

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

**Organisation:**

**Name:** Mr Graham Kelly

**Position:**

**Date Received:** 22 May 2017

21 May 2017

Graham Kelly



The Chair,  
Joint Committee on the ICAC,  
Parliament House,  
6 Macquarie Street,  
Sydney NSW 2000

I refer to your letter dated 4 May 2017 inviting me to make a submission to the inquiry that your Committee is currently conducting into protections for people who make voluntary disclosures to the ICAC.

The terms of reference for this inquiry require the Committee to consider 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. I express below my views on the reference in respect of, separately, criminal liability, civil liability and disciplinary liability. I do so in purely general terms, from the point of view of the general principles that, in my view, arise with such proposals.

### **Criminal Liability**

I think it would be a mistake to protect people who make voluntary disclosures from criminal liability, *as such*.

It is perfectly normal, in our criminal justice system, for people to be granted immunity from prosecution for very clearly defined disclosures and evidence against others charged with offences (in somewhat old fashioned language, for 'going Queen's evidence'). This process would, as I understand it, normally involve clear and careful prior consideration by those responsible (particularly by senior police and probably prosecution officials). Nevertheless, decisions to grant such immunity are still often controversial, and often not welcomed by the broader community that believes criminals should not escape prosecution merely because they 'squeal'.

An *automatic* exemption would take away this clear balancing of interests involved in the ordinary immunity from prosecution decision making process. It could lead to scoundrels making disclosures purely to gain immunity from prosecution.

The ICAC could, on the other hand, be given the power, *in its discretion*, to grant immunity from prosecution for disclosures made to it. The legislation could spell out the considerations it would

have to take into account, such as whether the disclosure is likely to result in evidence of corrupt conduct by someone else, and whether it is in the interests of justice that such a disclosure be facilitated by immunity being granted. This would be in addition to the existing protection of evidence given under compulsion from being used against the person from whom the evidence has been extracted.

### **Civil Liability**

The idea that a person making a voluntary disclosure would be protected from civil liability is, I believe, a bad one.

The proposition must be looked at from the point of view of the other party potentially having a civil (and therefore personal and private) claim against the whistle-blower; it would be unfair to this counter-party to expunge their rights (indeed, it would be confiscatory to do).

What could be done, however, is that evidence taken under compulsion might be precluded from being used in civil proceedings, just as it is precluded from being used in criminal proceedings, against the witness. This would leave a counter-party in no worse position than if the evidence extracted under compulsion had not been forthcoming.

It may also be possible to preclude the Government (in the broadest sense) from taking civil action against a person making a voluntary disclosure in respect of the issues involved in the disclosure. This would not raise the more general considerations referred to above that arise with the idea to protect the whistle-blower from civil liability at the suit of a private party. It would simply be that the Government (in the broadest sense) would give up its rights in the interest of facilitating the disclosure of potentially corrupt conduct.

### **Disciplinary Liability**

On the other hand, I see no objection, and considerable merit, in people making voluntary disclosures of seemingly corrupt conduct being protected from disciplinary liability. The very thing that otherwise innocent whistle-blowers expose themselves to - and fear most of all - is that they will end up being victimised in their work-places by those against whom they have informed.

I could support this proposal as a general provision, not dependent on the person being required to give the evidence under compulsion.

### **Conclusion**

Having observed the operation of ICAC at close range in my previous position of Inspector, I am broadly in favour of measures to enhance the disclosure of evidence of potentially corrupt conduct and to extend reasonable protection to those who voluntarily do so.

The circumscribed proposals I have outlined above would, I believe, achieve this without significant damage to the broader legal system.



Graham Kelly