

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

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Date received: 22/04/2009



The New South Wales Bar Association

99/251

17 April 2009

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



Dear Mr Terenzini

Proposed amendments to the Independent Commission Against Corruption Act 1988

I refer to your recent correspondence regarding the *Independent Commission Against Corruption Act 1988* ("the Act"). The New South Wales Bar Association is grateful for the opportunity to comment on the proposed amendments to the Act and, in particular, the proposed removal of the restriction prohibiting the use, in disciplinary and civil proceedings generally, of compulsorily obtained evidence provided under objection to the Commission contained in s37 of the Act.

The central aim of the Act is to achieve the primary objectives of investigating, exposing and preventing corruption involving or affecting public authorities and public officials. Whilst s37(2) specifically abrogates the privilege against self-incrimination for evidence produced during hearing, in its current form s37(3) offers the protection of inadmissibility of such evidence in any subsequent civil, criminal or disciplinary proceedings. The effect of the current protection is to encourage full and frank disclosure of information by witnesses which in turn fulfil the objectives of the Act.

The privilege against self-incrimination is a fundamental civil right. On the face of it, the removal of the "use" immunity clearly negates the rationale behind the abrogation of the privilege against self-incrimination in s37(2) and the associated benefits derived from full and frank disclosure by witnesses.

The purpose behind the abrogation of the privilege was to enable full and frank disclosure of relevant information by witnesses. Now it appears that ICAC wants more: not only abrogation of the principle, but also full exposure of the consequences arising from the abrogation. Should this occur it is easy to see how quickly this State investigative agency will become an instrument of oppression. In terms of adversity and oppression, clearly the most serious proposal concerns use of such evidence in subsequent criminal proceedings. The proposal would effectively turn ICAC into a forum for obtaining evidence for criminal trials by compulsion. Presumably, other investigative authorities would follow suit. It would also be entirely contrary to central assumptions on which our criminal justice system is based, more specifically, the rules

and requirements relating to criminal procedure and evidence as set out in the *Evidence Act*, which have been developed after much careful public debate, consideration by law reform agencies and the courts.

Although civil penalties are not mentioned in your correspondence or terms of reference, the same concerns apply to them: see *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42.

As for civil proceedings and disciplinary themselves, although there may be superficial attraction for removal of the 'use' immunity, on closer examination the proposal is replete with dangers and difficulties. The privilege is against self incrimination in relation to criminal offences. Most significantly it would allow something to occur outside the proceedings which would never have been allowed to occur in the proceedings themselves, namely, evidence being obtained under compulsion about the commission of criminal offences. The only qualification is that it is arguable that an exception might be justified in professional disciplinary cases where the protection of the public is the paramount consideration. On the other hand, diluting the immunity would potentially defeat the central purpose of ICAC investigations because it would inhibit witnesses from being honest or cooperative. If rooting out systemic corruption is a principal object of ICAC, then there is little justification for making that task any more difficult than it already is.

The Association regards this matter as one of considerable importance and would appreciate the opportunity to make oral submission to the Committee in due course.

Please do not hesitate to contact me on 9229 1736 or Leonie Young, Project Officer, on 9229 1728 should you have any queries regarding this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anna Katzmann', with a long horizontal flourish extending to the right.

Anna Katzmann SC
President