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Mr Frank Terenzini MP
Chairperson
NSW Parliamentary Committee
on the Independent Commission
Against Corruption
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Mr Terenzini

RE: Proposed amendments to the *Independent Commission Against Corruption Act 1989* (NSW)

Thank you for your letter of 6 March 2009 in which you sought Civil Liberties Australia's (CLA) views on potential amendments to section 37 of the *Independent Commission Against Corruption Act 1988* (NSW) (the Act). I am pleased to provide the following comments:

Introduction – the significance of international human rights instrument in the development of legislation

1. As you are aware, Australia has signed and ratified the *International Covenant on Civil and Political Rights* (ICCPR). It is of course well established that, because the Commonwealth Parliament has not given legislative effect to the terms of that convention, the convention does not form part of Australia's domestic law and the Commonwealth Government is not strictly bound to draft legislation in accordance with its terms. However, having ratified the ICCPR, the Commonwealth and State and Territory governments and legislatures have both a moral obligation, and an obligation in international law, to act and develop legislation in accordance with the terms of that instrument. As Mason CJ and Deane J observed in *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273:

> …ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights… Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention.

2. In this context, CLA submits that is incumbent on the NSW Parliament to develop proposed legislation in accordance with the terms of the ICCPR. The proposed amendments to section 37 of the Act engage Article 14(3)(g) of the ICCPR, which contains the privilege against self-incrimination. CLA submits that where the Parliament proposes to enact provisions which are inconsistent with the ICCPR and the common law, it should provide a detailed and compelling explanation as to why it has decided to pursue a legal policy outcome which is not in accordance with Australia's international human rights undertakings. CLA submits that it would not be appropriate for the Parliament to justify amendments of the Act which are inconsistent with Article 14 of the ICCPR with vague and imprecise assertions that it would be in the 'public interest' or 'in the interests of law enforcement'. Rather, any departures from Article 14 of the ICCPR should be justified with reference to the internationally accepted principles of proportionate limitations on human rights: see *R v Oakes* [1986] 1 SCR 103.

The privilege in section 37 of the Act

3. *Prima facie,* subsections 37(1) and (2) of the Act engage the privilege against self-incrimination. The effects of this breach are mitigated, however, by subsections 37(3) and (4) of the Act which provide that any information a person is compelled to provide to the Commission is not admissible in any criminal, civil or disciplinary proceedings against the person who provided that information. In effect, subsections 37(3) and (4) of the Act create a "use immunity".

4. At this juncture, it is worth expanding upon the meaning of a "use immunity" and a "derivative use immunity":

   - Derivative use immunity: The result of a derivative use immunity is that any information, document or thing obtained as a direct or indirect consequence of the answers or production of documents will not be able to be used in evidence against the witness in criminal or civil proceedings, except in specified circumstances (eg. where the witness is prosecuted for perjury, contempt or providing false or misleading answers during the examination).

   - use immunity: A use immunity only prevents the answers to questions or information obtained under compulsion from being admitted as evidence. It does not, however, prevent further information which has been obtained as a result of the answers or information which the accused was compelled to provide from being admitted into evidence. Put differently, a use immunity does not prevent the admissibility of evidence, other than the answers to questions, which police otherwise would not have been led to or obtained but for their ability to compel the accused to provide information and answer questions.

5. It is important to note that subsection 37(3) and (4) of the Act do not create a derivative use immunity as there is nothing to prevent authorities using information obtained as an indirect consequence of using their coercive powers to gain information even though they would not have been able to obtain that information without *prima facie* breaching the privilege against self incrimination.

6. For example, suppose person X is summonsed to provide information to the Commission. As a result of questioning, person X provides a particular document. Acting on information contained in this document, the Commission obtains further documents which contain information which implicates X in corruption. At person X's trial the initial document person X produces would be inadmissible, but the subsequent documents and the information they contain would not be. If however, section 37 provided a full "derivative use immunity" all documents would be inadmissible against person X. The relevance of this distinction will be explained below.

