

**Submission
No 22**

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

Organisation: NSW Premier and Cabinet
Name: Ms Jacqueline Moore
Position: Acting Deputy Secretary, Cabinet and Legal
Date Received: 5 July 2017

Reference: A2175875

Mr Damien Tudehope MP
Chair
Joint Committee on the ICAC
Parliament House
6 Macquarie Street
SYDNEY NSW 2000

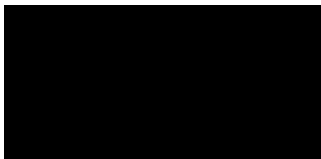
Dear Mr Tudehope

I refer to your letter addressed to the Premier dated 10 May 2017 regarding the Parliamentary Committee on the Independent Commission Against Corruption (**ICAC**) inquiry into protections for people who make voluntary disclosures to the ICAC.

Enclosed is a copy of the Department of Premier and Cabinet's submission to the inquiry.

If the Committee has any questions regarding the submission, the Secretariat may contact Mark Hare, Director (Legal Branch), by email to [REDACTED]

Yours sincerely



Jacqueleine Moore
Acting Deputy Secretary, Cabinet and Legal

4 July 2017

**Submission to the Parliamentary Committee on
the Independent Commission Against Corruption**

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

Department of Premier and Cabinet

3 July 2017

Contents

Introduction	3
The Committee's inquiry	3
Purpose of this submission	3
1. Background	3
Amendments to the ICAC Act	3
Protections for individuals who make voluntary disclosures to the ICAC	4
2. Existing protections for voluntary disclosures to the ICAC	4
Protections under the ICAC Act	4
Protections under the Public Interest Disclosures Act 1994	4
3. Protections for voluntary disclosures to integrity bodies in other Australian jurisdictions	5
Disclosures to the Queensland Crime and Corruption Commission	5
Disclosures to the Victorian Broad-based Anti-corruption Commission	6
Disclosures to the South Australian Independent Commissioner Against Corruption	7
Disclosures to the Western Australian Corruption and Crime Commission	7
4. Issues the Committee may wish to consider	7
Conclusion	9

Introduction

The Committee's inquiry

The joint statutory Parliamentary Committee on the Independent Commission Against Corruption (the **ICAC**) (**Committee**) is currently conducting an inquiry into protections for people who make voluntary disclosures to the ICAC.

The terms of reference for the inquiry¹ require the Committee 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.

As part of its inquiry, the Committee is seeking submissions that address the inquiry's terms of reference by 2 June 2017.

Purpose of this submission

This submission is provided by the Department of Premier and Cabinet (the **Department**) to assist the Committee with its inquiry. This submission sets out relevant factual and historical information relating to protections for individuals who make voluntary disclosures to the ICAC.

The submission does not seek to express a view on whether any legislative amendments should be made to increase or change protections for people who voluntarily disclose information to the ICAC. Where it might be useful to the Committee, the submission does, however, draw to the Committee's attention factual information about the background to the inquiry and existing protections for voluntary disclosures to the ICAC and to similar integrity institutions in other Australian jurisdictions. This submission also outlines some issues the Committee may wish to consider in making recommendations about whether changes to the law should be made.

The submission is structured as follows:

- **section 1** contains a brief summary of the relevant background to the Committee's inquiry
- **section 2** outlines existing protections for people who make voluntary disclosures to the ICAC
- **section 3** contains a summary of protections which apply to people who make voluntary disclosures to similar integrity bodies in other jurisdictions
- **section 4** sets out issues the Committee may wish to consider in making recommendations about whether any changes to the existing law should be made.

1. Background

The *Independent Commission Against Corruption Act 1988* (**ICAC Act**) commenced on 13 March 1989, the date on which the ICAC came into existence.

Amendments to the ICAC Act

The ICAC Act has been amended a number of times since its commencement. Two of the most significant sets of reforms to the ICAC Act have been made in response to substantive, independent reviews of the ICAC Act. In particular:

- the *Independent Commission Against Corruption Amendment Act 2005* followed a comprehensive report on a review of the ICAC Act undertaken by Mr Bruce McClintock SC
- the *Independent Commission Against Corruption Amendment Act 2015* implemented the recommendations of an independent panel comprising the Hon Murray Gleeson AC QC and Mr Bruce McClintock in their report entitled *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* dated 30 July 2015.

¹ Available at: <https://www.parliament.nsw.gov.au/committees/DBAssets/Inquiry/TOR/2433/Terms%20of%20Reference.pdf>

In November 2016, the Parliament passed the *Independent Commission Against Corruption Amendment Act 2016* to implement the Committee's recommendations from its review of the ICAC Inspector's reports.

The issue of protections for individuals who make voluntary disclosures to the ICAC was not the focus of any of these reviews.

