

Ms Lynda Voltz MP
Chair
Legislation Review Committee
6 Macquarie Street
SYDNEY NSW 2000

Legislation.Review@parliament.nsw.gov.au

Re: Legislation Review Digest No. 10/58

Dear Ms Voltz,

Legislation Review Digest No. 10/58

On 12 March 2024, the Legislation Review Committee (**Committee**) tabled its report entitled *Legislation Review Digest No. 10/58* that considered, amongst other Bills and Regulations, the Independent Commission Against Corruption Amendment Bill 2024 (**ICAC Amendment Bill**).

In accordance with Sessional Order 188A I am responding to the matters the Committee has referred to Parliament for its consideration. My comments in response to these matters are outlined below.

The ICAC Amendment Bill was amended in the Legislative Assembly on 13 March 2024 and passed the Parliament on 19 March 2024. The provisions of the *Independent Commission Against Corruption Amendment Act 2024 (ICAC Amendment Act)* commenced on 3 April 2024, amending the *Independent Commission Against Corruption Act 1988 (ICAC Act)*.

Privacy rights and procedural fairness – information-sharing with unknown recipients

The ICAC Amendment Act made amendments to the secrecy provisions in section 111 of the ICAC Act as requested by the Chief Commissioner of the Independent Commission Against Corruption (**ICAC**), including the amendment inserting section 111(4A) into the ICAC Act.

As noted by the Committee, section 111(4)(c) of the ICAC Act currently allows certain persons (e.g. an officer of the ICAC) who has received protected information during the exercise of their functions under the ICAC Act to divulge that information in accordance with a direction of a Commissioner or the Inspector of the ICAC if the Commissioner or Inspector has certified it is necessary to do so in the public interest.

The effect of the provision, prior to the commencement of the ICAC Amendment Act, was arguably that recipients of information under a section 111(4)(c) direction are precluded from making a record of or divulging or communicating the information to any other person. The amendment inserting

section 111(4A) into the ICAC Act changes this by providing the ICAC with an option to specify in a section 111(4)(c) direction that the further use or release of the information is not subject to the section 111 secrecy provisions.

The Committee queried how the new section 111(4A) of the ICAC Act, inserted by the ICAC Amendment Act, may impact on an individual's privacy rights and procedural fairness. In particular, the Committee raised concerns regarding the circumstances of a person who is the subject of a corrupt conduct complaint or investigation by the ICAC.

I note at the outset that the amendments inserted into the ICAC Act by the ICAC Amendment Act should be read consistently with the other provisions of the ICAC Act.

Section 111(4A) specifies the circumstances permitting additional disclosure of otherwise protected material. Such disclosures can be made only where they are the subject of a direction under section 111(4)(c). This power is not at large. A direction under section 111(4)(c), including any of the matters listed in section 111(4A), can only be made in the narrow circumstances where it is 'necessary to do so in the public interest'. This is a restrictive threshold that must be certified to be met by the Chief Commissioner or the Inspector of the ICAC. Further, this restriction on the exercise of the power is likely to be broad enough to allow the ICAC to consider the privacy of individuals before making such a direction.

The concept of 'the public interest' is a recognised legal concept. The ICAC is required by the ICAC Act to determine and apply this concept in multiple circumstances. For example, section 12 of the ICAC Act requires the ICAC to regard the protection of the public interest as one of its paramount concerns when exercising its functions. The new power in section 111(4A) of the ICAC Act is consistent with this overarching requirement.

The ICAC Amendment Act does not amend the ICAC's investigatory powers or the protections given to persons the subject of ICAC investigations. ICAC's investigatory powers are extensively regulated by the provisions of the ICAC Act (see, for example, Divisions 2 and 3 of Part 4 of the ICAC Act). The content of reports by the ICAC are regulated by Part 8 of the ICAC Act and include restrictions on naming persons in reports that are, and are not, the subject of adverse findings by the ICAC (see for example section 79A). Any person subject to an ICAC investigation will continue to benefit from those provisions.

Additionally, I note that section 111(4A) is not without precedent in the ICAC Act. Section 16(3) of the ICAC Act permits the ICAC to disseminate intelligence and information to law enforcement agencies. The section 111 secrecy provisions, however, do not apply to such disseminations unless the ICAC specifies that the information is confidential (see section 16(4) of the ICAC Act). Similarly, the ICAC may refer any person or body a matter under section 53 of the ICAC Act. The section 111 secrecy provisions only apply to information so referred if the ICAC specified the information is confidential (section 53(6) of the ICAC Act).

Non-reviewable decision to divulge or communicate information

The Committee raised an additional concern that the decision to issue a direction to further divulge or communicate information to a third party, pursuant to the new section 111(4A), may be non-reviewable.

I note that decisions by the ICAC are not the subject of a right of appeal to a court. The ICAC is, however, the subject of judicial and statutory oversight.

The Supreme Court of NSW has both an inherent and a statutory jurisdiction to supervise the functioning of administrative tribunals, including the ICAC, to ensure that they carry out their functions and perform their duties in accordance with law. The power of the Court to undertake judicial review, and the manner in which it may do so, are uncontroversial and described in cases such as *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242 and *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018 at [35].

Further, the ICAC is oversighted by the Inspector of the ICAC, whose principal functions include dealing with complaints of abuse of power, impropriety and misconduct on the part of the ICAC or officers of the ICAC as well as any conduct amounting to maladministration (section 57B(1) of the ICAC Act).

The Joint Committee also has a statutory oversight function with respect to the ICAC. Although the Committee cannot investigate a matter relating to particular conduct, it is empowered to monitor and review the exercise of the ICAC's functions (see section 64 of the ICAC Act).

The amendments made by the ICAC Amendment Act give the ICAC the flexibility it needs to enable its effective operation and ensure that the legislative protections of the secrecy of the ICAC's work are not applied beyond the circumstances in which it is necessary for the ICAC to perform its functions.

These amendments provide clarity to the existing rules around the dissemination and use of secret information and ensure that the initial disclosure, and any further recording or disclosure of information to a third party (in accordance with a section 111(4)(c) direction), are only undertaken when necessary to do so in the public interest.

I trust that this response to matters raised by the Committee is of assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jo Haylen', with a stylized flourish at the end.

Jo Haylen MP
Minister for Transport