



Silent Corruption

Section 37 of the NSW ICAC Act

24 April 2009

Mark Polden

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The current inquiry

PIAC welcomes the opportunity to provide this comment to the inquiry presently being held by the Committee on the Independent Commission on Corruption (the Committee) into whether the *Independent Commission Against Corruption Act 1988* (NSW) (the ICAC Act) should be amended to remove the restriction in section 37 prohibiting the use of compulsorily obtained evidence, given under objection, in disciplinary proceedings or in certain classes of civil proceedings.¹

Effect of ICAC Act section 37

It has been suggested in evidence before the Committee² that section 37 has the effect that where an official has confessed, and agency 'cannot even sue to get its money back'³, and that where an admission is made

¹ Request for inquiry and report to Parliament pursuant to the Independent Commission Against Corruption Act 1988 (NSW) sub-section 64(1)(b), 27 November 2008.

³ Review of the 2007-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption, Report No. 4/54 - October 2008, paragraph 1.3.

under objection agencies cannot take legal action to recover public funds ‘even where an individual has admitted defrauding the public’. Each of these assertions is wrong: section 37 does not bar the commencement of proceedings, nor does it provide derivative use immunity.

Balancing Factors

The removal of the common law right to silence through the operation of section 37 of the ICAC Act is balanced—as the Committee notes in its review of the 2007-2007 annual report of the Inspector of the Independent Commission Against Corruption —by the fact that answers given under objection cannot be used in civil, criminal or disciplinary proceedings.⁴ The right to object is balanced in turn by the fact that the ICAC can draw inferences, or bring contempt proceedings, over a refusal to answer.⁵

The Committee notes that even in an inquisitorial system—as opposed to the common law adversarial system that Australia inherited from England—the accused has a right to silence, and that removing the prohibition against the use of evidence given under objection during an ICAC investigation goes to one of the central pillars of the common law.

The Right to Silence

It has been noted⁶ that the expression ‘the right to silence’ describes a group of rights that arise at different points in the criminal justice process, and is not limited to the freedom from self-incrimination.

It is important to recognise that the ICAC Act abrogates the following at least the following rights: (1) the general immunity from being compelled on pain of punishment to answer questions; (2) the general immunity from being compelled on pain of punishment to answer questions, the answers to which may incriminate; (3) the specific immunity of anyone who is suspected of a crime from being compelled on pain of punishment to answer questions of any kind, while being interviewed by police officers or others in similar positions of authority; (4) the specific immunity, possessed by anyone charged with a crime, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.⁷

Procedural Protections

The European Court of Human Rights has held that the right to remain silent under police questioning, and the privilege against self-incrimination, are generally recognised international standards that lie at the heart of the notion of a fair procedure under Article 6 of the *International Covenant on Civil and Political Rights*.⁸

Exposure to Penalty

The High Court has accepted that the privilege against exposure to penalty (in addition to the privilege against self-incrimination, properly so called) serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it.⁹

⁴ Review of the 2007-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption, Report No. 4/54 - October 2008, paragraph 1.64.

⁵ Ibid.

⁶ New South Wales Law Reform Commission, *Report 95: The Right to Silence* (2000).

⁷ For a more complete taxonomy, See *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1 at 30-31.

⁸ *Murray v UK* (1996) 22 EHRR 29, at para [45] (ECtHR 1973).

The right to invoke the privilege is balanced by the fact that, even in the case of a criminal prosecution, there are circumstances in which an adverse inference may be drawn against an accused who exercises the right to silence, if facts which explain or contradict other evidence are only within the knowledge of the accused, and cannot be the subject of evidence from any other source.¹⁰

A Prosecutorial Independent Commission Against Corruption (ICAC)?

Any question of abrogating the privilege against self-incrimination, while stripping away some of the protection that section 37 presently affords, needs to be seen against the background of ICAC's proposal that it be given powers to prosecute its own investigations.¹¹

In relation to the second of these two linked proposals, ICAC Commissioner, Gerard Cripps, gave evidence to the Committee in June 2008 that the powers that ICAC already has:

“... far exceed the powers of the police, and people may very well think they are getting into a police state if you are letting those people in the one organization behave in that way.”¹²

Commissioner Cripps has also observed, in this connection, that the privilege against self-incrimination ‘is directed at ensuring that the power of the State is kept under control’.¹³

Disciplinary Proceedings

It is fair to observe, however, that Commissioner Cripps has expressed support for serious consideration being given to amending section 37, to make it clear that ‘at least civil and disciplinary proceedings are outside its ambit’.¹⁴

The *Police Integrity Commission Act 1996* (NSW) (the PIC Act) has been cited by Commissioner Cripps as an instance in which the privilege has been abrogated, but with evidence thus obtained remaining available for use in disciplinary proceedings.¹⁵ Under the PIC Act, evidence or information, for which the privilege against self-incrimination might otherwise have been claimed, produced to the Police Integrity Commission (PIC) under compulsion, cannot be used for the purpose of any civil or criminal proceedings - except for an offence

⁹ *Rich v Australian Securities and Investments Commission* [2004] HCA 42; 220 CLR 129; 209 ALR 271; 78 ALJR 1354 (9 September 2004) although noting that the privilege against exposure to a penalty is not a substantive rule of law, like legal professional privilege, having application beyond judicial proceedings.

¹⁰ *Weissensteiner v The Queen* (1993) 178 CLR 217.

