

Mr Peter Sidgreaves, MP
Chair, Standing Committee on Parliamentary Privilege and Ethics
Legislative Assembly
Parliament House
Macquarie Street
Sydney NSW 2000

By email: Ethics.Committee@parliament.nsw.gov.au

Our Ref AD21/0027

Dear Mr Sidgreaves,

Inquiry into a proposal for a Parliamentary Compliance Officer for the NSW Parliament

Thank you for your letter dated 10 March 2021 seeking a response from the NSW Independent Commission Against Corruption ("the Commission") to specific questions regarding the proposed resolution to establish a parliamentary Compliance Officer for the NSW Parliament.

The Commission's response to your detailed questions is **attached**. The Commission has numbered the separate topics as outlined in your targeted questions, to allow for consistent numbering of the Commission's answers.

I note that the same proposal and terms of reference were referred to the Legislative Council's Privileges Committee. As you would know, the Commission has provided a submission to this inquiry, which is now publicly available via NSW Parliament's website.

The Commission is currently investigating alleged conduct of the former Member of Parliament for Wagga Wagga, Daryl Maguire (Operation Keppel) and has also announced that it would hold a public inquiry in regard to allegations about the State Member for Drummoyne, the Hon John Sidoti MP (Operation Witney). It is likely that the Commission's final investigation reports will make recommendations and observations about topics that are also the subject of your inquiry. Consequently, the Commission may revise its position and observations on aspects of the proposal for a Compliance Officer. I will make sure the Committee is provided with a copy of our investigation reports and if requested, provide the Committee with a further submission.

In the meantime, if the Commission can be of further assistance, please contact Mr Lewis Rangott, Executive Director Corruption Prevention on [REDACTED] or [REDACTED].

Thank you for the opportunity to assist your inquiry.

[REDACTED]

Stephen Rushton SC
Commissioner

25 March 2021

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RESPONSE BY THE INDEPENDENT COMMISSION AGAINST CORRUPTION TO THE TARGETED QUESTIONS PROVIDED BY THE LEGISLATIVE ASSEMBLY'S PRIVILEGE AND ETHICS COMMITTEE UNDER COVER LETTER OF 10 MARCH 2021 REGARDING ITS INQUIRY FOR A PROPOSAL TO ESTABLISH A PARLIAMENTARY COMPLIANCE OFFICER

1. Jurisdictional Gap

1.1. In a 2013 corruption prevention report, the ICAC raised concerns regarding a 'jurisdictional gap' for regulating the conduct of Members of the NSW Parliament and recommended the Parliament consider creating a 'parliamentary investigator' position.

• Do you still have concerns about a jurisdictional gap?

1.1.1. Firstly, the Commission's concerns about a jurisdictional gap have not been addressed. As outlined in the Commission's 2013 report referenced in the Committee's correspondence, the effectiveness of codes of conduct as well as pecuniary interest regimes depend on timely and impartial enforcement mechanisms. This is particularly the case for allegations regarding minor misconduct that could be resolved in a timely manner.

1.1.2. The Legislative Council's Privileges Committee subsequent June 2014 report recommended that the Parliament appoint a Commissioner for Standards.¹ The July 2014 report by the Legislative Assembly's Parliamentary Privilege and Ethics Committee recommended the establishment of an Ethics Commissioner.² To date, these 2014 recommendations have not been implemented by NSW Parliament.

1.1.3. Of all the matters received by the Commission each year, only a small number (around 1%) become the subject of an investigation by the Commission.³ As outlined in section 12A of the *Independent Commission Against Corruption Act 1988* ("ICAC Act"), the Commission ought to direct its attention to serious or systemic corrupt conduct, and take into account the responsibility and role of other public authorities and officials in preventing corrupt conduct.

1.1.4. Furthermore, the Commission's ability to make findings of corrupt conduct is limited by s 9 of the ICAC Act. A potential breach of a code of conduct adopted for the purposes of this section by a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown) must amount to a substantial breach. This means that allegations that would amount to a minor breach of an applicable code of conduct are unlikely to become the subject of an investigation by this Commission.

1.1.5. As observed in the Commission's 2013 report, the creation of the role of a parliamentary investigator could provide for a "graded" approach regarding

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¹ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, 2014, recommendation 8, p 62.

² Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, recommendation 4, pp 15 – 16.

³ ICAC Annual Report 2019–2020, p. 27.

allegations of minor misconduct. Establishing a position that encompasses the role of a parliamentary investigator could reduce the need for the Commission to investigate by providing a viable avenue for less serious matters to be addressed.

