

Our reference: 2017/093679
(ADM/2017/450)

Contact: Selena Choo
Telephone: 9286 1014

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

By email: ICACCommittee@parliament.nsw.gov.au

Dear Mr Tudehope

NSW Ombudsman submission to the Parliamentary Committee on the Independent Commission Against Corruption

Thank you for the opportunity to make a submission to the Committee's inquiry into the adequacy of statutory protections for people who make voluntary disclosures to the Independent Commission Against Corruption.

The Ombudsman's office is of the view that the current statutory protections in the *Independent Commission Against Corruption Act 1988 (ICAC Act)* could be strengthened. Our view, in summary, is that there is already broad acceptance of the principle that comprehensive statutory protection should be available to any person who voluntarily provides information to a statutory oversight body. There is strong recognition of that principle in a number of different statutes.

However, the nature of the protection varies from one scheme to another, but for no apparent reason. In short, there are gaps. The coverage of the different statutes may reflect nothing more than drafting assumptions or conventions that applied at a particular time. It would therefore be better to ensure more uniform coverage among the different statutory schemes.

I will explain our view by discussing in turn the statutory protections in the ICAC Act, *Ombudsman Act 1974*, *Community Services (Complaints, Reviews and Monitoring) Act 1993 (CSC Act)* and *Public Interest Disclosures Act 1994 (PID Act)*. I will then return to the issue of principle concerning statutory protection for voluntary disclosures. This submission does not outline in detail how a new provision in the ICAC Act may look. However, there are a number of existing precedents in the legislation of NSW and other jurisdictions that provide excellent guidance.

Independent Commission Against Corruption Act 1988

The main protection provision in the ICAC Act is s 109(5) which gives protection against criminal and civil liability to any person complying ‘with any requirement made under this Act’.

The reference to a ‘requirement’ made under the Act suggests that the protection is available only to a person who provides information to ICAC in compliance with a notice or direction issued by ICAC. This interpretation is reinforced by the reference in s 109(6) to the protection against civil liability applying to a person who ‘gives any statement of information or produces any document or other thing under section 21 or 22’.

Sub-sections 109(3) and (4) likewise provide legal practitioners and witnesses participating in ICAC proceedings with the same protection they would enjoy in Supreme Court proceedings.

There is additional protection in ss 93 and 94 for any witness before the Commission, for any person who complies with a notice to produce information under ss 21 or 22, and for any person who ‘assist[s] the Commission in some other manner’. Section 93 makes it an offence to cause damage or disadvantage to any witness or person who has assisted the Commission; and s 94 makes it an offence for an employer to dismiss any such person from employment or cause prejudice to them in their employment.

The coverage of these offence provisions turns ultimately on what falls within the words ‘assist the Commission in some other manner’. Arguably, those words are capable of a broad construction that extends to any person who voluntarily provides relevant information to the Commission. On the other hand, the words could be construed narrowly by reference to the other provisions in the ICAC Act that provide protection to people who comply with notices and directions issued by ICAC.

That narrower reading gains support in the structure of the ICAC Act, which does not spell out any public complaint procedure. Although s 13(1) of the ICAC Act specifies that one of ICAC’s principal functions is ‘to investigate any allegation or complaint’, that is conditioned on ICAC being of the opinion that the allegation or complaint implies corrupt conduct.

Another provision that may indirectly provide protection to volunteer informants to ICAC is section 80, which provides that it is an offence to obstruct or hinder the Commission in the exercise of its functions. In the same vein, Schedule 1, clause 19 of the *Defamation Act 2005* extends absolute privilege to any matter ‘that is published ... to or by’ the ICAC and its staff.

Ombudsman Act 1974

The Ombudsman Act provides more extensive – or, at least, more explicit – protection than the ICAC Act to any person who voluntarily assists the Ombudsman.

The main provision is s 37 of the Ombudsman Act, which is expressed more broadly than ss 93 and 94 of the ICAC Act. Specifically, s 37(4) makes it an offence to cause damage or disadvantage to a person who makes a complaint to the Ombudsman or assists the Ombudsman, and s 37(5) makes it an offence for an employer to dismiss or cause prejudice to an employee who has assisted the Ombudsman.

