

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

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26 March 2009

Mr. Frank Terenzini MP
Chair, Parliamentary Committee on the ICAC
Parliament of New South Wales
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PARLIAMENTARY COMMITTEE

31 MAR 2009

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Dear Mr Terenzini,

I refer to your letter of 6 March 2009 inviting submissions in relation to the three terms of reference referred to in your letter.

Introduction

I note from reading report numbers 3/54 and 4/54 published October 2008 of the Committee on the Independent Commission Against Corruption (the Committee and the Commission or the ICAC), the Committee's concern at what appears to be a timely lack of follow up action consequent upon the ICAC making findings of serious corruption on the part of public officers.

In my submission any legislative change which can have the effect of removing a person who has been found guilty of corrupt conduct from his or her job and which enables the State to recover from that person monies taken from the State by that person as a result of corrupt conduct, is to be supported.

The rule against compulsory self incrimination has been part of our common law heritage for almost 300 years. Section 128 of the *Evidence Act 1995* (NSW) protects a witness from the use of compulsorily obtained evidence which may tend to prove that the witness has committed an offence against or arising under an Australian law or a law of a foreign country, or is liable to a civil penalty.

There are examples, particularly in taxation statutes, where the plaintiff being an agency of government can make an averment which is prima facie evidence of its truth. The submissions I am making are not unique although not common. The dismissal of a corrupt employee is not a matter of punishment of that employee; rather it is a matter of protection of the employing agency from the improper conduct of the employee.

The recovery of monies or assets obtained by an employee from an agency as a result of that employee's corrupt conduct is again not a matter of punishment of the employee but rather a matter of giving back to the agency what should never have been taken from it in the first place.

The First Term of Reference.

Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37, which prohibits the use, in disciplinary proceedings, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

I would support such an amendment. Any amendment which facilitates the removal of a person from a position which has been abused by corrupt conduct is to be supported.

Indeed, I would go one step further and suggest an amendment which would have the effect of making any finding of fact of corrupt conduct against a person by the Independent Commission Against Corruption *prima facie* evidence of the truth of that finding. The onus would then shift to the person to rebut that presumption.

In the course of amending the *Independent Commission Against Corruption Act 1988* (the ICAC Act) to give effect to these suggestions, consideration would also have to be given to possible amendments to section 128 of the *Evidence Act 1995* (NSW).

In addition, any amendment to this Act would require careful definition of the "finding of fact of corrupt conduct" which could be used as *prima facie* evidence in proceedings for dismissal of an employee of a government agency.

I also note that this view is supported by the evidence of Commissioner Cripps appearing at page 20 of Report number 4/54 October 2008 of the Committee entitled "Review of the 2006 - 2007 Annual Report and Audit Reports of the Inspector of The Independent Commission Against Corruption".

Furthermore, section 50 of the *Queensland Crime and Misconduct Act 2001* enables the Crime And Misconduct Commission (CMC) to charge police officers and officeholders in a unit of public administration (other than judges or judicial officers) with official misconduct.

Section 40 (3) of the *Police Integrity Commission Act 1996* (NSW) permits the use of any evidence given in a hearing, including answers given or documents or things produced, in disciplinary proceedings against police officers. These proceedings may lead to findings of misconduct pursuant to section 173 of the *Police Act 1990* (the Police Act) and Part 2.7 of the *Public Sector Employment Management Act 2002* or result in the dismissal of a police officer from the police force or the revocation of their promotion, pursuant to s.181D and 183A of the Police Act.

I would respectfully echo the Committee's conclusion appearing at paragraph 1.61 on p.22 of the Report, that making evidence gained under objection admissible for disciplinary proceedings, would strengthen the ICAC's hand in its investigation and, in doing so, help to eliminate corrupt practices.

One of the arguments raised in support of the present form of s.37 was that a person would be more likely to tell the truth to the Commission if he or she knew that what he or she said could not be used against him or her in subsequent disciplinary or civil proceedings. As pointed out by Commissioner Cripps at paragraph 1.57 of Report 4/54, his experience has shown this argument to be without foundation.

The Second Term of Reference.

Whether the *Independent Commission Against Corruption Act 1988* should be amended to remove the restriction in section 37, which prohibits the use, in civil proceedings generally, or in specific classes of civil proceedings, for example, proceedings involving the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

I would support an amendment which would permit the use in civil proceedings for the recovery of funds or assets that were corruptly obtained, of compulsorily obtained evidence provided under objection to the Independent Commission Against Corruption.

Any amendment which facilitates the recovery of funds or assets corruptly obtained is, in my view, to be supported.

Here again I would support an amendment which would have the effect of making a finding of corrupt conduct by the ICAC against a person prima facie evidence of the truth of that finding. The onus would then shift to the person to rebut that presumption.

The reasons expressed in support of the submissions on the First Term of Reference apply in relation to this Term of Reference.

The Third Term of Reference.

If either of the amendments referred to in paragraphs 1 or 2 above are made, whether the *Independent Commission Against Corruption Act 1988* should further be amended to make the Independent Commission Against Corruption's current function of assembling evidence for criminal proceedings a primary function.

I am concerned that this proposed amendment is conditional upon the acceptance of either of the first two proposed amendments.

The first two proposed amendments relate to admissibility of evidence. The third proposed amendment is of quite a different nature and relates to the question of the priority which the ICAC will give to the assembling of evidence for criminal proceedings. It is quite a different concept and, in my respectful view, should not be dependent upon acceptance of either of the first two proposed amendments.

The Commission is not a law enforcement body. Under s.2A of the ICAC Act its functions are to investigate, expose and prevent corruption involving or affecting public authorities and public officials as well as to educate them about corruption and its detrimental effects on public administration and the community. It may recommend to the Director of Public Prosecutions (the DPP) that consideration be given to prosecuting a particular person.

A problem arises when you have two independent statutory authorities – on the one hand the ICAC and on the other hand the DPP – with no statutory procedures for

allocating their respective functions in relation to the obtaining and assembling of evidence for criminal proceedings.

Part 4 of the ICAC Act sets out the functions of the Commission. Section 12A states:

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and has to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

Section 13 of the ICAC Act sets out the principal functions of the Commission. It is not until s.14 which refers to "other functions of the Commission" that one finds the functions:

(a) to assemble evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish any such evidence to the Director Of Public Prosecutions

(b) To furnish other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

The current situation is that priority in the allocation of resources is given to those functions in s.13 over those in s.14.

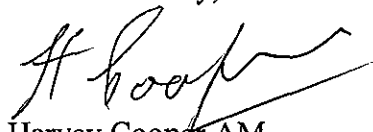
As I understand it, the suggestion in this third term of reference is that the function of assembling evidence for criminal proceedings be removed from "other functions" in s.14 to the principal functions set out in s.13.

I have no objections to the suggested amendment but note that it may well result in the need for additional resources being given to the Commission.

I do have some concern as to the use of the word "assemble" in s.14(a) above. The normal meaning of the word "assemble" is to collate or bring together items that one already has. It is quite conceivable that the DPP could require the Commission to obtain evidence in addition to and different from material that it had obtained for the purposes of its investigation. I am concerned as to whether the power to "assemble evidence" would extend to a power in the Commission to obtain further evidence at the request of the Director of Public Prosecutions after it had already completed its investigation into corruption.

I shall be happy to answer any further queries you may have.

Yours sincerely,



Harvey Cooper AM
Inspector