- 1.1.6. Having said that, in the Commission's experience it is often difficult to determine, at the commencement of an investigation, whether the alleged conduct could meet the definition of corrupt conduct. In the Commission's experience, investigations into allegations of minor misconduct can lead to the identification of more serious or systemic misconduct. Consequently, the Commission recommends that the remit of the proposed Compliance Officer be extended to *potentially* include matters that could amount to corrupt conduct. However, this suggestion is contingent on establishing satisfactory liaison arrangements with the Commission via a proposed protocol. Further comment about this point is provided under the subheading '4. Protocol for Complaints Investigations', below.
- 1.1.7. Secondly, the Commission is not a regulator. The Commission can make findings of serious corrupt conduct, express opinions and make recommendations. Any such findings opinions or recommendations, including regarding applicable codes of conduct or the pecuniary interest regime, ultimately rely on enforcement by other agencies.
- 1.1.8. The Commission refers to the details outlined in the discussion paper annexed to the correspondence provided under cover letter dated 10 March 2021, regarding the mechanisms in place to regulate the conduct of members of Parliament, and notes the practical limitations of section 14A (2) of the *Constitution Act 1902*.
- 1.1.9. In respect to the proposed monitoring role of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 ("the regulation") and the members' entitlement system, the Commission proposes that the Committee considers the limitations of the existing system, which essentially relies on self-regulation. Compliance and deterrence depend on effective enforcement mechanisms being in place. The Commission proposes that an effective regime requires monitoring and enforcement powers. This may necessitate amendments to the existing regulation.
- 1.1.10. Other than making orders for the repayment of misused funds or entitlements, the proposed functions of the Compliance Officer as outlined in the terms of reference do not include detailed processes relating to enforcement measures concerning "less serious misconduct". The Commission accepts that it is difficult for the Parliament to devise practical ways to discipline misconduct by its members. Options that are typically used in relation to employees, such as dismissal, demotion or even suspension, are not viable for members. However, because compliance and deterrence depend in part on the presence of effective enforcement mechanisms, the Commission encourages the Committee to put forward realistic options for disciplining any misconduct identified by the Compliance Officer. The Commission notes that the 2014 report by the Privilege and Ethics Committee proposed that sanctions are to include ordering an apology, ordering rectification or reimbursement.⁴

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⁴ Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, recommendation 4.

1.1.11. Thirdly, the Commission is concerned that there is ambiguity regarding a duty of relevant officers of NSW Parliament to notify the Commission of possible corrupt conduct pursuant to section 11 of the ICAC Act. This ambiguity was outlined by Mr David Blunt, Clerk of the Parliaments, in his 2013 paper "A Parliamentary Commissioner for Standards for New South Wales?". Mr Blunt referred to legal advice from the Crown Solicitor, Ref 200902640, dated 21 December 2009. The Commission has not seen this advice, and would appreciate if that could be provided, so this issue can be considered more fully.

1.1.12. If there is such a gap regarding section 11 reports emanating from NSW Parliament, it is essential that it be addressed to ensure relevant matters can be reported to the Commission, and/or referred back by the Commission.

1.2. Since the ICAC's 2013 corruption prevention report there has been increased focus on how to deal with allegations that a Member has bullied or harassed staff or another Member.

- **Do you agree that this is a 'jurisdictional gap' that needs to be addressed?**
- **Do you think it would be appropriate and practicable for the 'parliamentary investigator' referred to in your 2013 recommendation to have jurisdiction to investigate bullying and harassment matters?**
- **Is a Compliance Officer type role an appropriate way to address bullying and harassment matters?**

1.2.1. The Commission supports an expansion of the Code of Conduct for Members to specifically prohibit bullying and harassment. The Commission notes that the current wording regarding a proposed amendment to the Code of Conduct for Members as outlined in the terms of reference does not mention the word bullying.

1.2.2. The ICAC Act does not mention bullying and harassment specifically. However, bullying and harassment could amount to corrupt conduct if several elements are met, for example, if the intended purpose of the bullying and harassment was to affect the honest or impartial exercise of the official functions of a public officials (section 8(1)(a)). The alleged conduct must also be sufficiently serious to amount to at least a disciplinary offence, give ground for dismissal, or, relevantly for members and ministers, amount to a substantial breach of an applicable code of conduct (section 9(1) ICAC Act).

1.2.3. In the Commission's experience, a culture that tolerates bullying and harassment may also be linked to corrupt conduct if it entails reprisal actions. Such a culture does not engender the reporting of potential misconduct. For example, the Commission released a report in 2019, *Investigation into the conduct of NSW Corrective Services officers at Lithgow Correctional Centre*, following an investigation, also known as Operation Estry. In that report, the Commission recommended that there should be a coordinated strategy to improve workplace culture, which includes exposing as well as acting in response to those who engage in bullying, harassment or other forms of reprisal.

