

ICO Responses to questions from Parliamentary Privileges and Ethics Committee.

15 April 2024

Updates since last meeting

1. Please provide an update on your work as the ICO since you last met with the Committee in August?

Since August 2023 I have finalised three complaints that were in progress at the beginning of September and received and completed a further three complaints.

I have attached copies of my reports to the Committee for the periods September 2023 to November 2023 and for December 2023 to February 2024 providing additional details of these matters.

At present I have two ongoing matters, both in early stages of consideration.

On 4 December 2023, with the assistance of the Parliament House communications team I sent a message to all members of the Parliamentary Community reminding them of the Independent Complaints Officer (ICO) role.

I have attended meetings of the Parliamentary Privileges and Ethics Committee and the Privileges Committee to discuss their respective reviews of the ICO role.

General

2. How are you feeling the role is going generally?

I feel that the role is generally working as intended. It has been interesting that most of the complaints I have received have been about conduct which might be bullying, harassment or any other inappropriate conduct, with only a few complaints or inquiries relating to issues about allowances or entitlements.

As with any complaints-based system, I am reliant on people raising issues with me so I am unable to comment on whether all matters that could potentially have been the subject of a complaint to the ICO have come to my attention or whether there are factors that are making people reluctant to complain. I can only speculate, but it is possible that the limits on the ICO jurisdiction (eg no ICAC matters, no complaints from people outside the Parliamentary community etc) or the ICO remedies (recommended actions only) have discouraged complaints.

3. What changes, or improvements, would you make to the ICO system?

As outlined in my submissions to the Committee there are some clarifications that could be made to the resolutions creating the ICO (and consequential amendments to the ICO protocols).

In addition to these matters I note that the ICO currently differs from the description of the ICO as outlined in the Broderick Report. This reflects that the Broderick report was provided after the resolutions of the Parliament created the ICO but before I commenced in the role. It might be helpful to clarify that the ICO is not a direct result of the Broderick report, as this may be source of confusion about the role of the ICO.

4. In your view, has the relationship between you and the Department of Parliamentary Services developed smoothly? The Committee understands that the DPS makes “warm referrals” to you where complaints are more properly dealt with by the ICO, which prevents complainants having to repeat the details, and that you do likewise where complaints are more properly dealt with by the DPS? How is that process working?

I have developed a good working relationship with the Department of Parliamentary Services (DPS). I have had regular meetings with the Human Resources (HR) team including the Workplace Support Team (WST) both on matters of general interest and in relation to specific matters. I also have a quarterly catch up with the DPS Communications Team to discuss messaging and other related issues. I have also met with and received advice from the Members Entitlements Team.

The process by which DPS refers potential complainants to me has been working well. In most cases so far, the complainant has provided some details in writing to DPS and has consented to DPS providing that email to me. In other cases the complainant has emailed both the DPS and ICO simultaneously at the beginning of the matter. As a result it has been possible for matters to be transferred without complainants having to repeat details.

When I receive a complaint that is not within my jurisdiction (ie not about a member) I refer to the complainant to the DPS team. On the few occasions when this has occurred I have always offered to talk to the DPS team on behalf of the complainant. However so far in every case the complainant has wanted to approach the DPS team themselves, so I have respected their preference.

Education and expectations

5. Do you have a sense of whether people at Parliament are familiar with, and understand, your role?

I believe that staff of DPS and the two Houses are well aware of my role. I think most Members and their electorate staff have good knowledge about the ICO and the role but there are still some gaps. There was one occasion when I contacted a Member and it seemed that the Member and staff had not heard of the ICO. As most of the complaints I have received from electorate offices have come through DPS rather than direct to me I feel that there may not be a good level of knowledge among people who do not work in Parliament House.

6. How do you understand people at Parliament perceive your role? Are there any key differences between Members of Parliament or members of staff?

I believe that people understand that the ICO can deal with conduct of Members but there may be some lack of clarity about which conduct of members can be considered. Sometimes it seems there is a lack of understanding about the difference between conduct that a person doesn't like or disagrees with and conduct that would be considered to be bullying, harassment or other inappropriate conduct.