The nature of the privilege against self-incrimination

7. CLA submits that in interpreting the nature, meaning and extent of the privilege against self-incrimination, regard can and should be had to the judgements of international courts and tribunals which apply domestic human rights instruments expressed in similar terms to the ICCPR (e.g. the House of Lords, the European Court of Human Rights, the New Zealand Supreme Court, the Canadian Supreme Court and the United States Supreme Court). We note that human rights legislation in the ACT and Victoria which codifies and gives domestic effect to the ICCPR in those jurisdictions states that, in interpreting those Acts, regard can be had to the jurisprudence of foreign courts on the interpretation of human rights instruments, and the views and opinions of the United Nations Human Rights Committee.[1]

4. The privilege against self-incrimination includes the right of a person charged with an offence "to remain silent and not contribute to incriminating himself": *Funke v France* (1993) 16

[1] See section 31(1), *Human Rights Act 2004* (ACT); section 32(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

E.H.R.R. 297; *R v Herbert* [1990] 2 S.C.R. 151; *Miranda v Arizona* 384 U.S. 436 (1966). In addition, as the Canadian Supreme Court noted in *R v White* [1999] 2 S.C.R. 417, the privilege against self-incrimination goes further than to provide a right to silence. The Court noted that the privilege is based on the principle that:

> …an accused is not required to respond to an allegation of wrongdoing made by the state until the state has succeeded in making a *prima facie* case against him or her. It is a basic tenant of our system of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused will respond.

5. Drawing on these principles, the Court noted that the rule against self-incrimination, in its broadest form, can be expressed in the following manner:

> …the individual is sovereign and… proper rules of battle between government and individual require that the individual… not be conscripted by his opponent to defeat himself… Any state action that coerces the individual to furnish against him or her self in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

6. An important distinction does, however, need to be drawn between "communications bought into existence by the exercise of state compulsion, versus documents that contain communications made before and independently of such compulsion." Requiring the production of the latter type of document, i.e. documents that may have existed prior to an ACC examination which may contain incriminating information, is permissible without breaching the privilege against self-incrimination: *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313; *Thomson Newspapers v Canada* [1990] 1 S.C.R. 627.

7. Applying these principles, it is clear that subsections 37(1) and (2) of the Act create a *prima facie* breach of the privilege against self-incrimination. The question that needs to be asked is whether the "use immunity" created in subsections 37(3) and (4) of the Act render the limitations on the privilege against self-incrimination as reasonable and proportionate limitations on the right, thus preventing a breach of Article 14(3)(g) of the ICCPR and the relevant common law principles.

8. In addition to being protected by Article 14(3)(g) of the ICCPR, the privilege against self-incrimination is deeply ingrained in the common law of Australia and England. The privilege against self-incrimination is a fundamental right found in all common law countries. In *Sorby v the Commonwealth* (1983) 152 CLR at 288 Gibbs CJ speaks of the "firmly established rule of the common law since the 17th century that no person can be compelled to incriminate himself". He goes on to say at 294 that:

> It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice".

9. Similarly, in *Reid v Howard* (1995) 184 CLR 1, Justices Toohey, Gaudron, McHugh and Gummow observed that:

> The privilege which has been described as a "fundamental … bulwark of liberty" is not simply a rule of evidence, but a basic and substantive common law right. It developed after the abolition of the Star Chamber by the Long Parliament in 1641 and, by 1737, it was said that there (was) 'no rule more established in equity'. More recently the privilege has been described as 'deeply ingrained in the common law'.

Reasonable and proportionate limits on the privilege against self-incrimination

10. It needs to be emphasised that the privilege against self-incrimination is a fair trial right, and thus is ultimately concerned with the admission into evidence of evidence in a trial and the means by which the State obtains that evidence. Technically speaking, where the state uses

coercive means to obtain incriminating evidence, the privilege is not breached until the point that the evidence is tendered against the person in judicial proceedings. Thus, in *R v Kearns* [2002] Crim L.R. 650, Aikens J explained that:

> …[a] law will not be likely to infringe the right to silence or not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extra-judicial enquiry. However, if the information so produced is or could be used in judicial proceedings, whether civil or criminal, then the use of the information in those proceedings could breach those rights and so make the trial unfair.

