

Mrs Tanya Davies MP
Chair
Committee on the NSW ICAC
NSW Parliament House

BY EMAIL: icaccommittee@parliament.nsw.gov.au

Dear Mrs Davies,

ANSWERS TO QUESTIONS TAKEN ON NOTICE

Please find set out below, answers to questions taken on notice at the ICAC Parliamentary Joint Committee hearing on 15 May 2020 and answers to supplementary questions requested via email on 1 June 2020.

Independent Funding Model and analysis on other comparable jurisdictions

I ask my questions with regards to the CEO, but before I do I refer to the special report on funding. Commissioner Hall, you spoke of the nature and content of an independent model. In the creation of this report, what consideration or analysis was done with regards to other comparable jurisdictions? If any, what did it reveal? (p.4)

Further to the answers provided by the Chief Commissioner and the Chief Executive Officer during the Committee hearing on 15 May, reference was made to the ICAC submission of 6 November 2019 to the Legislative Council's Public Accountability Committee inquiry into Budget process for independent oversight bodies and the Parliament of New South Wales. A link to the ICAC submission follows.

<https://www.parliament.nsw.gov.au/lcdocs/submissions/66435/0002%20NSW%20Independent%20Commission%20Against%20Corruption.pdf>

The section entitled 'A Potential Model', commencing on page 38 of the ICAC Submission, outlines details of a potential funding model for the Commission. Specifically, on page 40 of the ICAC submission, reference is made to the only alternative funding model for like entities in any jurisdiction in Australia, with some similarities to that being proposed by the Commission. It is the recent funding model introduced in Victoria for the Independent Broad-Based Anti-corruption Commission. An excerpt of the relevant material follows.

'Another recent example of an alternative funding model for an integrity body can be found in Victoria. The Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 amends the Independent Broad-based Anti-corruption Commission Act 2011 to provide the Independent Broad-based Anti-corruption Commission (IBAC) and other agencies with greater budgetary independence.'

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The Bill will amend the budget processes for the IBAC so that draft budgets are determined in consultation with the Victorian Parliament's Integrity and Oversight Committee, which oversees the IBAC. It provides that the IBAC's annual appropriations will be specified in the relevant appropriation bill.

The aim of the reforms, as expressed by the Victorian Attorney General in the second reading speech for the Bill, is to strengthen the independence of the IBAC and the other bodies included in the Bill in a manner that accords with their status as "independent officers of Parliament".

Under the amendments, the IBAC, the Ombudsman, and the Victorian Inspectorate will no longer appear under the Department of Premier and Cabinet's annual appropriation. They will be vested with full responsibility for the financial management and financial services that support their annual appropriation allocation.

The Bill also requires the Integrity and Oversight Committee to appoint an independent performance auditor to conduct a performance audit of the Ombudsman, the IBAC and the Victorian Inspectorate at least every four years. The purpose of this is to establish an effective performance-monitoring regime to improve the overall performance of those bodies. The performance audit is intended to identify areas of strength and improvement to maximise the utilisation of taxpayers' funds and further increase and promote the accountability of these offices.

These reforms will commence on 1 July 2020'.

Referrals from ICAC to the Inspector relating to allegations of misconduct by ICAC staff

My final question relates to the report of the Inspector for the period ending 30 June 2019. On pages 19 and 20 three examples have been given of referrals from ICAC to the Inspector relating to allegations of misconduct by ICAC staff. Are you able to indicate what the nature of that misconduct was? And what was the resulting action in relation to those staff members and, I guess related to that, whether they remained employed at ICAC? (p.10)

Please refer to the extract below from pages 49 and 50 of the ICAC Annual Report 2018/19.

Complaints against Commission officers

Complaints concerning the misconduct of Commission officers may be made directly to the Inspector of the ICAC or to the Commission. The Commission's memorandum of understanding with the Inspector of the ICAC provides that the Commission will notify the Inspector of complaints against Commission officers that come within the Inspector's functions. The Inspector may decide to investigate complaints directly or ask the Commission to undertake an investigation and report its findings to him or her.

