

**Submission
No 1**

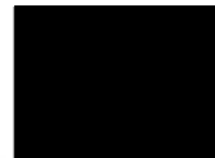
**INQUIRY INTO PROTECTIONS FOR PEOPLE WHO
MAKE VOLUNTARY DISCLOSURES TO THE
INDEPENDENT COMMISSION AGAINST
CORRUPTION**

Organisation:

Name: Hon Harvey Cooper AM

Position:

Date Received: 16 May 2017



15 May 2017

Damien Tudehope MP
Chair,
Committee on The Independent Commission against Corruption,
Parliament of NSW,
Macquarie Street,
SYDNEY NSW 2000

File Ref. LAC17/062

Dear Mr. Tudehope,

I refer to your letter of 4 May 2017 inviting me to make submissions regarding your inquiry into protections for people who make voluntary disclosures to the ICAC.

It is noted that the substance of your Inquiry is **“whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purposes of the ICAC’s functions”**.

In my submission it is axiomatic that persons who become aware of, or have a reasonable suspicion of, corrupt conduct on the part of a public official should report it to the ICAC and, at the same time be protected from retaliatory action taking all forms including criminal, civil or disciplinary liability.

It is not necessary for me to embark upon an analysis of all legislation on this topic. There is, however, an anomaly arising out of the provisions of the *Defamation Act 2005* and the *Public Interest Disclosures Act 1994* which, in my submission, requires special consideration.

The anomaly is more clearly demonstrated by way of a “hypothetical”

Two friends, Bob (a bus driver employed by a private company) and Dan (employed as a driver of Government Buses, Transport for NSW) attend at a State Service Centre to renew their respective driver licences. Whilst waiting to be served they notice what appears to be the strange behaviour of one of ^{the} clerks (aka Customer Service Officer) working at the State Service Centre. Whenever he received a cash payment he placed the cash in the back pocket of his trousers and did not give a receipt to the customer making the payment. However, cheques and credit card docketts were placed in a drawer under the till and the customers were handed a receipt.

After completing their business at the State Service Centre, Bob and Dan discussed what they should do. They agreed that the conduct of the clerk (aka Customer Service Officer) appeared to be corrupt and that it was so blatant that it was not impossible that the Manager of the Centre was complicit in the activity. And so they decided that they would report what they had seen to the ICAC. Thereupon Bob and Dan separately used their respective computers to lodge a formal complaint on ICAC’s web site describing the conduct they had witnessed.

After a preliminary investigation ICAC determined not to investigate the complaint because it was not considered sufficiently serious. Instead it referred the complaints to the Service Centre management.

The clerk (aka Customer Services Officer) learned of the complaint and the identity of the complainants. No action was taken against him. He then had his lawyer write to each of Bob and Dan demanding that they withdraw their complaints and apologise publicly otherwise he would commence action claiming heavy damages for defamation.

This is where it gets interesting.

They went to a lawyer who referred to section 27 of the *Defamation Act 2005* which provides that it is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege. Matter is published on an occasion of absolute privilege if the matter is published by a person or body in any circumstances specified in Schedule 1

Clause 19 of that Schedule includes matter that is published:

- (a) to or by the Independent Commission Against Corruption, or
 - (b) to or by the Commissioner for the Commission as Commissioner, or
 - (c) to or by the Inspector of the Independent Commission Against Corruption as Inspector, or
 - (d) to any officer of the Commission or officer of the Inspector (within the meaning of the *Independent Commission Against Corruption Act 1988*) as such an officer.
- (2) This clause applies in relation to . . . any other matter relating to the powers, authorities, duties or functions of the Commission or Inspector

The respective reports from Bob and Dan to the ICAC clearly came within clause 19. They were, therefore, absolutely privileged and no action in defamation could be taken against them.

Bob and Dan were greatly relieved by this advice. Unfortunately Dan's relief was short lived. He was employed by a Government instrumentality to drive government buses and, consequently, is a "**public official**" within the meaning of *The Public Interest Disclosures Act 1994*.

Unlike the *Defamation Act*, *The Public Interest Disclosures Act* contains no absolute immunity from action for defamation. Instead it provides (section 10) that, to be protected by this Act, a disclosure by a public official to the Commission must:

- (a) be made in accordance with the *Independent Commission Against Corruption Act 1988*, and
- (b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

Dan derives some help from section 9A which states:-

(1) For the purposes of determining whether a disclosure by a public official is protected by this Act, an assertion by the public official as to what the public official believes in connection with the disclosure is, in the absence of evidence to the contrary, evidence of the belief asserted and that the belief is an honest belief.

(2) Such an assertion need not be express and can be inferred from the nature or content of the disclosure.

Here we have two men engaged in the same industry (bus driving) reporting to the ICAC about the same conduct of the same public official not in the workplace of either of them. One who is employed by a private company enjoys absolute immunity from action for defamation. His friend, merely because he is employed by a government instrumentality, has only partial immunity and can be involved in litigation.

This different treatment may be understandable when a complaint is made by a person engaged in the same work place as the subject of the complaint. But where a public official complains about another public official unconnected with his place of work, should the protection not be absolute?

Yours sincerely,

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(Harvey Cooper AM)