours sincerely,



Michael Tidball
Chief Executive Officer