The Executive Director, Legal, is responsible for advising the Chief Commissioner with respect to complaints of misconduct dealt with by the Commission.

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In 2018–19, the Commission received and investigated three matters concerning the conduct of Commission officers.

There were two matters involving allegations that separate Commission officers had engaged in bullying and harassment towards other Commission officers. In both cases, the allegations were upheld, either in part or in whole.

In one case, the disciplinary outcome was a reduction in salary to the next rate below that to which the officer was receiving, direction to attend such remedial courses/programs as considered appropriate by the Commission and that the officer not be considered for any higher duties acting position for a period of 12 months. In the other case, a caution was imposed and the officer was required to undertake counselling.

In both cases, the fact of the investigation and the disciplinary action imposed was noted on the relevant personnel files.

In the third matter, a Commission officer was found to have breached Commission policy by giving a person engaged by the Commission as an interpreter access to the Commission's computer network by logging into the network under the officer's user account rather than arranging authorisation for the interpreter to have separate access. Access was required by the interpreter for the purpose of interpreting certain telephone calls lawfully intercepted by the Commission. The Commission officer was reprimanded and the fact of the investigation and the disciplinary action imposed was noted on the officer's personnel file.

The Inspector of the ICAC was fully informed about all matters at the time they arose, the conclusions reached by the Commission and the bases for those conclusions.

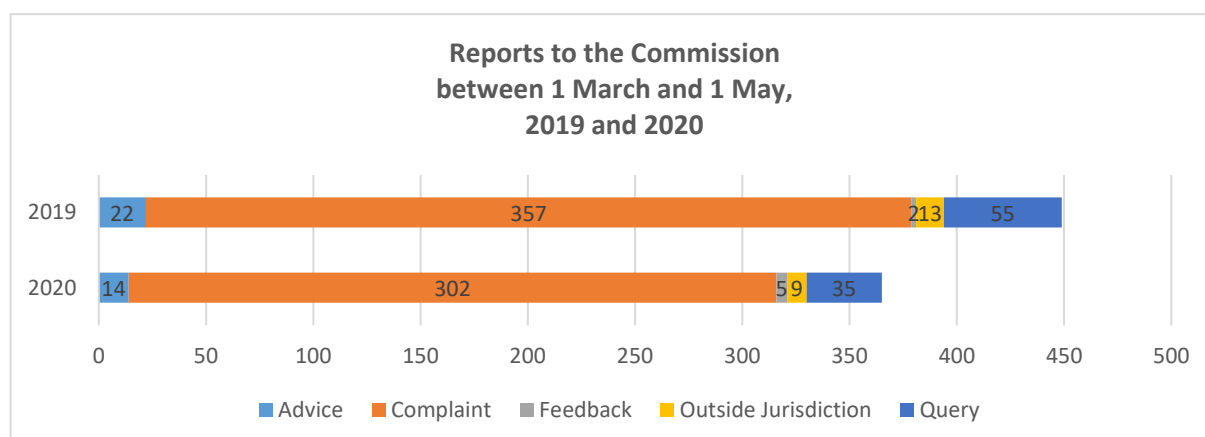
One of the Commission officers, referred to in the above extract, is no longer employed by the Commission.

COVID-19 Trends in Reporting

The guide of the ICAC that was given out today, and I understand members of the Committee received it earlier, "Managing corrupt conduct during the COVID-19 outbreak", states that some forms of corruption and serious misconduct are more prevalent during periods of significant disruption and economic downturn. You reference the media release of Deloitte of March 2020 which warns of a spike in bribery and corruption due to COVID-19. Chief Commissioner, you touched on this earlier today in your introductory remarks. Has ICAC found this to be the case during the COVID-19 outbreak already? (p.10)

As detailed in the COVID-19 advice paper, the Commission experienced an increase in complaints alleging corrupt conduct during the global financial crisis (2008-2011). The Commission saw a 47% rise in complaints received in the first half of 2008, compared to the first half of 2007, with allegations involving bribery more than doubling in that period. A cursory analysis of the number of reports made to the Commission since the COVID-19 outbreak

(between 1 March and 1 May 2020) shows reporting has slightly decreased in 2020, compared to the same two-month period in 2019.



