

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

**Organisation:** NSW Independent Commission Against Corruption

**Date Received:** 22 July 2022

The Hon Leslie Williams MP  
Chair  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW

Dear Ms Williams

Please find enclosed the submission of the NSW Independent Commission Against Corruption in relation to the Committee's inquiry into aspects of the *Independent Commission Against Corruption Act 1989*.

The submission does not contain confidential information and the Commission is content for the Committee to publish the submission as part of its inquiry.

Yours sincerely



The Hon Peter Hall QC  
Chief Commissioner

*22* July 2022



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INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

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## SUBMISSION TO THE COMMITTEE ON THE ICAC ON ASPECTS OF THE ICAC ACT

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JULY 2022

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# Introduction

This submission is made by the NSW Independent Commission Against Corruption ("ICAC") for the purposes of the inquiry being conducted by the Committee on the Independent Commission Against Corruption ("Committee") under the following terms of reference:

That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on aspects of the *Independent Commission Against Corruption Act 1988* to determine whether the Act continues to be effective and appropriate, with particular reference to:

- 1) the time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions;
- 2) the existing mechanism of judicial review;
- 3) the role and powers of the Inspector of the ICAC.

This submission is divided into five parts.

**Part 1** provides an overview of the ICAC and its statutory powers.

**Part 2** examines time standards for finalisation of ICAC investigation reports.

**Part 3** deals with mechanisms of judicial review.

**Part 4** examines the role and powers of the ICAC Inspector.

**Part 5** contains recommendations for certain amendments to the ICAC Act to enhance the ICAC's effectiveness.

The ICAC considers that the *Independent Commission Against Corruption Act 1988* ("ICAC Act") continues to be both effective and appropriate to enable the ICAC to fulfil its functions and that existing mechanisms of judicial review remain appropriate and should not be expanded to include any form of merits review. Subject to one matter discussed in Part 4 of this submission, the ICAC considers the powers granted to the ICAC Inspector are appropriate to enable the functions of that Office to be fulfilled.

The ICAC acknowledges that it has faced challenges in completing its s 74 investigation reports within the timelines it has previously established and proposes that it revise its KPIs for report completion times to provide that 80% of reports be furnished to the Presiding Officers within 80 days of completion of the public inquiry where the duration of the public inquiry evidence was five or less days and 180 days otherwise. The ICAC considers that, given the complexity of its investigations and the resources available to complete reports, these KPIs are realistic.

# Part 1: Overview of the ICAC

The ICAC was established in 1988 by the ICAC Act and commenced operations in 1989.

The ICAC's mandate under s 2A of the ICAC Act is to investigate, expose and prevent corruption involving or affecting public authorities and public officials and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community. The ICAC also investigates conduct that may involve certain specified criminal offences that the NSW Electoral Commission refers to the ICAC for investigation under s 13A of the ICAC Act.

Corrupt conduct is defined in s 7, s 8 and s 9 of the ICAC Act.

Section 12 of the ICAC Act provides that, in exercising its functions, the ICAC shall regard the protection of the public interest and the prevention of breaches of public trust as its "paramount concerns".

Section 12A of the ICAC Act stipulates that, in exercising its functions, the ICAC is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

Section 13 of the ICAC Act sets out the principal functions of the ICAC. These include:

- to investigate any allegation or complaint that, or any circumstances which in the ICAC's opinion imply that:
  - (i) corrupt conduct, or
  - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
  - (iii) conduct connected with corrupt conduct,
 may have occurred, may be occurring or may be about to occur,
- to communicate to appropriate authorities the results of its investigations,
- to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the ICAC, may be conducive to corrupt conduct,
- to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the ICAC thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,
- to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,
- to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,
- to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,



- to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament,
- the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
- the power to formulate recommendations for the taking of action that the ICAC considers should be taken in relation to its findings or opinions or the results of its investigations.

The ICAC may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.<sup>1</sup> An investigation may be in the nature of a preliminary investigation.<sup>2</sup>

Only a very small percentage of matters received by the ICAC are made the subject of an investigation.

Section 13(2) of the ICAC Act provides that the ICAC is to conduct its investigations with a view to determining:

- a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and
- b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and
- c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

The ICAC is an investigative body that can make findings of fact and can make findings of corrupt conduct against public officials and others who engage in serious corrupt conduct. Not every investigation will produce findings of corrupt conduct or even adverse factual findings. The purpose of an investigation is to determine the truth or otherwise of the allegations under investigation. As such, an investigation may find that there was no corrupt or improper conduct.