1.2.4. In addition, the misuse of information acquired by a public official during the exercise of his or her official functions, which can be corrupt conduct, may be for the purpose of bullying and harassment.

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- 1.2.5. NSW Parliament needs an environment in which people feel comfortable to share their concerns. The Commission understands that parliamentary and electoral staff are in a difficult and vulnerable position, as their employment is at the discretion of the individual member. The Commission understands that they are employed by either or both of the President of the Legislative Council or the Speaker of the Legislative Assembly and paid for by NSW Parliament.⁵ This situation makes it imperative that there are independent and supportive complaints mechanisms for staff to raise concerns.
- 1.2.6. In respect to the receipt and investigation of complaints made to the proposed position of a Compliance Officer, the Commission notes that clarification is required regarding who can make such complaints, including whether such complaints can be made by members' staff or members of the public, and whether a complaint needs to comply with any specific formality. In addition, while the Commission agrees a Compliance Officer's remit should include the investigation of alleged bullying and harassment, it may not be necessary for that officer to handle all such matters. In some situations, bullying and harassment complaints can be adequately dealt with by human resources staff or front-line management.
- 1.2.7. Section 8(1)(c1) of the *Public Interest Disclosures Act 1994* describes how disclosures about the conduct of members of parliament should be made. Subject to any advice available to the Committee, it may be necessary for the protocol to allow the proposed Compliance Officer to receive and manage public interest disclosures.
- 1.2.8. The Commission believes there is merit in extending the parliamentary investigator's remit to cover staff employed by the Parliament, including electorate officers and other staff employed by members. There are likely to be occasions when allegations against members and staff intersect and it may be efficient to deal with such matters using a single investigative process. In any case, the proposed Compliance Officer ought to have specialist investigative skills that can be put to better use with a broader mandate.
- 1.2.9. In the Commission's view, a Compliance Officer would require both legal and investigative qualifications to perform his/her functions, as well as a sophisticated understanding of parliamentary conventions. If the role is to encompass the investigation of potential bullying and harassment, a detailed position description should reflect this, which would help shape the pool of suitable candidates for such a position.
- 1.2.10. The Commission notes that the current proposal to establish the position of a Compliance Officer differs from the previous recommendations made by the Privileges Committee and the Privilege and Ethics Committee. That is, to establish a Commissioner for Standards or Ethics Commissioner. These previously recommended titles suggest a more authoritative role than the establishment of a Compliance Officer. The Commission suggests that the Committee consider an appropriate title to convey the seniority of this proposed position.

⁵ *Members of Parliament Staff Act 2013*

- 1.2.11. Regarding the specific proposal, the independence and impartiality of this officer will be paramount to ensure that it promotes and protects the good repute of the institution of Parliament, its members and staff.

2. Compliance Officer Records

2.1. Clause 7 of the Compliance Officer proposal that is before both Houses provides that the Compliance Officer's records are to be regarded as records of the House and are generally not to be made public.

- **Do you have any comments on these provisions?**
- **What provisions would you seek around the ICAC's ability to access these records?**

2.1.1. The Commission does not agree with the current proposal if it encompasses completed investigation reports. There is a need for finalised investigation reports to be made public in certain circumstances. The function performed by the proposed Compliance Officer relies on his or her findings and/or recommendations having a meaningful deterrent effect and a system that promotes both transparency as well as accountability. By itself, the annual report contemplated by clause 8 of the terms of reference would not, in the Commission's view, provide sufficient transparency. In any case, it is preferable that the decision to publish reports not be based on a political process. Similarly, it is preferable that addressing a member's failure to comply with the authorised powers of the Compliance Officer is not based on a political process.

2.1.2. The Commission notes that certain findings and reports of substantiated inquiries by the United Kingdom's ("UK") Committee of Standards and the Commissioner for Standards are published via a public website.⁶

2.1.3. The Commission notes that the submission by the UK's Commissioner for Standards to the current inquiry by the Legislative Council's Privileges Committee provides a response that could inform this specific query. The Commission understands that the UK model provides for an additional safeguard before findings are made public. The submission (number 2) states:⁷

There is an intermediate stage between the Commissioner and the House in the form of the Standards Committee or Independent Expert Panel. This allows for an additional independent element in the process, especially in relation to sanctioning, as well as some opportunity for appeal.

2.1.4. Regarding the query about the Commission having access to relevant records, please refer to the Commission's response under the next subheading.