During March and April 2020, the Commission recorded 11 complaints and four other reports (including requests for advice) that explicitly refer to the COVID-19 pandemic. It is anticipated that an analysis of complaints received during May 2020 will show a small number of COVID-19-related complaints. The majority of complaints pertain to the Health and Local Government sectors, and corruption prevention advice has also been sought from departments within those sectors.

As agencies begin to resume business-as-usual controls, it is expected reports to the Commission will also increase.

What are some of the main measures that agencies should consider—and I know you talk about it in this document—to mitigate this risk? (p.11)

To supplement the advice set out in its publication, the Commission notes the following:

- Many of the Commission's investigation reports indicate that corrupt conduct may be caused, allowed or encouraged by inadequate supervision. Many corrupt public officials have supervisors who are too busy, do not understand the nature of the work being performed by their subordinate, overlook red flags or are underperforming as managers. The circumstances surrounding the pandemic may aggravate this problem.
- An area that is already prone to corruption is maintenance, minor capital works and other 'soft services' such as cleaning and security. A relaxation of controls around these types of procurement and expenditure could lead to an increase in corrupt conduct.
- The Transparency International Australia media release of 13 May 2020 (<https://transparency.org.au/media-release-greater-integrity-measures-required-for-covid-commission-say-former-judge-and-legal-groups/>) calls for additional transparency and accountability mechanisms in relation to bodies such as the National Covid Coordination Commission. High levels of transparency, including public reporting, of the way that government funds are used during the pandemic, could deter or detect corrupt conduct.

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- The Commission's guidance notes the danger of cyber frauds taking place in the supply chain. Agencies should be aware that fraudulent changes to employee bank account details in the payroll system are also a risk.

Are you aware of any agencies that you have heard of or seen, that have implemented some of these ICAC recommendations in this guide? (p.11)

The Commission is not in a position to advise whether agencies have implemented its advice. However, the anecdotal response to the Commission's publication has been positive.

A number of agencies, as well as the NSW Local Government Professionals and the Institute of Internal Auditors have asked Commission officers to give online presentations based on the publication.

It is also noted that the OECD referenced the Commission's guidance in its 19 April 2020 publication *Public Integrity for an Effective COVID-19 Response and Recovery*, available at <http://www.oecd.org/coronavirus/policy-responses/public-integrity-for-an-effective-covid-19-response-and-recovery-a5c35d8c/>

Percentage increase of complaints alleging improper use of records of information

My question is in relation to the percentage increase of complaints alleging improper use of records of information. The report from 2017-18 noted 19 per cent and it has gone up to 27 per cent in the 2018-19 annual report. Do you know why there has been an increase in those allegations? Do you think agencies might require more corruption prevention assistance and advice in this area? (p.11)

The question refers to the increase in the proportion of Section 10 complaints alleging improper use of records or information, from 19% in 2017-18 to 27% in the 2018-19 reporting period. The number of reports also increased, from 238 to 331, though the overall number of Section 10 complaints made to the Commission decreased by 3%.

A breakdown of the 331 complaints shows Local Government is the sector with the largest number of this type of alleged conduct (named as subject)¹. Fifty-eight councils were named. The majority of councils (35) had only one complaint alleging inappropriate use of records or information. The largest number of complaints (for this conduct type) for a council was eight. As noted in the annual report, the "over-representation of local government in the complaints statistics may be due to the high level of people's interaction with local government and the personal interest many take in the decisions of their local council."

Health, Custodial Services and Transport - Ports and Waterways were the sectors with the next largest number of complaints (as subject)². Corrective Services NSW had the largest number of complaints for any organisation/department (34).

The nature of the conduct obviously varies across different sectors and entities. For allegations pertaining to local councils, the conduct is often associated with development applications and land rezoning, allocation of funds, and alleged bribery; whereas for Health matters, for

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¹ 101

² 43,41,39

example, allegations often pertain to human resources and staff administration, handling of patient records, or concerns regarding recruitment.