Those subsections provide in full:

37 Offences

...

- (4) A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of:

(a) **his or her making a complaint to the Ombudsman**, or

(b) his or her assisting the Ombudsman, or

(c) any evidence given by him or her to the Ombudsman,

is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (5) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Ombudsman is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

[emphasis added]

The main difference between s 37(4) of the Ombudsman Act and s 93 of the ICAC Act is the explicit reference to protecting a person who has **made a complaint** to the Ombudsman.

Both Acts use the similar language of ‘assisting’ the Ombudsman or the Commission, although the ICAC Act refers also to assisting the Commission ‘in some other manner’. The slightly different language and statutory contexts in which the words appear could alternately support arguments that the words had the same or different meanings. It seems undesirable that the scope of protection available to people who voluntarily provide information to an oversight body should turn on such fine differences in language.

Community Services (Complaints, Reviews and Monitoring) Act 1993

Persons who complain to the Ombudsman about the provision of a community service are also protected by the CSC Act, which provides in s 47:

47 Protection of complainant against retribution

- (1) A person who takes or threatens to take detrimental action against another person because that other person or any other person:

(a) makes, or proposes to make, a complaint to a service provider, an Official Community Visitor or the Ombudsman, or

(b) brings, or proposes to bring, proceedings before the Tribunal, or

(c) provides, or proposes to provide, information, documents or evidence to an Official Community Visitor, the Ombudsman or the Tribunal,

is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) It is a defence to a prosecution for an offence under this section if it is proved:

(a) that the action referred to in subsection (1) on which the prosecution was based was taken or proposed in bad faith, or

- (b) that any material allegation was known by the person making it to be false.
- (3) In this section, detrimental action means action causing, comprising or involving any of the following:
 - (a) injury, damage or loss,
 - (b) intimidation or harassment,
 - (c) discrimination, disadvantage or adverse treatment in relation to employment,
 - (d) dismissal from, or prejudice in, employment,
 - (e) prejudice in the provision of a community service,
 - (f) disciplinary proceedings.

The main point to note about s 47 of the CSC Act is that it provides extensive protection for any person who makes a complaint to or provides information to the Ombudsman or an Official Community Visitor (the Visitors are coordinated by the Ombudsman). The unqualified terms of s 47(1)(c) are consistent with the protection extending to any person who voluntarily provides information to the Ombudsman or a Visitor. The nature of the protection is defined differently (albeit broadly) to the protection in some other Acts, namely, as a protection against detrimental action.

Public Interest Disclosures Act 1994

Public officials who make a public interest disclosure to the ICAC or the Ombudsman (as well as certain other bodies) receive statutory protection under the PID Act.

Section 20 of the PID Act makes it an offence to take reprisal action against a person for making such a public interest disclosure; reprisal action includes intimidation, harassment, and taking disciplinary proceedings against an employee.

Section 21 provides in broad terms that a person who makes a public interest disclosure is not subject 'to any liability' or to any 'action, claim or demand', and that those protections apply 'despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act)'. It is clear that s 21 overrides statutory secrecy provisions, as well as contractual and other potential forms of liability.

Sections 20 and 21 provide as follows:

20 Protection against reprisals

- (1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.
Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.
- (1A) In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a public interest disclosure.
- (1B) A public official who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of engaging in conduct that constitutes misconduct in the performance of his or her duties as a public official and that justifies the taking of disciplinary action against the public official, including disciplinary action provided for:

- (a) by or under an Act that regulates the employment or service of the public official, or
 - (b) by or under a contract of employment or contract for services that governs the employment or engagement of the public official.
- (1C) This section extends to a case where the person who takes the detrimental action does so because the person believes or suspects that the other person made or may have made a public interest disclosure even if the other person did not in fact make a public interest disclosure.
- (2) In this Act, detrimental action means action causing, comprising or involving any of the following:
- (a) injury, damage or loss,
 - (b) intimidation or harassment,
 - (c) discrimination, disadvantage or adverse treatment in relation to employment,
 - (d) dismissal from, or prejudice in, employment,
 - (e) disciplinary proceeding.

