



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC:PWeh1348647

16 June 2017

Mr Damien Tudehope MP
Chair
Joint Committee on the Independent Commission Against Corruption
Parliament House
6 Macquarie Street
Sydney NSW 2000

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

Dear Mr Tudehope,

Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption (ICAC)

Thank you for your letter dated 4 May 2017 seeking our views in relation to the current inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption ("the ICAC"). Specifically, we understand that the Committee is considering whether those who make voluntary disclosures to the ICAC for the purposes of the ICAC's functions should be protected from criminal, civil or disciplinary liability.

The Law Society notes that currently the *Independent Commission Against Corruption Act 1988* (NSW) ("the ICAC Act") provides protection from criminal and civil liability to persons providing a statement of information or documents to the ICAC in circumstances where the ICAC has exercised its power to require or obtain the information or documents.¹ However, this protection does not operate where persons have voluntarily disclosed information to the ICAC about corrupt conduct of which the ICAC is not aware and which it is not, at that time, investigating.

We understand that in limited circumstances there may be protections for such voluntary disclosures to the ICAC under other legislation. We note that the *Public Interest Disclosures Act 1994* (NSW) ("the PID Act") allows NSW public officials to report suspected corruption and offers legal protection from workplace reprisals for those reports. In relation to the ICAC, a disclosure by a public official will be protected under the PID Act if the disclosure is made in accordance with the ICAC Act and is a disclosure of information that the person 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.² The ICAC Act provides that any person may make a complaint of corrupt conduct to the ICAC.³ Accordingly it appears that if a public official makes a complaint of corrupt conduct to the

¹ *Independent Commission Against Corruption Act 1988* (NSW) s 109(5) and (6). The powers of the ICAC to obtain information and documents are set out in sections 21 and 22 of that Act.

² *Public Interest Disclosures Act 1994* (NSW) s 10.

³ *Independent Commission Against Corruption Act 1988* (NSW) s 10.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

ICAC with an honest belief, on reasonable grounds, that the information shows or tends to show the corrupt conduct of a public authority or another public official, the provisions of the PID Act will apply to that disclosure. We note that the operation of s 10 of the PID Act has not been the judicially considered.

The PID Act provides that a person who has made a public interest disclosure cannot be subject to any liability for that disclosure and no claim, action or demand may be taken or made against the person for making the disclosure.⁴ The PID Act also provides a penalty for detrimental action taken as a reprisal against a person who has made a public interest disclosure.⁵ Accordingly, it appears that public officials who make voluntary reports of corruption to the ICAC are protected from liability. There is no equivalent legislative provision for people who are not public officials.

The Law Society supports amending the ICAC Act to offer similar protections to those in the PID Act to all people who make voluntary disclosures to ICAC whether or not the matter is the subject of an ongoing investigation by ICAC and whether or not the person making the disclosure is a public official. There may be members of the community who become aware of suspected or actual corruption which is relevant to the mandate of the ICAC. Without additional protections, those who provide information to ICAC do so at significant risk of incurring civil liability due to contractual or employment undertakings.

We note that some of the corruption commissions of other Australian states have varying degrees of legislative protection for voluntary provision of information for the purpose of a complaint, report or investigation.⁶

The terms of the proposed amendment

The Law Society notes that the ICAC has previously suggested to the Joint Committee on the ICAC that an amendment could be made to the ICAC Act to protect the voluntary provision of information for the purpose of a complaint, report or investigation.⁷ Particular reference was made to s 343 of the *Crime and Corruption Commission Act 2001* (Qld), which provides:

343 Information disclosure and privilege

- (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.

The Law Society notes that unlike the PID Act, the Queensland provision does not contain any threshold tests requiring the person who makes the disclosure to have an honest belief on reasonable grounds of the corrupt conduct. Accordingly, such a provision would not sit easily alongside the PID Act. Additionally, the Queensland provision may not offer full protection to a person who discloses information against an action for a breach of

⁴ *Public Interest Disclosures Act 1994* (NSW) s 21.

⁵ *Public Interest Disclosures Act 1994* (NSW) s 20. 'Detrimental action' is defined in s 20(2).

⁶ See for example: *Corruption and Crime Commission Act 2003* (WA) ss 220, 221; *Crime and Corruption Commission Act 2001* (Qld) s 343.

⁷ Committee on the Independent Commission Against Corruption, Inquiry into Prosecutions arising from Independent Commission Against Corruption Investigations, Submission No 8 from the Independent Commission Against Corruption, dated July 2014, pages 11-12.

confidence and there is no protection from criminal liability. We also note that 'disciplinary action' does not appear to be defined in relation to that section of the Act, which leaves the operation of s 343(2)(c) unclear. For these reasons, we have concerns about implementing a similar provision in the ICAC Act.

The Law Society proposes that instead of copying the provisions included in the legislation of other states, consideration should be given to amending the ICAC Act to replicate the existing protections offered for public officials in the PID Act and extend those protections to all persons making a disclosure to the ICAC, whether or not they are public officials.

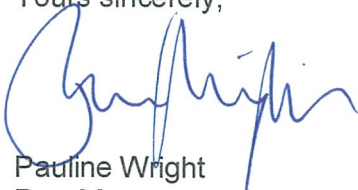
We also propose that, in light of the scope of comparable provisions in other Australian jurisdictions, the protection from liability for voluntary disclosures under the ICAC Act should be extended to provide protection from criminal liability, other than any criminal liability incurred under the ICAC Act.⁸ This would be consistent with the current provisions in the ICAC Act that provide protection against both civil and criminal liability for persons who are required to comply with a notice to provide a statement of information or any documents under that Act.⁹

As set out above, it is an offence under the PID Act to take detrimental action against another person that is substantially in reprisal for that person making a public interest disclosure.¹⁰ Detrimental action includes disciplinary proceedings. The Law Society suggests that consideration should be given to whether an amendment to the ICAC Act is necessary to ensure that all persons voluntarily providing information to the ICAC, with an honest belief on reasonable grounds of corrupt conduct, are protected from detrimental action. We note that the existing ICAC provision regarding "dismissal of witness, or person assisting Commission, by employer" purportedly applies to those who assist the ICAC other than by response to a compulsory notice.¹¹

The Law Society also proposes that a note should be included in the amended ICAC Act to refer people to the operation of the PID Act in relation to liability and disciplinary action for providing information to the ICAC in the event that the person disclosing the information is a public official.

Should you have any questions or require further information, please contact Ella Howard, Policy Lawyer, on 9926 0252 or at Ella.Howard@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

⁸ Currently offences are created under a number of sections of the *Independent Commission Against Corruption Act 1988* (NSW), including ss 50, 70, 80-96, 111, 112, 114-116.

⁹ *Independent Commission Against Corruption Act 1988* (NSW) s 109(5).

¹⁰ *Public Interest Disclosures Act 1994* (NSW) s 20.

¹¹ *Independent Commission Against Corruption Act 1988* (NSW) s 94. Section 94 makes it clear a person assisting the Commission can be a person who is assisting the Commission in manners beyond the scope of appearing as a witness or responding to a compulsory notice issued under the Act.