The proportion of Section 11 reports regarding improper use of records or information also increased, from 40% in 2017-2018 to 45% in 2018-2019.

SIRU's sector analyses has revealed that, in some cases, spikes in reporting regarding improper use/access to records has been the result of internal audits that were focused on identifying this type of misconduct, or were the result of improvements made to IT systems and data analytics that could identify unauthorised access to data, as opposed to an increase in misconduct. The sector analyses also revealed that spikes in the detection of unauthorised access reflects the shifting focus of internal audit priorities.

Although the increase in allegations relating to improper use of records or information could be due to improved detection and reporting, the Commission agrees this is an area that requires ongoing attention. There is some guidance on the Commission's website about this topic³. However, the corruption prevention team will review this and make any necessary updates.

National Strategic Intelligence Network

You mentioned a little bit in relation to the establishment of a national anti-corruption intelligence network, which I found really exciting to read. Could you perhaps elaborate to the Committee members how that is functioning? But, more particularly, have you uncovered any obstacles to that functioning in the best possible way, whether that is obstacles in terms of barriers between States and Territories in the legal framework, political barriers or jurisdictional issues that perhaps are preventing the best and highest functioning of that network across Australia? (p.15)

In 2019, SIRU established the National Strategic Intelligence Network for Anti-Corruption and Integrity Agencies. The network is focussed primarily on strategic intelligence but also proactive intelligence functions and seeks to provide opportunities and avenues for the gathering and sharing of intelligence, tools and tradecraft, as well as collaboration on shared issues relating to the prevention and investigation of corruption.

The network is constituted primarily by state anti-corruption and integrity commissions, with the inclusion of one Commonwealth agency. Members include: the Australian Commission for Law Enforcement Integrity (ACLEI); NSW Law Enforcement Conduct Commission (LECC); NT Office of the Independent Commissioner Against Corruption (NT ICAC); QLD Crime and Corruption Commission (QLD CCC); SA Independent Commissioner Against Corruption (SA ICAC); TAS Integrity Commission; VIC Independent Broad-based Anti-corruption Commission (IBAC); and WA Corruption and Crime Commission (WA CCC).

In August 2019, SIRU convened the inaugural forum in Sydney, which was attended by all agencies except NT ICAC. Forum topics covered the various strategic and proactive structures and functions that exist across agencies and how these are evolving, systems and methodologies utilised by intelligence teams in support of prevention and investigative functions, as well as current trends and projects.

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³ <https://www.icac.nsw.gov.au/prevention/corruption-prevention-advice-topics/confidential-information>

Network participants have agreed to endeavour to hold a forum annually, with hosting and coordination of the forum to be rotated throughout agencies/jurisdictions.

The network has opened communication between intelligence units within participating agencies. Since the forum, SIRU has provided and received information in relation to several projects including strategic priorities and emerging corruption risks, trends in under-reporting, and risk mitigation advice in response to COVID-19. The Unit has also shared insights and experiences regarding intelligence tools and training. The network operates on a strategic intelligence level, focusing on the sharing of thematic and trend analysis. Operational and tactical intelligence is not shared through the network. Established requests for information protocols continue to govern how that type of information is shared between agencies.

In addition to adhering to information security and records management policies, agencies have agreed to respect requests for information to be kept confidential and to use the information provided solely for the purposes agreed.

Given the nature of the network, no barriers have yet presented with regards to its functioning, though it is likely current distancing restrictions will see the 2020 forum moved online.

The National Intelligence Network (NIN) is comprised of state and territory integrity and anti-corruption agencies, with the exception of one Commonwealth body (ACLEI). Being a largely state and territory based network, all of whom share common organisational objectives, information sharing functions well amongst those agencies. Many of the organisations who comprise the NIN had pre-existing relationships and we were able to build on that foundation to establish a strategic intelligence network.

