

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

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Dear Mr Tudehope

**Inquiry into protections for people who make voluntary disclosures to the ICAC**

The opportunity to make a submission on the Committee's inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption (ICAC) is appreciated.

**Background**

The current inquiry being undertaken by the Committee on the ICAC provides a valuable opportunity to consider whether persons making disclosures of corruption to the ICAC should be protected from criminal, civil or disciplinary liability where the disclosures were made voluntarily.

The Committee on the Independent Commission Against Corruption Discussion Paper – Prosecutions Arising from Independent Commission Against Corruption Investigations, November 2014 provides relevant background to the current inquiry. Pages 19-22 of that Discussion Paper examine the question:

*Should a protection be inserted in the Independent Commission Against Corruption Act 1988 to provide that an individual voluntarily supplying information to the ICAC for the performance of its functions is not subject to any penalty for having breached an Act or rule of law.*

In examining this issue the Report recognised the submissions made by ICAC recommending an amendment to provide additional protection to voluntary disclosers of information. These submissions were founded upon the limitations under the extant provisions to provide protection to individuals only in cases where ICAC has exercised its powers to require or obtain the information. Accordingly, the provision does not apply in situations where information is disclosed voluntarily and in cases where the conduct in question is not under consideration by the ICAC.

The Committee recognised, inter alia that protecting witnesses against self-incrimination would make it easier to obtain evidence regarding an offence and in that regard the Committee referred to existing statutory protections. Ultimately the Committee identified this question as one warranting further review.

An examination of statutory protections operating under legislation other than the *Independent Commission Against Corruption Act 1988* (the ICAC Act) may assist the inquiry.

## Existing statutory protections

### Public Interest Disclosures Act 1994

Protections are available to public officials who make disclosures under the *Public Interest Disclosures Act 1994* (PID Act). The object of the PID Act can be summarised as establishing a system to:

*Encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector by:*

- (a) enhancing and augmenting established procedures for making disclosure of those matters*
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures,*
- (c) providing for those disclosures to be properly investigated and dealt with.*

Part 2 of the PID Act (sections 7-19) sets out the requirements which must be met for a disclosure to be a public interest disclosure and to therefore attract the protections of the Act. Section 8 of the PID Act identifies that a public official may receive protections under the Act if a disclosure is made either to the principal officer of a public authority or to a number of identified investigating authorities who may receive disclosures regarding specialist areas outlined in the PID Act. Threshold requirements are also established in sections 9A, 17 and 18 of the Act. Relevantly, the assertion by the discloser is not required to be express rather it can be implied from the nature or content of the disclosure (section 9A(2)).

Sections 11(2) and 12(1)(b) of the PID Act inject a test of *seriousness* into the threshold requirements to gain the benefit of the protections provided. This threshold may be seen to align with that contained at section 9 of the ICAC Act.

The seriousness of an allegation has a number of facets. "An allegation or complaint may be treated seriously because of its source, because of its subject matter or because of the potential consequences of the conduct complained of."<sup>1</sup>

Part 3 of the PID Act provides for protections against reprisal actions for those public officials who have made PIDs. In particular, section 21 provides for protections against actions and claims for making the PID. This protection applies despite any restrictions on disclosure based upon any duty of secrecy or confidentiality or any other restrictions on disclosure.

Section 21(3) provides examples of the ways that a person is protected by section 21. A person who has made a PID:

- has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation;
- where a duty to maintain confidentiality is imposed by a provision of an Act with respect to any information disclosed is taken not to have committed an offence against that Act;

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<sup>1</sup> *Cunneen v Independent Commission Against Corruption [2014] NSWCA 421*



- is subject to obligations by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is not taken to have breached the oath, rule of law or practice;
- is not liable for any disciplinary action because of the disclosure.

Section 12D Disclosure to Information Commissioner establishes additional threshold requirements in respect of disclosures to the Information Commissioner, in her capacity as an investigating authority that are necessary to benefit from the protections provided under the PID Act.

In particular section 12D(b) contains both an objective and a subjective test that need to be satisfied under the provision for the PID Act protections to apply to disclosure.

Statutory protections, usually predicated upon conduct by officers that meets the requirements of good faith are also found in statutes establishing the jurisdiction of public bodies and public office holders.

*Government Information (Public Access) Act 2009 and Government Information (Information Commissioner) Act 2009*

The *Government Information (Public Access) Act 2009* (GIPA Act) provides protections for persons making decisions in relation to the disclosure of government information, where the person who makes the decision to disclose the information believes in good faith that the Act permits the disclosure.

Section 113 of the GIPA Act provides for protections in respect of actions for defamation or breach of confidence; section 114 provides for protection from certain criminal actions and section 115 provides personal liability protections.

Section 42 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act) provides protections for the Commissioner and members of staff acting in good faith from civil and criminal proceedings and personal liability.

In summary, a number of statutes operating in NSW provide for penalties for the disclosure of information held by public sector agencies, unless the disclosure is made under certain conditions. In particular the ICAC Act offers some limited protections against actions for liability. Under section 109 of the ICAC Act protection is given from liability, but only in circumstances where the ICAC has exercised its power to require or obtain the information. In the absence of these conditions persons who are considering voluntarily reporting corruption to the ICAC may be open to criminal, civil or disciplinary liability. This circumstance may deter voluntary disclosure of information relevant to any investigation of corrupt conduct and detract from the objects of the ICAC Act contained at section 2A particularly in relation to the exposure and prevention of corrupt conduct and the role of ICAC in educating public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.

In considering any amendment to provide protections for persons making a voluntary disclosure to ICAC the Committee may wish to have regard to consideration of threshold tests including subjective and objective factors, such as motivation as envisaged by s18 of the PID

Act, a test of seriousness; and good faith provisions.

Likewise threshold provisions may also require the inclusion of limitations in contemplation of the specific protections against the actions contained within the terms of reference of the inquiry.

I trust these comments are of assistance to the Committee. Please do not hesitate to contact me in respect of any further assistance that could be provided.

Yours sincerely



 Elizabeth Tydd *2 June 2017*  
**Information Commissioner**  
**CEO, NSW IPC**  
**NSW Open Data Advocate**