

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

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New South Wales
Council for Civil Liberties

NSW Council for Civil Liberties

submission to

Joint Committee on the ICAC

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

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1. Introductory Comments

- 1.1. The NSW Council for Civil Liberties (NSWCCL) thanks the Committee on the Independent Commission against Corruption (the Committee) for its invitation to make a submission on its inquiry into protections for people who make voluntary disclosures to the NSW Independent Commission against Corruption (ICAC).

Anti-corruption agencies and civil liberties

- 1.2. The NSWCCL has previously opposed bodies such as ICAC. In recent years we have changed our position. As a preliminary to our direct comments on the issue of protection in relation to voluntary disclosures we think it useful to reproduce comments we made in our recent submission on the establishment of a National Integrity Commission.

- 1.3. *'As a civil liberties organization NSWCCL has opposed anti-corruption agencies sitting outside the established justice system and wielding extraordinary coercive and covert powers. We have done so on the principled grounds that they infringed established rights and liberties in an unwarranted manner, caused unfair reputational damage and undermined the rule of law. As such we have regarded these bodies as dangerous, unnecessary and inappropriate in a democratic society.'*

In recent decades it has become clear that increasingly complex forms of corruption pose a serious and growing threat to the public good in Australia: by undermining the integrity of our political system, distorting the policy making process, diverting resources from public good objectives and generally undermining public trust in our political class, governing institutions and public administration.

If not more effectively checked, corruption poses a threat to our democratic values and processes –including individual rights and liberties. We note with concern the growing disillusionment with democracy in Australia and elsewhere. The perceived lack of integrity within our political systems is a significant contributing factor to this trend.

NSWCCL remains very cautious about the granting of extraordinary covert and coercive powers to state agencies - including anti- corruption bodies. However, from a civil liberties perspective we consider the balance between greater public good and greater public harm has shifted. In this evolving context, if the public interest is to be protected against corruption, NSWCCL acknowledges that the establishment of anti-corruption agencies equipped with extraordinary investigative powers- with proper constraints and safeguards- is necessary and proportionate.

NSWCCL has in recent years generally supported the NSW ICAC for its successful anti-corruption work – notably its immensely important exposure of corruption to the public view.

On balance, ICAC has been force for good in NSW. It enjoys strong community support which has provided a restraint (albeit not totally effective) on politicians from undermining ICAC for personal/party political reasons or in response to self-interested pressure from others.¹

- 1.4. It is from this perspective that NSWCCCL supports a strong and effective ICAC - subject to the strongest safeguards for individual liberties and rights that are compatible with operational effectiveness.
- 1.5. The Committee has been tasked “to inquire into and report on 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”. NSWCCCL strongly supports an amendment to the ICAC Act to provide comprehensive protections for people who make voluntary disclosures to ICAC. Such an amendment will provide appropriate protections for individuals wishing to make disclosures about corruption and can also be expected to increase the flow of voluntary information about corruption to ICAC.

2. Detailed comments

- 2.1. Corrupt activities are by nature covert and difficult to discover. Notwithstanding the effectiveness of the mandatory reporting requirements within the ICAC Act, there are strong grounds for presuming that a great deal of corrupt activity and misconduct relating to public administration in NSW goes undetected by law enforcement agencies or ICAC.²
- 2.2. The undemocratic trend for secrecy provisions and practice across public administration in NSW poses an obvious and serious barrier to the detection and exposure of corruption and misconduct.
- 2.3. The relevance of public service protocols, regulations and laws is declining with the increased privatization of public services and the transformation of major public service agencies into state corporations. In these contexts transparency is further undermined by the overuse of ‘commercial in confidence’ barriers to public accountability for allocation of major public resources.
- 2.4. The increasing role and power of large corporations in relation to Government is also a transformative factor. The close linkages between these corporations and Government /public administration is manifest in many ways: the regular interchange of personnel – including the movement of ex Ministers and bureaucrats into employment with corporations; the significant representation of corporations on boards and committees; corporate donations to political parties; joint public-private ventures etc.

¹ NSWCCCL submission to Senate Select Committee on a National Integrity Commission April 2017 (Sub 26) P1 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Submissions

² The observations in this section restate NSWCCCL’s relevant arguments in its submission on the NIC. Ibid

- 2.5. These close linkages between the public and private sectors, including at the corporate level, are of course, not in themselves a negative in terms of the public good. They are an integral dimension of NSW's and Australia's economic and social structure and generate much public good. But they also create a great opportunity for many kinds of corruption.
- 2.6. It is impossible for the public to have any meaningful knowledge of the extent and influence of corporations and the lobbyists over public policy, legislation, development decisions, mining approvals, environmental decisions, tendering processes and the awarding of contracts etc.
- 2.7. There is abundant precedent for us to know that such lack of transparency relating to public administration will encourage corruption to flourish.
- 2.8. In this context ICAC's capacity to detect and expose corruption relating to public administration is critical. To be effective it needs the maximum possible information about undetected corruption. In the current context, this will be enhanced by strong protections to allow public servants/officials and private persons to make voluntary disclosures about perceived corrupt activity or misconduct without fear of legal, civil or disciplinary liability.

Protections currently available

- 2.9. The ICAC Act provides a range of protections from liability in section 109- but these are limited to persons summonsed to appear before ICAC or produce information relating to a current investigation.

Section 109 provides protection from liability for persons required to produce information, documents and things:

(4) Subject to this Act, a person summoned to attend or appearing before the Commission as a witness, or producing a document or other thing to the Commission, has the same protection as a witness in proceedings in the Supreme Court.

(5) No criminal or civil liability (apart from this Act) attaches to any person for compliance, or purported compliance in good faith, with any requirement made under this Act.