In terms of legal differences that exist between the states and territories, as the network only shares information that is pertinent to strategic intelligence (e.g. trends, pattern analysis, methodologies and organisational priorities), we avoid many of the legal challenges that arise from sharing operational and tactical intelligence. That type of information sharing is dealt with under pre-existing request for information (RFI) arrangements and MoU's. The exchange of "big picture" analysis tends to avoid many of the privacy and legal barriers one might experience in operations.

At present there do not appear to be any political impediments to the proper functioning of the network. The network has participation from all states and territories across Australia, each of which serve under a mixture of partisan governments.

The NIN is not utilised to share operational and tactical intelligence as it pertains to specific projects and preliminary investigations. Any operational requests to other jurisdictions is not connected to the operation of the network that is specific to our preliminary investigations.

Local Council Complaints and Pilot Project

Could you perhaps explain or explore a little bit further in terms of the corruption prevention work of your organisation and how you may go about assisting local government further to tackle what seem to be some problems? (p.16)

To supplement the information provided during the hearing, the Commission can advise that in 2019, SIRU commenced an information-sharing pilot focussed on local government. The purpose of the project was to identify potential parameters and indicators for assessing the risk of corrupt conduct by local councils and council officials.

SIRU conducted extensive analysis of complaints data, as well as a range of open and closed source datasets, and information provided from another agency via MoU. The project

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established a baseline of complaints, which allowed for the comparison of reporting types and rates across councils, and the identification of councils with the greatest number of complaints and those that may be under-reporting.

The analysis also identified averages and outliers across a range of risk categories, such as types of alleged misconduct, costs and expenditure, council transparency and councillor business interests, and uncovered new information of value.

The pilot concluded in December 2019 and the Commission and another contributing agency have agreed to continue the project and expand the datasets. A successful project has the potential to prevent corrupt conduct in local councils by:

- allowing the Commission to exchange relevant information with council general managers and other organisations such as the Office of Local Government. This could include identifying at risk councils by examining complaint trends and other data, which could highlight systemic issues within a particular council
- assisting local councils to conduct tailored corruption risk assessments and due diligence exercises
- identifying councils that might benefit from training.

Supplementary Questions

1. *Are there selection criteria/professional expertise that should be identified as qualities of elected councillors and senior management of councils that are not currently identified which could go further to combating corruption in this sector?*

- Like all public officials, councillors and senior staff would benefit from a sound understanding of administrative law principles. New and returning councillors are expected to undertake induction and professional development training and the Commission understands that relevant guidance issued by the Office of Local Government (OLG) provides scope for addressing some administrative law principles.
- The Commission's experience is that some councillors find it challenging to balance their role as community advocates with their duty to apply the law in an objective manner, in particular under the *Environmental Planning and Assessment Act 1979* and environmental planning instruments. This areas also appears to be addressed by OLG guidance relating to induction training and professional development.
- Clause 290(1)(e) of the *Local Government (General) Regulation 2005* requires candidates for election to council to disclose whether they are a property developer or close associate of a property developer. While a candidate's status as a property developer should not be viewed as a 'selection criteria', it is important that these disclosures be accurate and available to electors before local council elections.
- Senior staff of councils should be subject to pre-employment screening and if necessary, periodic rescreening. The Commission's publication *Strengthening employment screening practices in the NSW public sector* (February 2018) describes how this can be done in practice. A council's general manager, senior staff and other members of senior management should be subject to pre-employment screening. It is

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also advisable that periodic rescreening be completed in respect of a general manager and senior staff. Non-senior staff managers should also be subject to periodic rescreening where a risk-based assessment determines that it is warranted.

2. Are you satisfied that the disclosures (pecuniary and non-pecuniary interests) regime are stringent enough for elected representatives and council staff? Are there adequate disclosures of these interests within the operations of local government to ensure transparency and fairness of decision-making?