Protections for individuals who make voluntary disclosures to the ICAC

In June 2014, the Committee commenced an inquiry into prosecutions arising from ICAC investigations. As part of its submission to the inquiry, the ICAC recommended that the ICAC Act be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to ICAC for the purpose of the ICAC's functions.

In November 2014, the Committee released a discussion paper entitled *Prosecutions Arising from Independent Commission against Corruption Investigations 2014*. The discussion paper noted the ICAC's support for the amendment, but did not make any recommendations for reform.

2. Existing protections for voluntary disclosures to the ICAC

Protections under the ICAC Act

The ICAC Act contains protections for individuals who provide information or evidence to the ICAC where the person is legally required to provide the information or evidence to the ICAC.

The ICAC Act provides that:

- no criminal or civil liability (apart from the ICAC Act) attaches to any person for compliance, or purported compliance in good faith, with any requirement made under the ICAC Act (section 109(5))
- if a person gives any statement of information or produces any document or other thing in response to a notice under section 21 or 22 of the ICAC Act, no civil liability attaches to the person for doing so, whether that liability would arise under a contract or otherwise (section 109(6)).

The effect of these provisions is to provide immunity from any criminal or civil liability for individuals complying with a legal obligation under the ICAC Act to provide information or evidence to the ICAC. For example, where a notice is issued to a person under section 21 of the ICAC Act requiring the person to produce a statement of information, and the person is bound not to disclose the information by a private confidentiality agreement, the person has immunity from any liability under the confidentiality agreement for producing the information to the ICAC. The immunity would also apply to any liability for defamation arising from the disclosure to the ICAC.

Section 94 of the ICAC Act makes it an offence for an employer to dismiss an employee, or prejudice an employee in his or her employment, due to the employee assisting the ICAC. Section 93 of the ICAC Act contains offences of (relevantly) causing or inflicting any damage, loss or disadvantage to any person for or on account of his or her assisting the ICAC. A reference to a person "assisting" the ICAC for the purposes of these offences is a reference to (in summary) a person appearing as a witness before the ICAC, complying with a notice to produce information or documents issued under section 21 or 22 of the ICAC Act or assisting the ICAC in some other manner.

Protections under the Public Interest Disclosures Act 1994

The *Public Interest Disclosures Act 1994 (PID Act)* provides protections for public officials who make disclosures to the ICAC in certain circumstances. In particular:

- section 20 of the PID Act makes it an offence to take detrimental action against another person substantially in reprisal for the other person making a public interest disclosure

- section 21 of the PID Act provides that a person is not subject to any liability for making a public interest disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.²

The PID Act only protects disclosures made by public officials. “Public official” is defined in section 4A of the PID Act and includes public service employees, Members of Parliament, individuals employed under the *Members of Parliament Staff Act 2013* and contractors who provide services to a public authority. Members of the public are not covered by the PID Act. Former public officials are also not covered by the PID Act, unless the former public official made a disclosure while he or she was a public official (PID Act, s 8(3)).

Section 10 of the PID Act provides that, to be protected by the PID Act, a disclosure by a public official to the ICAC must be made in accordance with the ICAC Act and 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.

3. Protections for voluntary disclosures to integrity bodies in other Australian jurisdictions

The legislative frameworks for other integrity institutions in Australia contain varying protections for individuals who make complaints or reports to the relevant body.

This section outlines the relevant protections which apply to people making disclosures to the:

- Queensland Crime and Corruption Commission
- Victorian Broad-based Anti-corruption Commission
- South Australian Office for Public Integrity and Independent Commissioner Against Corruption
- Western Australian Corruption and Crime Commission.

Disclosures to the Queensland Crime and Corruption Commission

In Queensland, the Crime and Corruption Commission (**QCCC**) is established under the *Crime and Corruption Act 2001* (Qld) to prevent and investigate major crime and corruption in the public sector in Queensland.

Section 343 of the *Crime and Corruption Commission Act 2001* (Qld) contains protections from civil liability or disciplinary action for people who disclose information to the QCCC for the performance of the CCC’s functions.

In particular, section 343 provides that:

- 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 QCCC for the performance of the QCCC’s functions (section 343(1))
- a person who discloses information under s 343(1) does not, only because of the disclosure:
 - contravene a provision of an Act requiring the person to maintain confidentiality in relation to the disclosure of information
 - incur any civil liability, including liability for defamation, or
 - become liable to disciplinary action.

² Section 21(2) provides that 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 person.

