

The Commission's co-operation policy

Introduction

The NSW Independent Commission Against Corruption ("the Commission") aims to protect the public interest, prevent breaches of public trust and guide the conduct of NSW public officials. To do this we:

- investigate and expose corrupt conduct in and affecting most of the NSW public sector (including state government agencies, local government authorities, members of Parliament and the judiciary but excluding NSW Police and the NSW Crime Commission);
- actively prevent corruption through advice and assistance; and
- educate the NSW community and public sector about corruption and its effects.

Corruption harms public administration, can involve the misuse of public funds and assets and undermine trust in government and the effective and efficient delivery of public services. It involves secrecy and deception and is often difficult to detect without inside information.

The purpose of this policy is to set out what we can do to encourage those involved in corruption to co-operate with us to establish that corrupt conduct has occurred and the full extent of that conduct so that we can stop the harm arising from such conduct.

How to co-operate with the Commission

A person can co-operate with us by:

- fully reporting any corrupt conduct at the earliest possible time;
- honestly and completely disclosing all relevant information;
- providing voluntary assistance during an investigation, including by providing evidence and/or other information in relation to the subject matter of an investigation, including at a public inquiry; and
- giving evidence in the criminal prosecution of others arising from the investigation.

Merely fulfilling certain legal obligations under the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), such as producing documents in response to a notice or summons issued by the Commission or attending to give evidence in response to a summons (unless the evidence is comprehensive and entirely truthful), does not constitute co-operation for the purposes of this policy.

Protection for those co-operating with the Commission

We take seriously the need to protect people who have assisted us, including their family members, against any potential harm, intimidation or harassment arising from their co-operation.

Part 8A of the ICAC Act sets out protections for the makers of complaints or disclosures of misconduct or wrongdoing that are substantially aligned with the protections available to the makers of public interest disclosures under the *Public Interest Disclosures Act 2022*.

Section 79L of the ICAC Act provides that the Commission may make an application to the Supreme Court for an injunction to restrain a person from engaging in a detrimental action

offence or to require a person to an act or thing to remedy conduct that constitutes a detrimental action offence. Applications for an injunction are dealt with in IP06.

Section 79S of the ICAC Act provides that, if it appears that, because the person is a “protected person”, the safety of the person or another person may be prejudiced, or the person may be subject to intimidation or harassment, we may make arrangements to:

- protect the person’s safety; or
- protect the person from intimidation or harassment.

Such arrangements may involve directing the Commissioner of Police or a public authority or public official prescribed by the regulations to:

- provide protection;
- provide personnel or facilities or both to assist in providing protection; or
- otherwise assist in providing protection.

A “protected person” is a person who takes “protected action” (as defined in s 79D(1) of the ICAC Act), being:

- making a complaint or disclosure of information about a matter that concerns or may concern corrupt conduct or another matter the Commission may deal with under the ICAC Act;
- making a report under s 11 of the ICAC Act;
- complying with a requirement under s 21 or s 22 of the ICAC Act;
- giving evidence or producing a document or other thing in a hearing (or being about to do so); or
- assisting the Commission in some other way.

Section 79T provides that 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.

It is an offence under s 79I of the ICAC Act for any person to take detrimental action against another person if:

- (a) the person suspects, believes or is aware, when taking the detrimental action, that the other person or a third person is a “protected person”, and
- (b) the suspicion, belief or awareness is a contributing factor to the taking of the detrimental action.

Under s 79J of the ICAC Act, a person who takes detrimental action may also be liable in damages.

The Commission may also make an order applying to a specified person for the purposes of protecting the safety of another person or protecting another person from intimidation or harassment (s 79S((2)(b)). It is a criminal offence for anyone to contravene such an order.

Potential benefits of co-operating with the Commission

There are various potential benefits available to those who fully co-operate with us.

1. Acknowledgement of assistance in a Commission report

The Commission may prepare a report in relation to any matter that has been the subject of an investigation. Such reports are made public and published on our website.

Where appropriate and subject to the consent of the relevant person(s), we will include mention in our report of the co-operation provided by particular persons and the value of that co-operation to us in uncovering corruption. This will be a public acknowledgement of the assistance provided to us in uncovering corruption.

2. Discretion not to make corruption findings

In reporting on its investigations, the Commission may make factual findings and findings that a person has engaged in serious corrupt conduct.

The Commission may exercise a discretion not to make a finding that a person has engaged in corrupt conduct, even though the factual findings permit such a finding.

The discretion may be exercised where a person has fully co-operated with the Commission. Relevant considerations include:

- the value to the Commission of the assistance, including the value of any evidence or other information provided by the person;
- the stage of the investigation the person began to fully co-operate;
- the extent and level of their involvement in the relevant corruption;
- whether they were an instigator or beneficiary of the corrupt conduct; and
- whether the making of such a finding would be, in all the circumstances, unduly severe.

3. Discretion not to recommend consideration of prosecution

In reporting on its investigations, the Commission may make a statement as to whether consideration should be given to:

- obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of a person for a specified criminal offence
- taking action against a person for a specified disciplinary offence, and
- taking of action against a person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

Where a person has fully co-operated with the Commission, the Commission may also exercise its discretion to not recommend consideration be given to seeking the advice of the DPP or the taking of disciplinary or dismissal action against that person. The discretion may be exercised where a person has fully co-operated with the Commission. Relevant considerations include:

- the value to the Commission of the assistance, including the value of any evidence or other information provided by the person;
- the stage of the investigation the person began to fully co-operate;
- the extent and level of their involvement in the relevant corruption;
- whether they were an instigator or beneficiary of the corrupt conduct; and
- whether the making of such a statement would be, in all the circumstances, unduly severe.

Where a person, who has given false or misleading evidence to the Commission, voluntarily returns to the Commission and co-operates by providing a full and truthful account, we will take that co-operation into account when deciding whether consideration should be given to obtaining the advice of the DPP with respect to a prosecution for an offence under s 87 of the ICAC Act of giving false or misleading evidence. In exercising our discretion we will take into account:

- whether the person has on their own volition approached the Commission to change their evidence;

- whether the person has provided a full and truthful account;
- the stage of investigation at which the person approached the Commission to change their evidence; and
- whether the change is likely to materially affect the progress and outcome of the investigation.

Although the Commission may exercise its discretion not to recommend consideration of prosecution, the DPP retains statutory functions with respect to instituting and carrying on criminal proceedings that have operation independent from a referral for advice from the Commission. Ultimately, it is a matter for the DPP to determine whether a person should be prosecuted and nothing in this Policy is binding on the DPP.

4. Indemnities and undertakings

Under s 49 of the ICAC Act, the Commission may recommend to the NSW Attorney General that a person be granted an indemnity from prosecution for a specified offence or in respect of specified acts or omissions. If such an indemnity is granted, no proceedings may thereafter be instituted or continued against the person in respect of the offence or the acts or omissions.

The Commission may also recommend to the Attorney General that a person be given an undertaking that an answer, statement or disclosure in proceedings before the Commission or the fact of a disclosure or production of a document in proceedings before the Commission will not be used in evidence against the person. If such an undertaking is given, the answer, statement, disclosure or the fact of the disclosure or production is not admissible in evidence against the person in any civil or criminal proceedings, other than proceedings in respect of the falsity of evidence given by the person.

5. Assistance to a person convicted of an offence

Where a person who has co-operated with the Commission is subsequently convicted of an offence arising from the Commission investigation, we can provide a letter to the relevant court setting out details of the co-operation and request the court take that co-operation into account when imposing the sentence.