There may be some lack of understanding about what outcomes the ICO can achieve (see further below).

I don't think there are any key differences between Members and staff.

7. What outcomes are complainants generally seeking from you as the ICO?

This varies widely depending on the nature of the complaint. Some of the outcomes sought have been:

- a change in future behaviour from the Member. This would be the most common outcome sought. Sometimes it is not behaviour towards them personally (as they may have left the employment situation) but for the benefit of their colleagues and future staff;
- an adverse “finding” against a Member;
- wider remedies (sometimes way outside the jurisdiction of the ICO) because their concerns about the Member's behaviour are intertwined with concerns about how the Member is performing their role as a Member of Parliament.

8. How do you manage the expectations of the parties to a complaint?

As part of the initial discussion with the complainant I talk about what outcomes they are seeking and explain what might be possible under the ICO process. If a complaint is proceeding, I write up an initial summary of the complaint to ensure that I have correctly understood the details of the matter. One of the sections of that summary is "outcomes sought" so that I can ensure that the complainant and I are on the same page about the range of possible outcomes.

9. What steps have you taken, or could you take, to better promote the role of the ICO at Parliament?

I have been working with the DPS Communications team and have regular meetings with them. They have included information about the ICO in wider NSW Parliamentary emails, and as noted above I emailed everyone, with their assistance, on 4 December 2023. I have worked with the Communications Team to keep the Parliament's intranet site updated, and to seek to ensure that links about the ICO are available in logical places.

I have done a presentation for the monthly meeting of the Legislative Assembly staff and to a meeting of a committee representing Electorate Officers. I would be happy to speak to other similar groups.

I attended and presented at the first session of the Respect Inclusion Safety and Effectiveness (RISE) training and also filmed a video about the role of the ICO that I understand is shown at each of the RISE sessions.

I have quarterly meetings with the DPS Communications team where we discuss possible avenues to further publicise the role of the ICO. The next meeting is on 2 May 2024.

Investigations

10. How do you generally approach your investigations into alleged, low-level misconduct by Members?

As noted in response to question 8, after my initial discussion with the complainant I prepare a summary of the complaint which contains details of the matter and the outcome sought (and also some background information about the role of the ICO). I provide the summary to the complainant so they can correct any errors. I also ask the complainant whether there are any other persons which they think I should talk to.

My next step is usually, with the permission of the complainant, to provide the summary to the Member on a strictly confidential basis. I provide them a copy of the ICO protocols at the same time. I invite the Member to either meet with me, or alternatively to respond to the complaint in writing. I also offer to the Member to let me know if there are any other persons that they believe I should talk to about the matter. If the Member decides to meet with me, I take notes from that meeting and discuss options to resolve the matter.

Sometimes following the meeting or written response I have some further questions of the complainant. Depending on the Member's response I may also talk to the other persons identified by complainant or the Member.

I then will usually prepare a draft report, outlining the matter and providing some draft recommended actions or next steps. This draft is provided to both the complainant and the Member giving the opportunity to correct or add any facts, respond or make submissions and suggest any further lines of inquiry. Depending on that response, I may make some further inquiries. During this time I may also have telephone discussions with the complainant and / or the Member.

Taking into account the submissions I receive I prepare a final report. In that report I outline any recommendations and how they may be implemented. I also note that the Member has various options to appeal

to the Committee. (If my final report is going to differ markedly from the draft I will give the parties a further opportunity to comment on any significant changes.)

11. Are there any standard steps that you take, for example, to ensure procedural fairness is afforded to the parties (e.g., the opportunity to comment on adverse findings or outcomes)?

As noted in the previous answer, the complainant has an opportunity to comment on my summary of the complaint and the Member has an opportunity to respond to that summary. Both parties have an opportunity to comment on the draft report and may have a second opportunity to comment if there is going to be significant difference between draft and final. In all my dealings with the parties I offer them the opportunity to contact me at any point in the process to raise any issues that they have.