In addition, the *Crime and Corruption Commission Act 2001* (Qld) contains other protections which apply where a person is legally required to comply with a requirement made under that Act. Section 203 provides that:

- no criminal or civil liability, other than liability under that Act, attaches to a person for compliance, or purported compliance in good faith, with a requirement made under that Act (s 203(4))
- if a person produces a document or thing under a notice to discover or a notice to produce, no civil liability attaches to the person for producing the document or thing, whether the liability would arise under a contract or otherwise (s 203(5)).

Disclosures to the Victorian Broad-based Anti-corruption Commission

In Victoria, the Independent Broad-based Anti-corruption Commission (**IBAC**) is established under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) to investigate, expose and prevent public sector corruption and police misconduct in Victoria.

The IBAC is responsible for assessing complaints to determine whether a complaint is a “protected disclosure” under section 26 of the *Protected Disclosure Act 2012* (Vic) (the **PD Act**).

Part 2 of the PD Act provides that a protected disclosure includes a disclosure of information that shows or tends to show that a person, public officer or public body has engaged in improper conduct which has been made in accordance with the prescribed procedure. A protected disclosure may be made to the IBAC by any natural person (ie not just by public officials) and may be made voluntarily.

If the IBAC assesses a complaint as a protected disclosure:

- the discloser is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the disclosure, unless the person has provided information that the person knows to be false or misleading in a material particular (PD Act, ss 39(1), 72(1)-(2))
- the discloser does not, by making the protected disclosure:
 - commit an offence under section 95 of the *Constitution Act 1975* (Vic) (including the offence of publicly commenting on the administration of any Victorian State department) or a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information
 - breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter (PD Act, s 40(1))
- in any proceedings for defamation there is a defence of absolute privilege in respect of the making of the protected disclosure (PD Act, s 41(1))
- it is an offence for a person to take detrimental action against another person where a substantial reason for doing so was the making of a protected disclosure (PD Act, s 45).

However, a person’s liability for his or her own conduct is not affected by the person’s disclosure of that conduct under the PD Act (s 42).

In addition, as a result of section 53 of the PD Act, the IBAC may not disclose information likely to lead to the identification of a person who has made a protected disclosure, except in certain circumstances. The exemptions include where the disclosure is:

- by the IBAC or an officer of the IBAC where necessary for the purpose of the exercise of functions under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (PD Act, s 54(2)(b))
- for the purposes of a proceeding for certain offences (PD Act, s 54(2)(c))
- for the purpose of a disciplinary process or action in respect of conduct that could constitute certain offences (PD Act, s 54(2)(d)), or

- for the purposes of obtaining legal advice or representation in relation to certain matters (PD Act, s 54(2)(e)).

Disclosures to the South Australian Independent Commissioner Against Corruption

In South Australia, the *Independent Commissioner Against Corruption Act 2012* (SA) established the Office for Public Integrity and the Independent Commissioner Against Corruption.

The functions of the Office of Public Integrity include receiving and assessing complaints and reports about corruption, misconduct and maladministration in the South Australian public sector. The Commissioner is responsible for identifying, investigating and referring for prosecution corruption in public administration. The office also has other functions, such as assisting inquiry agencies and public authorities to identify and deal with misconduct and maladministration.

The *Independent Commissioner Against Corruption Act 2012* (SA) contains a number of protections for individuals who make disclosures under that Act. These protections extend to the voluntary disclosures of information or complaints.

Section 50 contains a provision overriding any contractual or legislative obligations to maintain confidentiality in respect of information or complaints provided to the Office for Public Integrity or the Commissioner. In particular, section 50 provides that “[n]o obligation to maintain secrecy or other restriction on the disclosure of information applies for the purposes of a complaint, report, assessment, investigation or referral under the Act, except an obligation or restriction designed to keep the identity of an informant secret.”

Section 57 prohibits causing detriment to another person (victimisation) because the person or a third person has made or intends to make a complaint or report under the Act or has provided information or other assistance to the Commissioner. The section provides for civil and criminal sanctions for acts of victimisation contrary to the provision.

Lastly, section 21 of the Act makes it an offence to prevent another person from making a complaint or report under the Act about a matter that may involve corruption, misconduct or maladministration, or hinder or obstruct another person in making such a complaint or report.

Disclosures to the Western Australian Corruption and Crime Commission

In Western Australia, the Corruption and Crime Commission (the **WACCC**) assesses allegations of, and investigates, serious misconduct (including corrupt or criminal conduct) in the Western Australian public sector.

The *Corruption, Crime and Misconduct Act 2003* (WA) contains protections which apply to people who provide information to the WACCC voluntarily and under compulsion. In particular:

- subsection 220(2) provides that, if an allegation (defined as any matter reported, notified or referred to the office of the Parliamentary Inspector established under the Act) has been made or information given to the WACCC, no civil or criminal liability (other than liability under the Act) attaches to a person by reason that the allegation was made or the information was given
- section 221 provides that no civil or criminal liability, other than liability under the Act, attaches to a person for compliance, or purported compliance in good faith, with a requirement made under the Act (including a requirement to produce a document or thing under a notice or summons issued under the Act).

