Submission No 2

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

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Date Received: 10 July 2022

Committee on the Independent Commission Against Corruption
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Inquiry into aspects of the *Independent Commission Against Corruption Act 1988* (NSW)

This submission responds to the Committee's 16 June 2022 invitation to comment on aspects of the *Independent Commission Against Corruption Act 1988* (NSW).

The submission reflects the 29 July 2020 submission by myself (University of Canberra) and Dr Brendon Murphy (Australian Catholic University) on the reputational impact of adverse naming by the Independent Commission Against Corruption (ICAC).

It also reflects separate submissions and consideration of integrity mechanisms outside New South Wales, notably that with Dr Wendy Bonython (Bond University) to the Victorian Parliament's Integrity & Oversight Committee, alongside ongoing research into regulatory incapacity.

The submission does not represent what would be reasonably construed as a conflict of interest.

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10 July 2022

2020 Inquiry into aspects of the *Independent Commission Against Corruption Act 1988* (NSW)

As a preliminary comment ongoing disclosures about improper behaviour in Australian states and territories alongside community responses to the former Morrison Government's inordinate delay in establishing a national integrity commission are reminders that –

- integrity is an issue for NSW at the state and local government levels
- there is a consensus among the community about the need for accountability by officials and politicians
- Australia's ranking in global integrity and transparency indices has declined, pertinent for both public sector legitimacy and for choice of NSW as a location for investment.

More broadly, enhancing integrity requires strengthening of transparency mechanisms at the state and national levels, in particular resourcing as the basis of a 'fit for purpose' freedom of information regime and the expansion of whistle-blower protection in both the public and private sectors.

The Committee has sought comments on three aspects of the Act, as follows.

> **1) the time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions;**

It is not appropriate to enshrine 'time standards' (ie a specific number of weeks or months for provision of a report after an ICAC hearing) in the Act.

Victoria's Independent Broad-based Anti-Corruption Commission last year noted that

> Some of our work is long-term with results occurring months or years after our initial involvement. This includes potential criminal prosecutions and changes in public sector and community practices, which affect our ability to report, and the timing of our reporting.

In NSW some perceived delays in the finalisation of reports will necessarily be outside ICAC's control, for example because they involve activity by other entities such as the NSW Police or litigation in NW courts.

Ultimately the timeliness of activity within ICAC (including the finalisation of reports) and associated entities is a function of prioritisation within those entities and the resources available to those entities.

There is general acceptance among scholars of regulation that under-funding regulatory agencies is pernicious, likely to result in undesirable consequences such as –

- deficiencies in evidence gathering and other investigative activity that thwarts successful litigation and thereby erodes the perceived legitimacy of the regulator
- prioritisation of 'soft' or 'easy' targets rather than targets where investigation is more challenging, requires a longer time frame and is likely to result in significantly greater results
- demoralisation of agency staff, with consequential difficulty in recruiting and retaining expertise.

Extra funding for ICAC (and for counterparts such as IBAC and the CCC), alongside systemic strengthening of the NSW Freedom of Information regime, is not a silver bullet but will provide a basis for both wider and quicker handling of investigations.

Funding of anti-corruption entities has a financial benefit and more broadly reinforces the legitimacy of government on an ongoing basis. A 'penny wise pound foolish' approach to integrity is highly undesirable and will be exacerbated if the Act is amended to require specific short term reporting deadlines.

2) the existing mechanism of judicial review;

The 2020 Arnold and Murphy submission to the Committee noted the existing mechanism of judicial review under the Act, highlighting salient judgments.

Since that time there appear to have been no failures in the operation of ICAC that require fundamental changes to the judicial review mechanism.

3) the role and powers of the Inspector of the ICAC.

The basis for any fundamental change to the legislation regarding the role and powers of the Inspector is unclear.

This submission began by noting the need to strengthen Australian integrity mechanisms such as ICAC through enhanced whistleblowing frameworks, in other words to think systemically rather than relying on isolated specialist agencies dealing with gaming, sport, health, law enforcement personnel and the behaviour of public administration.

The time has perhaps come where it is appropriate for the Australian jurisdictions to consider the establishment of *qui tam* provisions in whistle-blowing law. Those provisions incentivise whistle-blowers whose disclosures in the public interest result in successful prosecution of major integrity breaches.