12. What standards or proof are you applying to factual findings? Do you believe greater clarity is needed on the applicable standards?

I have adopted the usual approach of a fact finder in an administrative or regulatory context. That is, seeking first hand accounts from both the parties, and asking them if there is any secondary information (eg emails and other documents) or other parties who could assist in clarifying the facts. If there is any doubt about facts I am careful to use language like "the complainant says . . ." or "it is the Member's recollection that . . ." to be clear that I am recounting someone's version of the facts.

If there is controversy about the facts I note that the controversy exists. I would not usually arbitrate between the two versions of events unless there is some clear secondary evidence as to who is correct. Instead I would just note that they have different recollections of events, or different interpretations of what happened, both of which I believe are honestly held opinions. In some cases this may mean that my finding is that I cannot determine that conduct of concern has occurred.

I do not believe that greater clarity is needed. The role of the ICO is to try to resolve matters, not to adjudicate on them. Referring to a "standard of proof" is for the courts and would only confuse people into thinking that the ICO is a judge or arbitrator.

13. Do you believe that terms like "bullying" and "harassment" should be defined in the Resolution, if so, what terms (in your experience) are most in need of definition?

I do not believe they need to be defined. The Parliament of NSW is, I understand, close to settling its Policy on Bullying, Harassment and Sexual Harassment and I believe that it would be better for me to use the definitions in that policy. Otherwise there would be risk of lack of clarity about the standards that apply.

14. You note in your submission that the ICO is required to deal "expeditiously" with matters and that rigid timeframes are not envisaged under the Resolution for the work of the ICO. How do you determine what is a "reasonable" timeframe?

I consider the amount of detail that I have asked someone to respond to, and also take in surrounding circumstances that would likely impact on the Member's ability to respond (eg is Parliament sitting? is it a holiday period? etc). I always indicate that the time frame is a suggestion only and invite the Member to ask for more time. I have always provided an extension when requested (some time not to the extent requested, but I seek to be reasonable.)

15. How would you approach the issue of a Member or key witness refusing to comply with your requests, including as to reasonable timeframes, but also in relation to providing a submission or giving a statement? Are there instances of individuals, including Members, who have not cooperated with you?

I would endeavour to resolve the issue with the Member (or witness) to understand why it was they had not complied with my request. If they continue to refuse to comply I would indicate to them what next course of action I would take. Depending on the circumstance, I might let them know that I will assume that their non-responsiveness means that they have no relevant information to provide. Alternatively, if I think it is important that I receive a response from them I might indicate my intention to raise the matter with the Committee as provided for in paragraph 24.7 of the ICO Resolutions.

So far I have not had an instance of refusal to co-operate.

16. What steps do you take to ensure that individuals with standing will, as required, maintain confidentiality concerning complaints and investigations? Is your approach towards Members who are expected, *except in extraordinary circumstances*, to maintain confidentiality about complaints and investigations any different?

All emails that I send to any parties have the words "Strictly Confidential" as the first words in the email title. I also note in all the emails that the work of the ICO is strictly confidential and repeat this at each point in the process. Any word documents I prepare, including drafts, have a "Strictly Confidential" watermark.

My advice about the confidentiality of the process is the same for all parties. That is, I don't specifically draw Member's attention to the qualification about "extraordinary circumstances" although, as noted above I do provide a copy of the ICO protocols so perhaps they might see this distinction there.

17. To what extent, if any, are you aware of parties using the ICO process to achieve a political purpose or seeking to politicise aspects of the process or the outcome?

I am conscious of the fact that a political purpose may be a reason for making a complaint to the ICO. However as I cannot know for sure what is the true motivation of a complainant I seek to deal with complaints on their merits. I consider whether if the conduct had been reported by another person, without any possibility of a political purpose, would it be a matter that the ICO would follow up. I don't believe that any matter that I have considered has been solely motivated by political purpose. I acknowledge that in some cases there may have been a political purpose among other reasons or that the person may have sought opportunistically to use a complaint in this way. However I am not in a position to judge whether this may have been a reason for making the complaint.