¹¹ Review of the 2007-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption, Report No. 4/54 - October 2008, paragraph 1.62.

¹² Gerard Cripps QC, Transcript of evidence to the Committee on the Independent Commission Against Corruption, 9 July 2008, p 28.

¹³ Gerard Cripps QC, Transcript of evidence to the Committee on the Independent Commission Against Corruption, 9 July 2008, p 3.

¹⁴ Note 12.

¹⁵ Note 13.

under the PIC Act, the “Commissioner’s Confidence” provisions of the *Police Act 1990* (NSW),¹⁶ or disciplinary hearings under the *Public Sector Employment and Management Act 2002* (NSW).¹⁷

PIAC does not believe that there is a warrant for the ICAC Act going further.

Other Legislation

Commissioner Cripps also referred in evidence before the Committee to Commonwealth and Queensland legislation.¹⁸

Under the *Crime and Misconduct Act 2001* (Qld), any answer, document, thing or statement given or produced subject to objection on the grounds of self-incrimination is not admissible in evidence against the individual who gave the evidence in *any* civil, criminal or administrative proceeding (except for a false or misleading answer, a breach of the Act itself, or a contempt).¹⁹

Under the *Law Enforcement Integrity Commissioner Act 2006* (Cth), evidence given under objection is not admissible (with some exceptions) in evidence against the person who gave it, in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty, other than a disciplinary proceeding against a staff member of a law enforcement agency.²⁰

Under the *Royal Commissions Act 1902* (Cth) the privilege is partially abrogated, but not where charges are pending or proceedings for a penalty have been commenced. Any evidence given or document produced under objection is not admissible in evidence against any person (though not corporations) in *any* civil or criminal proceedings in any court of the Commonwealth, of a state or of a territory (except for an offence against the Act itself)²¹

In PIAC’s view, the conclusion to be drawn from examining broadly comparable legislation in other Australian jurisdictions must be that any proposal to repeal section 37 of the ICAC Act would strip away a layer of checks, balances and protections that have generally been applied where the privilege has been modified or abrogated by statute.

Other Considerations

PIAC is not convinced that the proposed change is necessary, proportionate – or even reflects a correct appreciation of the present law - so far as it appears to be based upon a belief that section 37 of the ICAC Act prevents legal action being taken to recover public funds where an individual has admitted fraud.²²

¹⁶ Police Act 1990 (NSW) ss 173, 181D

¹⁷ Police Integrity Commission Act 1996 (NSW) sub-section 40(3).

¹⁸ Gerard Cripps QC, Transcript of evidence to the Committee on the Independent Commission Against Corruption, 9 July 2008, pp 3; 22.

¹⁹ Crime and Misconduct Act 2001 (Qld) s 197.

²⁰ Law Enforcement Integrity Commissioner Act (Cth) 2006, Section 80.

²¹ Royal Commissions Act 1902 (Cth) sub-sections 6A, 6DD.

²² See, for example, evidence of the Inspector of the Independent Commission Against Corruption, Mr Kelly, cited in the Review of the 2007-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption, Report No. 4/54 - October 2008, at paragraph 1.51.

There is nothing in section 37 of the ICAC Act which imposes a statutory bar on such action being taken; section 37 confers no derivative use immunity. Nor does it prevent ICAC using information under objection to further its lines of inquiry. There is nothing in section 37 that prevents ICAC from using 'roll-over' evidence, given by witnesses under objection, against each other.

PIAC is concerned at the potential for long-standing rights and protections—like the right to silence and the privilege against self-incrimination—to leach out of the general law under the influence of statutes of more specific application, such as the ICAC Act. Examples of this already exist: a recent NSW example is the introduction of covert search warrant powers, originally restricted to anti-terrorism investigations, to a very wide range of relatively minor criminal offences²⁴.

PIAC holds similar concerns about the gradual erosion of the privilege against self-incrimination, and the right to silence. It is troubled by the evidence given to the Committee by Mr Kelly, the Inspector of the Independent Commission Against Corruption that:

"Were you go as far as to further detract from the right against self-incrimination to enable the evidence extracted under compulsion to be used in a criminal prosecution is a fairly serious policy issue. To be honest, in this day and age, I do not see many good reasons against that. If a person has confessed to criminality, that ought to be used against them, and the only thing that stands between it being use against them or not being used against them is a relatively technical formula."²⁵

A Possible Compromise

PIAC does not believe that section 37 should be repealed in its entirety. Comparison with legislation in the other Australian jurisdictions referred to in this submission does suggest, however, that there is potential for an amendment which provides that, despite section 37, evidence gathered under objection is admissible for the purpose of disciplinary proceedings under specific statutes dealing with public sector misconduct, while remaining inadmissible in any other criminal, civil or administrative proceedings.

While PIAC would prefer, for the broader policy reasons outlined above, to see no further step towards abrogating or limiting the privilege, an amendment in this form might represent an acceptable compromise *provided* ICAC resiles from any desire to acquire the powers of a prosecutorial agency.

Conclusion

PIAC welcomes the opportunity that has been provided to comment on the proposal. PIAC would be happy to enlarge on any of the points outlined in this submission, and looks forward to continuing involvement in policy discussions with Government around this issue.

²⁴ Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009 (NSW).

²⁵ Transcript of evidence to the Committee on the Independent Commission against Corruption, 3 July 2008, pp11-12; cited in Review of the 2007-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption, Report No. 4/54 - October 2008, paragraph 1.3.