2.2. As the ICAC is to focus on serious corrupt conduct and systemic corrupt conduct, on what grounds do you envisage that you would need to access records and other information held by the Compliance Officer?

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⁶ [Allegations Reported to the Standards Committee - UK Parliament](#). Accessed 15 March 2021.

⁷ [Proposal for a Compliance Officer for the NSW Parliament](#). Accessed 15 March 2021.

- 2.2.1. The duty to report suspicions of corrupt conduct pursuant to section 11 of the ICAC Act means that the Commission is apprised of all matters that could involve corrupt conduct affecting the NSW public sector. It is up to the Commission to determine whether the matter could involve serious or systemic corrupt conduct.
- 2.2.2. The Commission has issued guidelines about what such a section 11 report to the Commission should include. These guidelines and any further arrangements beyond the usual reporting requirements could be outlined in the proposed protocol or memorandum of understanding.
- 2.2.3. This proposed protocol is addressed in more detail under the subheading '4. Protocol for Complaints Investigations', below.

3. Publication of Investigation Outcomes

3.1. Clauses 5(b) to (d) of the Compliance Officer proposal relate to the reporting of investigative outcomes, including where there is a minor breach or where the Compliance Officer declines to investigate.

- **Should the outcomes of the Compliance Officer's investigations be published?**
 - **What about in the case of minor and/or inadvertent breaches?**
 - **What about in the case of unsustained matters?**
- **Are the arrangements for reporting on investigative outcomes, as set down in clause 5 of the Compliance Officer proposal, appropriate?**

- 3.1.1. As outlined in the Commission's response under points 2.1.1 to 2.1.2, above, the Commission's view is that the proposed arrangements for reporting on investigative outcomes is not appropriate, as there is a need for finalised investigation reports to be made public in certain circumstances.
- 3.1.2. At this stage, the Commission cannot be more precise about what investigatory outcomes ought to be made public, as the terms of reference are somewhat equivocal. For example, the terms of reference under point 5(b) outline the situations when a report to the House is to be made by the Compliance Officer, which may *recommend* corrective action. 5(c) anticipates that the proposed Compliance Officer can make findings that a breach of a code of conduct or regulation was minor and can be rectified. On the other hand, the annual reports mentioned under point 8 of the terms of reference envisage a report by the Compliance Officer with *findings* of investigations. In other words, it is not entirely clear from the terms of reference who will be the adjudicator for the so-called 'investigation outcomes', especially regarding potential breaches that are not 'minor and/or inadvertent'.
- 3.1.3. As outlined in the discussion paper attached to your correspondence, this ambivalence could be due to the powers of the Compliance Officer being unresolved, and the Houses of NSW Parliament having "self-protective but not punitive powers".

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3.1.4. The Commission notes that the UK's Parliamentary Commissioner for Standards publicly reports on matters reported to the Standards Committee, on allegations the Commissioner has not upheld, and on allegations the Commissioner has rectified.⁸

3.1.5. The Commission has not formed a final view on this question. There are number of factors that are likely to determine what findings and/or recommendations are to be made public. The Commission's preliminary view is that, as a general rule, investigative outcomes of breaches of the codes of conduct and the regulation ought to be made public. Allegations that are not sustained would not usually become public. Investigative outcomes of minor or inadvertent breaches of the codes of conduct, including any rectification steps taken, could also benefit from being made public, as these could still provide an important educative function.

4. Protocol for Complaints Investigations

4.1. Clause 5(a) of the Compliance Officer proposal provides that within three months of his or her appointment the Compliance Officer is to develop a protocol to cover matters including the referral of matters between the Compliance Officer and ICAC.

- **Do you have any specific comments about what should be included in this protocol?**

4.1.1. As mentioned already, in the Commission's experience it is often difficult to determine, at the commencement of an investigation, whether the alleged conduct could meet the definition of corrupt conduct.

4.1.2. The Commission's support for the proposal to establish a parliamentary Compliance Officer is contingent on a robust and sound process being in place, which ensures that the Commission is apprised of complaints to the Compliance Officer. There should be an explicit provision in any protocol or Memorandum of Understanding between the Commission and the Compliance Officer by which the Commission can, in appropriate circumstances, assume the investigation of a complaint.

4.1.3. The Commission recommends that the proposed protocol includes arrangements for liaison between the Compliance Officer, the Presiding Officers, senior staff of the Parliament and the Commission. This could entail a memorandum of understanding or other agreement that addresses:

- prompt reporting of matters to the Commission
- dealing with matters referred by the Commission
- other information sharing, liaison and mutual assistance arrangements that are in the public interest
- cooperation in relation to educational and corruption prevention issues.