18. In at least two matters (Matters 10 and 13), complainants have decided not to proceed with their complaints.

(a) If possible, while maintaining the confidentiality of those complainants, what factors prevented them from proceeding?

In one matter the complainant indicated that the preferred course of action was to resign, and that they didn't want to take any further action.

In the other case, the conduct was a one-off event. The person involved decided in the end that they would wait to see if any other conduct of concern occurred.

[I note that I have discussed with DPS what I would do if someone didn't want to pursue a complaint but I was concerned that the information they had disclosed to me suggested a high risk of there being an ongoing unsafe workplace, raising issues about duties under the Work Health and Safety Act 2011. The information provided to me in these two cases did not raise that concern.]

(b) Again, while maintaining confidentiality, was there a causal connection in Matter 10 between the complainant's resignation and the subject matter of the complaint?

I believe that it may have been a factor, but I don't have full details of the reasons for the person's decision to resign.

19. In your submission, you have essentially asked the Committee to clarify whether:

(a) The ICO should cease their investigation whenever a question arises as to whether “the conduct” in question is “conduct in proceedings”, whereupon the ICO would immediately refer the question to the Committee; or

(b) The ICO should make a finding or “first call” about whether “the conduct” is “conduct in proceedings” and allow the parties to appeal to the Committee if they are dissatisfied with that finding.

Can you please clarify for the purposes of (a) above whether a question about “the conduct” being “conduct in proceedings” would arise for the ICO whenever one of the parties raised it (i.e., the Member complained about)? Or would it only arise whenever the ICO independently formed the view there was a question? Or some combination of the two?

I think a question about this issue could arise in both circumstances. Either the information provided by the complainant has raised this question in the mind of the ICO, or it has been raised by a Member in response to a complaint. Even if the ICO believes that the Member’s claim is unlikely to fit the definition, under scenario (a) the ICO would refer it to the Committee in any case.

20. You suspended one matter (Matter 6) because a claim of parliamentary privilege was made in respect of the conduct. (a) If possible, again without breaching anyone’s confidentiality, what steps did you take to determine the validity of that claim?

I referred it to the Committee based on advice from the Clerk and at the request of the complainant. I explained to the Committee, based on what the Member had told me, my understanding of the logic behind the claim. (I did not ask the Member for a copy of the legal advice because I was mindful of their entitlement to legal professional privilege.)

(b) Or did you immediately cease your investigation once the claim was made (in the same way suggested above that the ICO might cease their investigation once a question about “the conduct” being “conduct in proceedings” arises)? If so, why did you not refer the claim to the Committee?

The claim that the conduct was subject to Parliamentary privilege was made at a late stage of the investigation, after I had provided my draft report to both the complainant and the Member involved. I suspended the investigation immediately the claim was made and referred it to the Committee.

(c) As a general matter, where or from whom would you seek advice about parliamentary privilege?

Following discussion with the Clerks, it has been agreed that if it is seen as the role of the ICO to come to a view on Parliamentary Privilege, they would provide resources so that I could seek some independent legal advice.

Other methods of resolving complaints

21. You have had at least one matter in which you liaised with the parties in relation to mediation (Matter 8), which did not proceed as the complainant ceased to be a member of the parliamentary community.

(a) In what circumstances do you see mediation as being effective or appropriate to resolve complaints?

In this particular case the complainant had a very strong view that the outcome they wanted was a mediation session and I considered that in the circumstances it might be good for the parties to seek to agree on how they would communicate with each other in future. In general I think mediation might work in circumstances where there seems to be a lack of communication between the parties, or a need for an agreed process as to how the issues which have led to the complaint should be dealt with in future.

I note that the NSW Parliament Grievance Policy outlines a resolution process that involves some element of mediation.

(b) How many other matters have you proposed mediation to the parties and what have the reactions been?