(6) In particular, if a person gives any statement of information or produces any document or other thing under section 21 or 22, no civil liability attaches to the person for doing so, whether that liability would arise under a contract or otherwise.

- 2.10. More generally, section 128 of the Evidence Act³ provides protection from liability but only in a court context. This does not apply to ICAC investigations.

Support for protection of voluntary disclosures

- 2.11. We note the ICAC Committee was asked to address this issue in an earlier ICAC related inquiry in 2014. One of the questions posed to this Inquiry was:

*Question 7 - 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?*⁴

- 2.12. In its submission to this Inquiry ICAC supported an amendment of the ICAC Act to provide this protection:

*The Commission recommends that the ICAC Act be amended to include a provision that protects persons from any criminal, civil or disciplinary liability for the voluntary disclosure of information to the Commission where the disclosure was made for the purpose of the Commission's functions.*⁵

- 2.13. In support of this recommendation ICAC referenced:

..the numerous secrecy and confidentiality provisions in legislation under which public authorities operate that have the effect of prohibiting the disclosure of information obtained by a public official in the course of their employment unless that disclosure is for the administration of or a function of operating legislation or is otherwise required by a law.

As examples it cited s 30 Road Transport Act 2013, s 71 Housing Act 2001 or s 257 of the Crimes (Administration of Sentences) Act 1999.⁶

- 2.14. ICAC also drew attention to the fact that other State anti-corruption agencies have legislative protections for voluntary disclosures and cited the WA, SA and Queensland agencies as examples.⁷

The provision relating to information disclosure and privilege in the Queensland Crime and Corruption Commission Act 2001 (QLD) is comprehensive:

³ Evidence Act 1995 (NSW)

⁴ Inquiry into Prosecutions arising from Independent Commission Against Corruption Investigations Discussion Paper November 2014 P19

⁵ Submission from the Independent Commission Against Corruption to the Inquiry into Prosecutions Arising from ICAC Investigations. July 2014. Sub 8. P11

⁶ Ibid

⁷ Ibid P12

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(1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to a person, whether imposed by any Act or by a rule of law, applies to the disclosure of information to the commission for the performance of the commission's functions.

(2) A person who discloses information under subsection (1) does not, only because of the disclosure—

(a) contravene a provision of an Act requiring the person to maintain confidentiality

in relation to the disclosure of information; or

(b) incur any civil liability, including liability for defamation; or

(c) become liable to disciplinary action.

2.15. NSWCCCL notes that the Committee, while referencing the voluntary disclosure issue, did not make any 'Committee comments' as to its position. We are not clear as to whether this was unintentional or reflected a lack of agreement as to a position.

2.16. In 2016 the matter was raised again through a private member's bill introduced by Greens MP Jamie Parker: Independent Commission against Corruption Amendment (Disclosure of Information) Bill 2016.

2.17. The object of this Bill was:

"to protect persons who lodge complaints about corrupt conduct with the Independent Commission Against Corruption, or who otherwise voluntarily give statements or documents to the Commission, from any criminal or civil liability that might otherwise arise as a result of the complaint, statement or document, including liability for defamation or breach of confidentiality and the taking of disciplinary action by a professional organisation."

2.18. The Bill proposed the replacement of current limited provisions in s109 (5) and (6) with more comprehensive protections covering persons who make voluntary disclosures:

(5) A person is not subject to any criminal or civil liability for compliance, or purported compliance, with a requirement of this Act and no action, claim, demand or disciplinary action may be taken against or made of the person in relation to that compliance or purported compliance.

(6) A person who voluntarily gives any statement of information or produces any document or thing to the Commission in good faith in connection with a complaint made to, or an investigation conducted by, the Commission about a matter that concerns or may concern corrupt conduct is not subject to any criminal or civil

liability for giving the statement of information or producing the document or thing and no action, claim, demand or disciplinary action may be taken against or made of the person in relation to the statement or production.

(7) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the relevant person.

- 2.19. NSWCCCL agrees with Jamie Parker's summative comment in his 2R speech that the proposal was:

*'a common-sense and simple amendment that will protect individuals who voluntarily disclose information to the commission from criminal or civil liability in connection with that disclosure. The Bill will make it easier for the Independent Commission Against Corruption [ICAC] to obtain evidence. It will give confidence to persons who provide information to the ICAC and it will bring the arrangements of the Independent Commission Against Corruption in line with other jurisdictions.'*⁸

- 2.20. The views of Parliament on this Bill were not tested as it did not proceed beyond the 2R speech by Jamie Parker. The Bill has since lapsed.

NSWCCCL consider this to have been a missed opportunity for the NSW Parliament to strengthen the ICAC Act and remedy an obvious weakness in its protection for persons who currently come forward voluntarily at considerable personal risk and for others, who may in the future come forward with important disclosures, if they know they will be protected from criminal, civil and disciplinary liabilities.

3. Recommendation

NSWCCCL recommends that the Independent Commission against Corruption Act 1988 be amended to include comprehensive provisions 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.

NSWCCCL considers this can be done quickly by reviving the *Independent Commission against Corruption Amendment (Disclosure of Information) Bill 2016*

⁸ NSW Hansard 17th November 2016 Independent Commission against Corruption Amendment (disclosure of information) Bill 2016 Second Reading speech

4. Concluding comment

NSWCCL hopes this submission is of assistance to the ICAC Committee in its inquiry into this proposed amendment to the ICAC Act. We would be pleased to elaborate on this submission or respond to queries in any public hearing the Committee may hold or by supplementary submission.

This submission was prepared on behalf of the NSWCCL by Dr. Lesley Lynch with input from the NSWCCL Criminal Justice and Police Powers Action Group.

Yours sincerely

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