

**Submission  
No 3**

## **REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988**

**Organisation:** Parliamentary Inspector of the Corruption and Crime Commission

**Date Received:** 18 July 2022



**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

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18 July 2022

The Hon Leslie Williams MP  
Committee Chair  
Committee on the Independent Commission Against Corruption  
Parliament of New South Wales  
By email: [icaccommittee@parliament.nsw.gov.au](mailto:icaccommittee@parliament.nsw.gov.au)

Dear Ms Williams

**Review of aspects of the *Independent Commission Against Corruption Act 1988***

Thank you for your correspondence dated 16 June 2022, in which you invited me to make a submission to an Inquiry being conducted by the Committee on the Independent Commission Against Corruption (Committee).

The Inquiry's terms of reference require the Committee to inquire into and report on aspects of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) to determine whether it continues to be effective and appropriate, with particular reference to three aspects, including the role and powers of the Inspector of the ICAC. I have not had any professional involvement with the ICAC and accordingly I make no comment on the first two terms of reference. However, as Parliamentary Inspector of the Western Australian Corruption and Crime Commission (Commission), my role is directly analogous to that of the Inspector of the ICAC.

There will necessarily be differences in the statutory powers conferred on Inspectors of integrity agencies and the way individual Inspectors carry out their roles. My own functions and powers are set out in Part 13 of the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act), and in preparing this submission I have had regard to its equivalent, Part 5A of the ICAC Act. There are many similarities between the relevant provisions, as one might expect. For instance, both officers are charged with scrutinising the operations of an integrity agency; both can hold an inquiry with the full powers of a royal commission; and both report to parliament rather than to an individual minister. I was nevertheless interested to see some nuances in the powers these Acts confer on Inspectors. These are briefly discussed below, in the hope that this will be of some assistance to the Committee in conducting its Inquiry.

**Allegations of misconduct against Commission officers**

One of the critical functions of an officer charged with scrutinising an integrity agency such as the ICAC or the Commission is to deal with allegations of misconduct against the agency's officers. In some respects, the Inspector of the ICAC's ability to do so may be wider than my own in that the Inspector is empowered to deal with 'complaints of

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abuse of power, impropriety and other forms of misconduct’ as well as ‘conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy)’.<sup>1</sup> By contrast, the equivalent section of the CCM Act simply provides that I am to deal with ‘matters of misconduct’ on the part of the Commission and its officers.<sup>2</sup> Having said that, the scope of what amounts to ‘misconduct’ in the CCM Act is relatively broad and encompasses a lack of honesty or impartiality at one end of the spectrum through to corruption and the commission of criminal offences punishable by imprisonment at the other.<sup>3</sup>

There are also some sections of the CCM Act which appear to have no equivalent in the ICAC Act, and which confer broad powers on the Parliamentary Inspector to investigate Commission officers. First, the CCM Act provides that:

The Commission is to notify the Parliamentary Inspector whenever it receives an allegation that concerns, or may concern, an officer of the Commission and at any time the Parliamentary Inspector may review the Commission’s acts and proceedings with respect to its consideration of such an allegation.<sup>4</sup>

In this way, I am immediately made aware of all allegations of misconduct on the part of Commission officers that are reported to the Commission. The specific scope of this requirement has been agreed in a memorandum of understanding between my office and the Commission, and consequently I am informed of even the most trivial allegations falling within this category. The vast majority of such allegations are of course not substantiated, but I consider that it is critical that I be aware of them.

I have spoken with the former Inspector of the ICAC, Bruce McClintock SC, and I understand from him that the ICAC advises its Inspector of allegations of corruption made against its officers as a matter of course, notwithstanding the lack of a statutory requirement to do so. I respectfully suggest, however, that the Committee may wish to consider including such a requirement in the ICAC Act. In my view, the relevant CCM Act provision reinforces my oversight function as well as negating any need for each Inspector, upon taking office, to agree informally on the provision of such information by the Commission.