I would normally mention mediation in general terms at the beginning of a matter as one of the possible outcomes a complainant could consider. So far there have been no other matters, apart from the one mentioned in (a) above, where either party has asked for mediation as an outcome or suggested it as a means of resolving a matter.

22. What methods other than a formal investigation, or formal findings, do you think might be effective in resolving complaints?

Just the fact of there being a complaint itself can resolve matters without the need for an investigation (formal or informal). The act of bringing conduct that is of concern to a complainant to a Member's attention might lead to a satisfactory outcome for the complainant.

As noted above, a mediation process might be an appropriate way to resolve complaints in some cases. This need not be formal mediation, it might be sufficient to have an informal meeting between the parties.

Ongoing awareness and engagement about workplace safety, respect and the requirements of the Members Code of Conduct might resolve some complaints if it means that behaviour that might have been the subject of complaint changes without the need for someone having to go through the complaints process.

23. Which other persons or agencies could you refer complaints to? What would be the challenges or barriers to entry for complainants?

Complainants can be referred to the Workplace Support Team (WST) in DPS who have phone and emails contacts and also a process by which complaints may be made anonymously. There should be no challenges or barriers for a person making a complaint to the DST.

Complainants can also be referred to SafeWork NSW. Complaints can be made to SafeWork online through its website (which includes a specific link for reporting psychosocial hazards) or through its 24 hour phone service. I do not believe that there are any challenges or barriers to entry for making a complaint. I have met with SafeWork NSW and they have always offered their willingness to assist with the work of the ICO. If appropriate, and with the consent of the complainant, I could contact SafeWork NSW on the complainant's behalf. Ultimately it will be SafeWork's NSW decision about what, if any, action they will take in respect of a complaint.

In appropriate cases I could refer the complainant to Anti-Discrimination NSW. They only consider complaints about discrimination or sexual harassment, so a potential barrier might be that the complaint does not meet this criteria. Complaints may be made through an online community reporting tool or a 1800 number and I do not believe that there are any specific challenges in making a complaint. If appropriate, and with the consent of the complainant, I could contact Anti-Discrimination NSW on the complainant's behalf. Ultimately it will be Anti-Discrimination NSW's decision about what, if any, action they will take in respect of a complaint.

In appropriate cases, if there has been a potential breach of the criminal law, I would refer the complainant to the NSW Police. Complaints to the NSW Police may be made through phone and through an online reporting tool (or attendance at a Police Station) and I do not believe that there are any specific challenges or barriers to entry for making a complaint. If appropriate, and with the consent of the complainant, I could assist a complainant in contacting the police or seek other support (eg from DPS) to assist the complainant in making that contact. Ultimately it will be for NSW Police to determine what, if any, action they take in respect of a complaint.

Matters relating to entitlements and allowances may fall within the jurisdiction of the NSW Independent Commission against Corruption (ICAC) and I would suggest the complainant refer the matter to the ICAC (as well

as indicating that the ICO would not have jurisdiction). Complaints may be made to ICAC by phone and in writing and I do not believe that there are any specific challenges or barriers to entry for making a complaint. As outlined in paragraph 15.3 of the ICO protocols, I will not normally contact ICAC on the complainant's behalf even if the complainant requests that I do, unless there are exceptional circumstances. Ultimately it will be for ICAC to determine what, if any, action they take in respect of a complaint.

In a very specific case, it may be appropriate to refer the complainant to the NSW Ombudsman or NSW Privacy Commission.

24. How would you view the role of the ICO:

(a) were the focus to centre on mediation and/ the triaging of complaints to ensure the parties to a complaint are advised of support services or other avenues to resolve the complaint? In other words, would you see value in the ICO role if it was not responsible for conducting investigations with the cooperation of parties to the complaint and other individuals, eg witnesses, or to make findings about matters?

In respect of complaints about bullying, harassment and other inappropriate conduct it would be possible for the ICO role to be to facilitate mediation without any preliminary fact finding. This may work in some cases to resolve the issues between the parties.