11. As such, the question of the extent to which evidence obtained under the Act can be used against a person in subsequent judicial proceedings, and the strength of any immunities which are provided, will be key to determining whether these sections contravene the privilege against self-incrimination.

12. The Canadian Supreme Court considered the adequacy of different kinds of immunities to prevent a breach of the privilege against self-incrimination as protected by the *Canadian Charter of Rights and Freedoms* where the State seeks to admit evidence obtained under compulsion in *R v S (R.J.)* [1995] 1 S.C.R. 451. After a rigorous analysis of the common law jurisprudence, and the approach taken to the privilege in the United States and other countries with human rights instruments, the Court concluded that:

> …derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally be excluded under s. 7 of the *Charter* in the interests of trial fairness.

13. In reaching this conclusion, the Court reasoned that:

> [s]uch evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a 'case to meet' (emphasis in original).

14. The European Court of Human Rights reached a similar conclusion in *J.B. v Switzerland* [2001] Crim.L.R. 748 when it held that right not to incriminate oneself "presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'".

15. As was explained at paragraphs 4-6, subsections 37(3) and (4) of the Act only create a "use immunity", and not a "derivative use immunity". Accordingly, the immunity created by subsections 37(3) and (4) of the Act will only be sufficient to displace the *prima facie* incompatibility of subsections 37(1) and (2) of the Act with Article 14(3)(g) of the ICCPR if it is a full derivate use immunity, and not merely a direct use immunity. As was pointed out in *R v Whyte,* a derivative use immunity is the mechanism which most effectively balances "society's goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other".

16. As such, CLA urges the Committee to recommend that section 37 of the Act be amended to create a full derivative use immunity to prevent evidence being admissible in civil or criminal proceedings which the Commission obtains as a result of the exercise of its coercive powers.

Disciplinary proceedings

17. The privilege against self-incrimination is primarily directed at criminal proceedings, although there is judicial authority that it is also applicable in some civil proceedings: see *R v Kearns* [2002] Crim L.R. 650, Aikens J.

18. Where a proceeding is described as a civil proceeding but is criminal in nature or can lead to an outcome which is punitive in nature or involves an exercise of the coercive powers of the state, then it will nonetheless engage Article 14(3)(g) of the ICCPR. For example, proceedings in relation to "civil offences" would engage Article 14(3)(g) given their quasi-

criminal nature. International Courts have been keen to emphasise that states cannot escape the application of rights like that contained in Article 14(3)(g) simply by describing proceedings as 'civil' when, in effect, they resemble criminal or quasi-criminal proceedings given their nature or their outcome: *Engel v The Netherlands (No.1)* [1976] 1 E.H.R.R. 647; *R v Dover Magistrates Court* [2003] Q.B. 1238

19. Administrative and disciplinary proceedings do not usually attract the application of the privilege against self-incrimination, unless information produced in such proceedings may later be tendered in criminal or civil proceedings. In *R v Wigglesworth* [1987] 2 SCR 541 the Canadian Supreme Court considered whether section 11 of the *Canadian Charter of Rights and Freedoms,* which is expressed in substantially similar terms to Article 14(3) of the ICCPR, is engaged by disciplinary proceedings. The Court reasoned that:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino*, *supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission*, *supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasicriminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.
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> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

20. The British Court of Appeal reached a similar conclusion in *R v Kearns* [2002] Crim L.R. 650.

21. In light of this jurisprudence, CLA has no in-principle objection to amending section 37 of the Act to allow the use of evidence or information obtained by the Commission through the use of its coercive powers in administrative disciplinary proceedings, provided derivative use immunity applies in any subsequent criminal and/or civil proceedings.

If you would like to discuss any of the issues raised in this submission, please do not hesitate to contact the principal author of this submission, CLA Director Mr Anthony Williamson, at awilliamson@cla.asn.au[redacted]

Yours sincerely

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