### **Investigations of Commission officers**

My role in receiving the notifications referred to above is not merely a passive one. Once I am made aware of an allegation regarding the Commission or its officers, I may notify the Commission that the allegation is to be removed to me for consideration and determination.<sup>5</sup> On receiving such a notice from me, the Commission must comply with its terms.<sup>6</sup> I can then annul the Commission’s determination as to the allegation and

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<sup>1</sup> Sections 57B(1)(b) and 57B(1)(c), ICAC Act.

<sup>2</sup> Section 195(1)(b), CCM Act.

<sup>3</sup> Section 4, CCM Act.

<sup>4</sup> Section 196(4), CCM Act.

<sup>5</sup> Section 196(5), CCM Act.

<sup>6</sup> Section 196(6), CCM Act.

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substitute my own; make any decision I might otherwise have made if exercising an original jurisdiction; or make any ancillary remedial or compensatory orders.<sup>7</sup>

However, before annulling the Commission's determination and substituting another, I must give the Commission a reasonable opportunity to show cause why its determination should not be annulled.<sup>8</sup> I am also unable to undertake a review of a matter that arises from, or can be dealt with under, a jurisdiction created by, or that is subject to, the *Industrial Relations Act 1979* (WA).<sup>9</sup> In addition, although I can make recommendations to the Commission,<sup>10</sup> I cannot impose disciplinary sanctions on its officers. That power resides with their employer, the Commission.<sup>11</sup>

The CCM Act powers referred to here are rarely used. It has not been necessary for me to exercise them since I commenced in my role a little over eighteen months ago. However, they are certainly not dormant and have been employed by previous Parliamentary Inspectors.<sup>12</sup> Further, their presence in the CCM Act is a powerful reminder of the Parliamentary Inspector's oversight function, and an incentive to the Commission to ensure that all allegations of misconduct against its officers are appropriately dealt with.

As the Committee will of course be aware, the ICAC Act provides that the Inspector of the ICAC has power to do all things necessary or reasonably incidental to the exercise of his or her functions.<sup>13</sup> It may well be that this provision is thought to encompass the kinds of investigations referred to above. In my view there is nevertheless merit in specifying the precise steps that an Inspector may take in exercising his or her oversight function, and I raise this approach as something the Committee may wish to consider.

### **Assessments of the Commission's Procedures**

Another of my functions in the CCM Act is to assess the effectiveness and appropriateness of the Commission's procedures.<sup>14</sup> This function is primarily discharged by receiving and acting on complaints from members of the public who are dissatisfied by the manner in which the Commission has dealt with allegations of serious misconduct they have made. The ICAC Act gives the Inspector of the ICAC an equivalent function, although I note that the Inspector's jurisdiction in that regard appears to be confined to the 'legality and propriety' of the ICAC's activities.<sup>15</sup> There is no such constraint on the Parliamentary Inspector's powers under the CCM Act.

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<sup>7</sup> Sections 196(7)(a), (b) and (c), CCM Act.

<sup>8</sup> Section 196(8), CCM Act.

<sup>9</sup> Section 196(9), CCM Act.

<sup>10</sup> Section 195(1)(d), CCM Act.

<sup>11</sup> Section 179(4), CCM Act. Similarly, when the Commission makes a finding of serious misconduct regarding a public officer, it cannot itself impose disciplinary sanctions on that officer.

<sup>12</sup> My immediate predecessor, the Hon Michael Murray QC, reported to Parliament several times on his use of these powers. See for instance *Report on Allegations of Misconduct against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters*, 8 October 2015.

<sup>13</sup> Section 57F(1), ICAC Act. There is also an equivalent provision in section 196(2) of the CCM Act.

<sup>14</sup> Section 195(1)(c), CCM Act.

<sup>15</sup> Section 57B(1)(d), ICAC Act.

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When I receive a complaint that requires action from me, I obtain a copy of the Commission's file on the matter to assess the procedures used in that instance. Such an assessment is not in the nature of a merits review. Instead, I am effectively checking for process failures: instances where the Commission might have neglected to take into account relevant considerations, had regard to irrelevant considerations, or misstated the nature of an allegation. If I form the view that the Commission's procedures were free from error and that the conclusions it reached were open on the available materials, I consider the matter closed from my perspective.