- Councillors are required to disclose pecuniary interests at the relevant meeting of council (or committee of council). However, councillors obtain information and carry out official functions outside of these meetings (e.g. attending briefings and site visits and liaising with constituents). This could mean that a conflicted councillor, who might be prevented from voting on a matter due to a pecuniary interest, still has confidential information about the matter and an influence over the outcome. Preferably, pecuniary interests should prevent a councillor from having any involvement in such matters.
- As elected officials, not under the supervision of a manager, councillors are expected to use their own judgement to determine whether a non-pecuniary conflict of interest is significant or not significant. This introduces an inevitable degree of subjectivity and self-dealing. Short of introducing a mechanism that creates an umpire to preside over non-pecuniary interests, it is difficult to see how to resolve this. In metropolitan areas, development applications are now determined by independent planning panels rather than councillors, which plays a role in reducing the adverse impact of a concealed or mismanaged conflict of interest. However, members of planning panels can themselves be subject to conflicts of interest that also need to be managed in the public interest.
- Pursuant to “Information Access Guideline 1” issued by the Information and Privacy Commission, pecuniary interest returns are treated as open access information and are therefore subject to mandatory proactive release. This is subject to application of a public interest test that allows certain personal information to be redacted. The Commission supports Guideline 1 but notes that it has only been in place since September 2019 and councils may not yet be in full compliance.
- Councillors and designated persons are not required to disclose, in their pecuniary interests return, the interests of their spouse and members of their family economic unit. This potentially allows an official to arrange their financial affairs so as to avoid disclosure. The Commission has previously recommended that parliamentarians be required to disclose the relevant pecuniary interests of spouses and members of the same economic unit. The same argument could also apply in local government.
- The decision of the Supreme Court in *Cornish v Secretary, Department of Planning, Industry and Environment* [2019] NSWSC 1134, has the effect of limiting the means by which councillors can be disciplined, including for certain failures to disclose and manage conflicts of interest. The Commission understands that the Office of Local Government is considering a response to this decision.

- Pecuniary interest returns are generally lodged annually by councillors and designated persons. An ideal system would allow for continuous, ongoing disclosure of pecuniary interests. Continuous, ongoing disclosure is generally recognised as having a positive impact on the management of conflicts of interest and enhancing transparent decision making.

3. *I note the Office of Local Government has a range of 'Guidelines' which outline best and recommended practice to the sector. Do you have a view on whether these guidelines are enough to ensure best practice or should guidelines be made mandatory in certain circumstances and if so, what circumstances would they be.*

In its 2017 investigation report, *Investigation into the conduct of the former City of Botany Bay Council chief financial officer and others* (Operation Ricco), the Commission recommended:

That the NSW Government considers adopting a model of local council oversight that is comparable to that applicable to state government agencies. This model could include:

- *mandatory administration and governance directives similar to those that apply to state government agencies*
- *requirements concerning the composition and operation of audit committees that are similar to those that apply to state government agencies*
- *the requirement for council general managers to attest that audit committees are operating in accordance with requirements.*

In response, the Office of Local Government (OLG) indicated that it planned to partially implement the recommendation. The OLG expressed the view that mandatory requirements are best prescribed by way of regulations or statutory instruments. The Commission agrees with this approach and the requirement for local councils to take guidelines “into consideration” under s23A(3) of the *Local Government Act 1993*. The detail of some legislative and policy reform following Operation Ricco is set out in the ‘Recommendations for corruption prevention’ section of the Operation Ricco page on the Commission’s website (<https://www.icac.nsw.gov.au/investigations/past-investigations/2017/city-of-botany-bay-council-operation-ricco>). However, some of the actual and proposed changes include:

- appointment of the Auditor General as the external auditor for all councils (including the power to conduct performance audits)
- induction and professional development programs for councillors
- revisions to the Model Code of Conduct for Local Councils in NSW
- creation of audit, risk and improvement committees.

The Commission supports these reforms.

When investigating conduct affecting an agency, such as a local council, the Commission forms a view about whether any compliance issues or corruption risks are confined to that agency, or are widespread. Where the conduct or risks could be widespread, it may be open

to the Commission to recommend changes to legislation or sector-wide policy settings. Otherwise, the Commission may issue its own advice, which is not mandatory for agencies to follow.

Should you require further information please do not hesitate to contact me.

Yours sincerely,

The Hon Peter Hall QC
Chief Commissioner
17 June 2020

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