However, there would need to be a clear understanding of what would happen if the mediation failed, potentially leaving the parties at odds with each other (perhaps even more so than before the mediation). The fact that no fact finding has been undertaken would mean that the mediation would be a "I said" / "You said" discussion, without any attempt having been made to determine how accurate the statements of each party are. In these circumstances a mediation may not advance resolution of the matter.

In matters relating breaches of the entitlements and allowances I am not sure that mediation without at least some preliminary fact finding would work. These matters are primarily factual disputes about whether the requirements have been met. It would seem more helpful for some attempt to be made to see what the paperwork says and what the Member's response to the allegations is before putting the complainant in the difficult position of having to front up in person and be responsible for proving the breach.

The role of advising complainants about possible alternative options is already carried out by the WPS team and the DPS. They provide information about all these other options with resources being continually improved (see for example the draft Bullying, Harassment and Sexual Misconduct policy and the associated material on the NSW Parliament intranet). The ICO could provide a supportive service of pointing complainants to possible options using the DPS resources.

(b) If the role were effectively divided into someone who investigates and makes findings in relation to complaints, and another person who provides support to Members and their staff (for example, by making training and resources available in a sort of Human Resources role)?

This division seems to be the current arrangement, as the ICO role is dealing with complaints and DPS has the role of providing support such as training and resources (although of course I would always seek to assist those with expertise in these HR functions in providing this support).

While I seek to be helpful and empathetic to the parties it is not the ICO's role to provide support to complainants and Members. Instead, persons needing specific support in relation to the matters that are the subject of the complaint are referred to the EAP and WST team or I find other qualified resources to provide support for this. This is outlined in paragraph 13.1 of the ICO protocols.

Report from Independent Complaints Officer of the NSW Parliament to Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee

Period: 1 September 2023 to 30 November 2023

Matters concluded during the period

	Complaints received	Outcome
11	Complaint alleging bullying and harassment and / or inappropriate conduct.	Report finalised and provided to parties. Appeal made to Parliamentary Privileges and Ethics committee who determined that the conduct involved was subject to parliamentary privilege and therefore outside the jurisdiction of the ICO.
12	Inquiry made about alleged bullying and harassing conduct.	Conduct was not by member and therefore outside jurisdiction of the ICO.
13	Complaint alleging harassment or other inappropriate conduct.	Preliminary discussion held with complainant. Complainant decided not to go ahead with a complaint. ICO agreed to keep confidential record of information provided in case it became relevant later.

Complaints received during period and ongoing

	Complaint received	Current status
14- and 15	Complaints received separately from two former staff of the same member (both complaints received within 21 days of last day of employment) alleging bullying and harassment and / or inappropriate conduct and misuse of public funds.	Information obtained from complainants and was agreed with both that ICO would deal with the complaints together. Preliminary discussion held with member. Further information being obtained from Department of Parliamentary Services.

Other

The ICO provided submissions to the Review of the Independent Complaints Officer System (2023) inquiries of the Legislative Council Privileges Committee and the Legislative Assembly Parliamentary Privileges and Ethics Committee.

Report from Independent Complaints Officer of the NSW Parliament to Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee

Period: 1 December 2023 to 29 February 2024

Matters concluded during the period

	Complaints received	Outcome
14- and 15	Complaints received separately from two former staff of the same member (both complaints received within 21 days of last day of employment) alleging bullying and harassment and / or inappropriate conduct and misuse of public funds.	Inquiries made of Department of Parliamentary Services and meetings held with complainants and a number of witnesses. Draft report supplied to Member and both complainants and comments and submissions considered. Final report did not make findings or recommend specific actions, but a number of possible improvements to administrative and personnel processes suggested.
16	Complaint about alleged bullying and harassing conduct.	Conduct may have fallen within the exceptions for “relating to proceedings of the Parliament”. In any case conduct was determined not to amount to bullying or harassment.

Complaints received during period and ongoing

	Complaint received	Current status
	No ongoing matters	

Other

The ICO met with members of the Legislative Council Privileges Committee in early December 2023 as part of the Review of the Independent Complaints Officer System (2023).