4. Issues the Committee may wish to consider

As mentioned above, this submission does not seek to express a view on whether any legislative amendments should be made to increase or change protections for people who voluntarily disclose information to the ICAC.

The Department has, however, taken this opportunity to identify the following issues the Committee may wish to consider as part of its inquiry.

- Under the current NSW legislative framework, there are existing protections from civil and criminal liability, and protections from reprisals, for people who are compelled by the ICAC to provide information or documents. Public officials may make a voluntary public interest disclosure to the ICAC, in which case no action, claim or demand may be taken or made of the public official for making the disclosure. There are, however, no general statutory immunities from civil or criminal liability for people who are not public officials who have voluntarily disclosed information or evidence to the ICAC.
- The legislative frameworks for integrity institutions in Victoria, Queensland, South Australia and Western Australia contain varying protections for people who make voluntary disclosures to those integrity institutions. In particular:
 - In all of these States, the relevant legislation contains (in some cases, qualified) protections from any civil liability arising from breaches of statutory or contractual confidentiality or secrecy provisions which would otherwise prevent the person from making the disclosure.
 - In Queensland, Victoria and Western Australia, the relevant legislation provides that a person will not incur any civil liability for making a voluntary disclosure to the relevant integrity body (although in Queensland, this is limited to where the disclosure is for the performance of the QCCC's functions).
 - In Victoria and Western Australia, there are also provisions which have the effect of providing immunity from any criminal liability for making a voluntary disclosure (although, as mentioned below, in Victoria the protection does not apply where the person has provided information which the person knows to be materially false or misleading).
 - In Queensland, Victoria and South Australia, there are provisions providing for certain protections from disciplinary action as a result of making a voluntary disclosure.
 - In Victoria, the protections from any civil or criminal liability, or any liability arising by way of administrative process (including disciplinary action) for making a protected disclosure do not apply if the person has committed an offence under section 72(1) or (2) in relation to providing information that the person knows to be false or misleading in a material particular.³
- In its submission to the Committee's inquiry into prosecutions arising from ICAC investigations, the ICAC recommended that the ICAC Act be amended to include a provision that protects people from any criminal, civil or disciplinary liability for the voluntary disclosure of information to the ICAC where the disclosure was made for the purpose of the ICAC's functions. The ICAC noted that:
 - a large number of complaints and information accepted by the ICAC each year are received directly from public officials who are not required or authorised by law to report or provide that information and in circumstances where the voluntary disclosure of that information is prohibited by a secrecy or confidentiality law
 - similarly, private individuals who voluntarily provide information to the ICAC may be at risk of incurring civil liability because of contractual or employment undertakings into which they have entered.⁴
- In considering whether existing protections from civil and criminal liability and disciplinary action should be expanded, the Committee may wish to consider the potential risk that this would result in disclosures being made for improper purposes or encourage the making of vexatious complaints, in the knowledge that the person making the disclosure is protected from liability. The potential risk may be reduced if any additional protections apply to disclosures of information:
 - made in good faith and for the purposes of the ICAC's functions

³ *Protected Disclosure Act 2012* (Vic) ss 39, 72.

⁴ ICAC's submission to the Committee's inquiry into prosecutions arising from ICAC investigations dated 1 August 2014, page 11.

- that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or public official has engaged, is engaged or proposes to engage in corrupt conduct (ie the same criteria required for a public interest disclosure to be protected under the PID Act – see section 10(b)).
- There is a risk that any new, broad protections from disciplinary action could lead to individuals disclosing information to the ICAC about their own misconduct or wrongdoing, in order to protect themselves from disciplinary action. Any additional protections from disciplinary action for making a voluntary disclosure should not protect the person from disciplinary proceedings that result from the person's own misconduct or wrongdoing.
- The Committee may wish to consider whether any additional protections should apply where a person has knowingly disclosed information to the ICAC that is false or misleading, or where a disclosure is vexatious or frivolous. The Department notes that it is currently an offence under the ICAC Act to wilfully make any false statement to or mislead, or attempt to mislead, the ICAC or an officer of the ICAC in making a complaint under the ICAC Act (ICAC Act, s 81).⁵

Conclusion

This submission has sought to bring to the Committee's attention relevant historical and factual information, and issues the Committee may wish to consider, relating to possible legislative amendments 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.

The Department would be happy to assist the Committee by providing further information, if requested.

⁵ The offence carries a maximum penalty of 20 penalty units (\$2,200) or imprisonment for 6 months, or both.