21 Protection against actions etc

- (1) 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) 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.
- (3) The following are examples of the ways in which this section protects persons who make public interest disclosures. A person who has made a public interest disclosure:
- 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
 - on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act
 - who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice
 - is not liable to disciplinary action because of the disclosure.

The main limitation on those protections is that they apply only to public officials who make disclosures that meet the threshold requirements of the PID Act. In summary, the PID Act requires the person making the disclosure to have an honest belief, on reasonable grounds, that information shows or tends to show the alleged wrongdoing.

The application of the PID Act to ICAC is spelt out in s 10, which provides:

10 Disclosure to Commission concerning corrupt conduct

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.

The scope of protection provided by the PID Act is also extended by s 15, which provides protection if a disclosure is mistakenly provided to the wrong investigating authority. A misdirected disclosure gains the protection of the PID Act so long as a public official had an honest belief that the matter was being disclosed to the appropriate investigating authority. For example, a disclosure to ICAC would be protected if the public official honestly believed that the information provided showed alleged corruption. Section 15 provides:

15 Protection of misdirected disclosures

- (1) A misdirected disclosure by a public official to an investigating authority that the public official honestly believed (at the time the disclosure was made) was the appropriate investigating authority to deal with the matter is a public interest disclosure if:
 - (a) the investigating authority (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) refers the disclosure under Part 4 to another investigating authority or to a public official or public authority, or
 - (b) the investigating authority could have referred the disclosure under Part 4 but did not do so because it has power to investigate the matter concerned under the relevant investigation Act.
- (2) A misdirected disclosure is a disclosure that is not a public interest disclosure because it was not made to the appropriate investigating authority or public authority (but that would have been a public interest disclosure had it been made to the appropriate investigating authority or public authority).

It is therefore clear the PID Act provides significant protection to public officials making voluntary disclosures to ICAC. As noted, the main limitations are that protection applies only to public officials, and only for disclosures that meet the threshold test in the PID Act. Importantly, too, the scope of the PID Act protection is not explicitly reflected in the ICAC Act.

Much public debate and consideration was given to the appropriate threshold for protection under the PID Act during this Committee's 2009 review of the Act.¹ It is significant that the threshold for protection for public officials making public interest disclosures to ICAC is no different to the threshold for people making disclosures to other investigative bodies or using other disclosure pathways.

¹ Committee on the Independent Commission Against Corruption 2009, *Protection of public sector whistleblower employees*, pp.129-134.

Concluding observations

There is extensive recognition in the statute book that people who voluntarily disclose information to statutory oversight bodies should be protected from civil and criminal liability for the act of making the disclosure. However, as this submission has pointed out, there is uneven coverage in the protection that is provided.


That is an undesirable consequence, on public policy grounds. It is essential that public officials, government contractors and members of the public should be able to provide information to statutory oversight bodies without suffering detriment for doing so. This information is a crucial element of the intelligence that is relied on by these bodies to discharge their statutory function of providing assistance to complainants and ensuring integrity in government and public administration.

There is no downside to providing statutory protection. Bodies such as the Ombudsman and ICAC are subject to statutory secrecy constraints that preclude them from publicly releasing the information they receive, except in the context of an investigation report or other statutory reporting mechanism. To that extent, unsubstantiated allegations that are made to the Ombudsman, ICAC and similar bodies are not publicly mentioned by those bodies without proper investigation or verification.

We note also that the threat of recrimination is a realistic fear that may hamper or dissuade people from providing valuable information to a statutory oversight body. The Ombudsman's office is currently handling two matters where complainants to our office have been, or feel threatened in relation to their employment, by reason of providing information to the Ombudsman.

I trust that this submission may assist the Committee in its deliberations about this important issue. Please contact my Executive Officer, Ms Selena Choo, on 9286-1014 or schoo@ombo.nsw.gov.au should you require any further information.

Yours sincerely



Professor John McMillan
Acting NSW Ombudsman

2 June 2017