If I am not satisfied on these counts, I can write to the Commission to request that it reassess an allegation. The ability to receive and act upon complaints made by members of the public is in my view an important part of my role in scrutinising the way the Commission exercises its serious misconduct jurisdiction. Each time I review a file, I am effectively conducting an audit of the Commission's assessment procedures.

What is colloquially referred to as my 'complaints function' takes up a substantial proportion of my office's time and resources, and I note that there seems to be a difference between my office and that of the Inspector of the ICAC in this regard. That is, during the 2020-2021 financial year, my office undertook 98 new matters, 59 of which were complaints from members of the public concerning the way in which the Commission had handled allegations made by them.

The most recent Annual Report of the Inspector of the ICAC indicates that during the same period, his office received 21 complaints. Even allowing for the fact that the ICAC's jurisdiction excludes police officers,<sup>16</sup> it seems counter-intuitive that my office should receive more complaints from members of the public than the office of the Inspector of the ICAC, given the disparity in population between New South Wales and Western Australia. However, it may be that this difference is attributable, at least in part, to an administrative change implemented by me.

Upon commencing in my role in November 2020 I had some concerns about a lack of public awareness of my functions under the CCM Act, which meant that potential complainants were sometimes unaware of their ability to raise an issue with my office. In order to allow me to more broadly assess the effectiveness and appropriateness of the Commission's procedures, I requested that when the Commission informed a complainant that their allegation of serious misconduct or corruption could not be substantiated, it should advise them of the existence of my office as a matter of course. The Commission agreed to this proposal. As of 1 January 2021, it now includes a brief paragraph in all its closing letters advising complainants of their right to contact the Parliamentary Inspector if dissatisfied with the Commission's conclusions. A copy of that paragraph is attached as an annexure to this letter.

Since that time my office has experienced a pronounced increase in complaints, which has to date been manageable within its current resourcing. Understandably, most of these communications simply reflect dissatisfaction with the outcome of a complaint to

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<sup>16</sup> Relevantly, the most recent Annual Report of the Office of the Inspector of the Law Enforcement Conduct Commission of New South Wales (OILECC) notes that the OILECC received 43 complaints during the 2020-2021 financial year.

the Commission, or a lack of understanding of its serious misconduct jurisdiction. However, each year a sizeable minority of complaints require some intervention on my part, and I am satisfied that I am now more closely fulfilling my function of assessing the Commission's procedures.

This demonstrates, to my mind, that members of the public are not necessarily cognisant of the full extent of their entitlement to seek a review of the decision-making processes of government, and that cannot be a good thing. I do not know whether the ICAC and the Inspector of the ICAC would be interested in adopting a similar mechanism, and of course that is a matter for them to determine.

I hope that this submission has been of assistance to the Committee, notwithstanding that I have no active involvement with the Inquiry's subject matter. I am happy to provide further information if that would assist the Committee.

Yours sincerely,



**MATTHEW ZILKO SC**  
**PARLIAMENTARY INSPECTOR**

**ANNEXURE**

If you believe there is additional information the Commission has not considered please provide the information or advise the Commission of its nature as soon as possible. You can email this information to the Commission at [reportcorruption@ccc.wa.gov.au](mailto:reportcorruption@ccc.wa.gov.au). Please ensure you add the Commission file number in the title of your email.

If you have no further information but are unhappy with the Commission's decision, you can contact the Parliamentary Inspector of the Corruption and Crime Commission and request that he assess the effectiveness and appropriateness of the Commission's procedures in this instance.

The Parliamentary Inspector is not empowered to overturn the Commission's decision, but he may make recommendations to the Commission and may investigate any aspect of the Commission's operations or the conduct of its officers.

The contact details are as follows:

Parliamentary Inspector of the Corruption and Crime Commission  
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PERTH WA 6831  
Email: [piccc@piccc.wa.gov.au](mailto:piccc@piccc.wa.gov.au)