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⁸ [Allegations and complaints against MPs - UK Parliament](#). Accessed 22 March 2021.

- 4.1.4. The Commission envisages that it will be closely consulted over the development of this proposed protocol. Also, that the Commission will have an opportunity to provide comment to the Standing Committee on Privilege and Ethics prior to its approval.

4.2. Should the Compliance Officer have the discretion to decide what matters should be drawn to the ICAC's attention?

- 4.2.1. Please refer to the Commission's response at 4.1.2, above.
- 4.2.2. The Commission recommends that the proposed position of a Compliance Officer also has designated responsibilities to report reasonable suspicions of corrupt conduct to the Commission under s 11 of the ICAC Act.
- 4.2.3. Pursuant to section 11 of the ICAC Act, there is a duty to report to the Commission any matter that certain persons suspect, on reasonable grounds, concern or may concern corrupt conduct. Section 11 of the ICAC Act provides that all principal officers of NSW public sector authorities have a duty to report all matters they suspect on reasonable grounds concern corrupt conduct. This includes secretaries and chief executives of government departments, as well as any officer who constitutes a public authority. Others with a duty to report such matters include the NSW Ombudsman, the Police Commissioner and ministers of the Crown. Such officers have some discretion when determining whether they have a reasonable suspicion of corrupt conduct has been formed but once it has, the officer must report the matter to the ICAC. As a general rule, the Commission encourages the reporting of matters that could involve corrupt conduct and erring on the side of caution.
- 4.2.4. Section 11 reporting requirements do not directly differentiate between so-called low-level, minor, or serious corrupt conduct, and the Commission expects that all matters that reach the section 11 reporting threshold are reported. However, as section 9 of the ICAC Act limits the nature corrupt conduct, for instance, to "substantial" breaches of a parliamentarian's code of conduct, some less serious matters will not need to be reported if the Commission's recommendation is accepted in regard to the proposed Compliance Officer having section 11 reporting obligations.

4.3. Based on ICAC's experience of receiving complaints about and investigating allegations of corrupt conduct:

- **To what extent do you think that low-level matters dealt with by the Compliance Officer would be relevant to the ICAC's work?**
- **What proportion of matters received by ICAC do you anticipate would be suitable to refer to the Compliance Officer?**

- 4.3.1. As mentioned already, pursuant to section 11 of the ICAC Act, there is a duty to report to the Commission any matter that certain persons suspect, on reasonable grounds, concern or may concern corrupt conduct.
- 4.3.2. Section 11 reporting requirements do not differentiate between so-called low-level, minor or serious corrupt conduct. This means that the reporting of so-called low-level matters is relevant to the Commission's work, including providing trends and data that could be relevant for detailed analysis, including

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to the Commission's Strategic Intelligence and Research Unit ("SIRU"). Although the Commission only investigates a very small number of the matters reported to it, the information it has received will be retained and may assist with other matters of current or future interest to the Commission. This information may help inform a corruption prevention project, an education program or a combination of these approaches.

4.3.3. Given the potential gap regarding section 11 reports emanating from NSW Parliament, the Commission's estimate of matters that would be suitable for referral back to the proposed Compliance Officer lacks precision.

4.3.4. Searches of the Commission's data base show that the Commission has referred very few matters to NSW Parliament in the past.

4.3.5. The Commission has not conducted an exhaustive analysis of its data holdings to determine how many matters could potentially be referred to the proposed Compliance Officer. If the low number of referrals back to NSW Parliament are an indication, then there are unlikely to be many such referrals in the future.

4.4. The Compliance Officer position is intended to allow speedy resolution of low level matters around Members' entitlements and standards of behaviour.

- **How would a protocol between the Compliance Officer and the ICAC balance the competing interests of complaint handling, informal resolution, and the prompt investigation of relatively minor matters; with the ICAC's investigative priorities and the use of its investigative powers?**

4.4.1. The Commission's practice is to prioritise high priority and sensitive matters and within its resource limitations, assist agencies to manage time pressures.

4.4.2. As is the case with many officers in complaint handling and investigative roles, the Manager of the Commission's Assessments unit is usually available to discuss time sensitive matters.

4.4.3. Assuming that so-called low level or minor matters around members' entitlements and standards of behaviour are handled by the Commission's Assessment section, the average number of days for Assessments to deal with matters will provide an indication to assist with a speedy resolutions of such matters. As per figures contained the Commission's latest annual report, for 2019/2020 the average figure for the Commission's Assessment Section to deal with matters was 28 days, for 2018/2019 it was 24 days, and for 2017/2018 it was 25 days.⁹

⁹ ICAC Annual Report 2019–2020, p. 13.