

**Submission
No 7**

**INQUIRY INTO PROPOSED AMENDMENTS TO THE
INDEPENDENT COMMISSION AGAINST CORRUPTION ACT
1988**

Organisation: Corruption and Crime Commission
Name: The Hon Len Roberts-Smith RFD QC
Position: Commissioner
Telephone:
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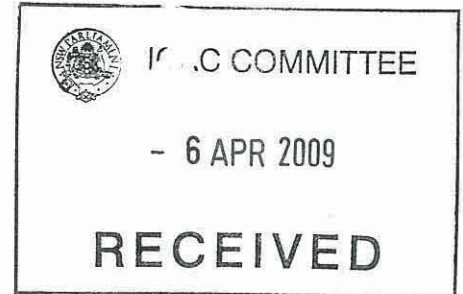


CORRUPTION AND CRIME COMMISSION

Our Ref: LWRS/MP

2 April 2009

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



Dear Mr Terenzini

PROPOSED AMENDMENTS TO THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 (NSW)*

I refer to your letter dated 6 March 2009.

In Western Australia, the situation with respect to a claim of legal professional privilege in examinations conducted by the Corruption and Crime Commission (CCC), and to the use of statements made by a witness, is governed by sections 144 and 145 respectively of the *Corruption and Crime Commission Act 2003 (WA)* ("the CCC Act").

A copy of those sections is forwarded herewith for your convenience.

I note the Committee's particular interest at present is with the latter.

Unlike section 37(3) of the *Independent Commission Against Corruption Act 1988 (NSW)* ("the ICAC Act"), section 145(1)(b)(iii) of the CCC Act expressly allows a witness' evidence given in an examination before the CCC to be used in disciplinary proceedings against that witness. That has been done on a number of occasions.

The reference in subsection (2) of section 145 to a witness being asked questions about their statement (evidence) under section 21 of the *Evidence Act 1906 (WA)*, is a reference to it being used as a prior inconsistent statement.

This Commission takes the view that use of such evidence in that way is the only circumstance in which a witness' evidence before it can be used against the witness in civil proceedings, notwithstanding that, unlike section 37 of the ICAC Act, there is no other express mention of civil proceedings in section 145 of the CCC Act.

That view is based on the proposition that the privilege against self-incrimination is entrenched in the common law and is abrogated only where, and only to the extent,

that is done expressly by statute. In the absence of any express abrogation of the privilege with respect to civil proceedings, it must accordingly continue to apply.

The Committee will note section 145 does not condition the use or admissibility of a witness' evidence in other proceedings, disciplinary or otherwise, on whether or not the witness objects to giving the evidence.

So far as I am aware, there has been no application made since the CCC commenced in January 2004, to use the evidence given by a witness in a CCC examination, against that witness in civil proceedings.

This Commission considers that subject to one possible exception, the public interest is best served by maintaining the privilege with respect to civil and criminal proceedings – that is, that evidence which a witness is compelled to give the Commission should not be able to be used against that witness in any civil or criminal proceedings (other than disciplinary proceedings or as a prior inconsistent statement where the witness subsequently gives different evidence).

The possible exception I would suggest is in relation to proceeds of crime (including unexplained wealth) applications.

Various jurisdictions already have legislation providing for the compulsory examination of persons with respect to property seized as proceeds of crime, and to which there is no privilege against self-incrimination. In Western Australia, such examinations may be conducted before a Judge of the Supreme Court under section 58 of the *Criminal Property Confiscation Act 2000 (WA)*. There would seem to be no reason in logic or principle why the evidence given by a witness before a Commission of Inquiry such as the CCC or ICAC, should not be able to be used in the same way as that obtained similarly under proceeds of crime legislation.

As to the proposal to amend the ICAC Act to make the assembling of admissible evidence for criminal prosecutions, I make the following comments.

The CCC may make recommendations as to criminal prosecutions. Where the Director of Public Prosecutions is to conduct a prosecution recommended by it, the CCC prepares the brief and provides it to the DPP.

That is done pursuant to section 43(5) of the CCC Act (copy enclosed).

I do not know particularly why ICAC is seeking this amendment, but if there is felt to be a need for legislative cover for a function which ICAC in fact necessarily performs it would seem sensible to provide it.

I hope the above observations are of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink that reads "Len Roberts-Smith". The signature is written in a cursive, slightly slanted style.

The Hon L W Roberts-Smith RFD QC
Commissioner

144. Legal professional privilege

- (1) Subject to subsection (2), nothing in this Act prevents a person who is required under this Act to answer questions, give evidence, produce records, things or information or make facilities available from claiming legal professional privilege as a reason for not complying with that requirement.
- (2) Subsection (1) does not apply to any privilege of a public authority or public officer in that capacity.

[Section 144 inserted by No. 78 of 2003 s. 17.]

145. Use of statements of witness against the witness

- (1) A statement made by a witness in answer to a question that a Commission requires the witness to answer is not admissible in evidence against the person making the statement in —
 - (a) any criminal proceedings; or
 - (b) proceedings for the imposition of a penalty other than —
 - (i) contempt proceedings;
 - (ii) proceedings for an offence against this Act; or
 - (iii) disciplinary action.
- (2) Despite subsection (1), the witness may, in any civil or criminal proceedings, be asked about the statement under section 21 of the *Evidence Act 1906*.

43. Recommendations by Commission

- (1) The Commission may —
 - (a) make recommendations as to whether consideration should or should not be given to —
 - (i) the prosecution of particular persons; and
 - (ii) the taking of disciplinary action against particular persons;
 - and
 - (b) make recommendations for the taking of other action that the Commission considers should be taken in

relation to the subject matter of its assessments or opinions or the results of its investigations.

- (2) The Commission may make the recommendations on the basis of —
 - (a) its assessments, consultations, opinions, and investigations and other actions (either by itself or in cooperation with an independent agency or appropriate authority);
 - (b) investigations or other action of the Police Royal Commission;
 - (c) preliminary inquiry or further action by the A-CC;
 - (d) investigations or other action of an independent agency or appropriate authority; or
 - (e) information included in any received matter or otherwise given to the Commission.
 - (3) Without limiting subsection (1), the Commission may —
 - (a) recommend that further inquiry or investigation into any matter be carried out by an Inquiry Panel appointed under the *Local Government Act 1995*, or in such other manner as the Commission may recommend; and
 - (b) recommend the terms of reference of any such inquiry or investigation.
 - (4) The Commission may give the recommendations to an independent agency or appropriate authority.
 - (5) If the Commission gives an independent agency a recommendation that consideration should be given to the prosecution of a particular person, the Commission must also give the independent agency all materials in the Commission's possession that would be required for the purposes of sections 61 and 95 of the *Criminal Procedure Act 2004* if that prosecution took place.
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- (6) A recommendation made by the Commission under this section is not a finding, and is not to be taken as a finding, that a person has committed or is guilty of a criminal offence or has engaged in conduct that constitutes or provides grounds on which that person's tenure of office, contract of employment, or agreement for the provision of services, is, or may be, terminated.