The ICAC does not institute or conduct criminal proceedings. The decision on whether or not to commence criminal proceedings as a result of an ICAC investigation is a matter for the NSW Director of Public Prosecutions (DPP). The DPP conducts any prosecutions arising from ICAC investigations. If the ICAC has obtained admissible evidence of the commission of a criminal offence in another State, the Commonwealth or a Territory, then the ICAC will furnish such evidence to the Attorney General or to the appropriate authority of the jurisdiction concerned.

Since the commencement of its work in 1989, the ICAC has conducted numerous investigations and undertaken significant corruption prevention work to strengthen NSW public administration against corruption.

The ICAC has been entrusted with significant powers under the ICAC Act and other legislation to enable it to conduct its investigations both efficiently and effectively. These include power to:

- obtain a statement of information from a public authority or public official (s 21 of the ICAC Act)
- obtain documents or other things by serving a written notice (s 22 of the ICAC Act)

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<sup>1</sup> Section 20 of the ICAC Act.

<sup>2</sup> Section 20A of the ICAC Act.

- enter and inspect public premises to inspect documents and other things and take copies of any document (s 23 of the ICAC Act)
- conduct a compulsory examination (private hearing) (s 30 of the ICAC Act)
- conduct a public inquiry (s 31 of the ICAC Act)
- apply for the issue of a search warrant (s 40 of the ICAC Act)
- prepare a report in relation to any matter that has been or is the subject of an investigation (s 74 of the ICAC Act)
- apply for a warrant to use a surveillance device (*Surveillance Devices Act 2007*)
- obtain approval for the conduct of an operation that would otherwise be unlawful (*Law Enforcement (Controlled Operations) Act 1997*)
- obtain authorisation for ICAC officers or others to use a false identity (*Law Enforcement and National Security (Assumed Identities) Act 2010*)
- apply for a telecommunications interception warrant and a stored communications warrant and obtain access to existing and prospective telecommunications data (*Telecommunications (Interception and Access) Act 1979*).

The ICAC considers that these powers are necessary and appropriate to effectively investigate and expose corrupt conduct and to enable it to identify weaknesses in NSW public sector procedures and practices with a view to working with the relevant public authorities to reduce the opportunities for corrupt conduct.

The extent to which the ICAC's powers were appropriate was the subject of consideration by Bruce McClintock SC in the 2005 review of the ICAC Act (2005 Review).

The conclusion reached by the 2005 Review was in the following terms (paragraphs 6.4.1 – 6.4.3):

The potential for misuse of the coercive powers granted to ICAC under the Act was a major focus of the Parliamentary debates on the establishment of the ICAC. In 1993, the Parliamentary Committee concluded that:

*'It is generally accepted that the grave concerns about ICAC's possible misuse of its coercive powers have been proven to be groundless.'*

Little appears to have occurred in the eleven years that have elapsed that would warrant a revision of the Parliamentary Committee's conclusion. Relatively few submissions to the review complained about misuse of investigative powers by ICAC. I am satisfied that ICAC's powers are appropriate to meet its objectives.

The 2005 Review noted that the establishment of an Inspectorate would significantly reduce the possibility of any misuse not being detected.

The 2015 Independent Panel, comprising the Hon Murray Gleeson QC and Bruce McClintock SC, was required to consider whether the ICAC's powers, and its exercise of its powers were consistent with principles of justice and fairness. In its 30 July 2015 report *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* (2015 Review) the Independent Panel did not make any recommendations that the ICAC's powers be limited except with respect to the power to make findings of corrupt conduct, which it considered should be limited to where there has been serious or systemic corrupt conduct. Section 74BA was inserted into the ICAC Act to give effect to this consideration.



The ICAC is mindful of the need to ensure that it exercises its powers lawfully and ethically. To this end, it has instituted various procedures that must be followed by ICAC officers in considering whether a power should be exercised and in exercising the power.

The ICAC's Operations Manual sets out procedures for the exercise of relevant statutory powers. These procedures ensure that all relevant legislative requirements and internal ICAC requirements are identified and addressed before any power is exercised.

The ICAC has also developed an Investigation Policy Framework, which sets out the minimum standards for the conduct of investigations.

In addition, ICAC lawyers are assigned to each preliminary investigation and investigation. All applications for the exercise of statutory powers, whether under the ICAC Act or other legislation, are reviewed by the responsible lawyer to ensure they meet relevant regulatory and ICAC requirements. Applications are then reviewed by the Executive Director, Legal.

If approved by the Executive Director, Legal, applications for the exercise of powers under the ICAC Act and some other statutes are submitted to a Commissioner for final approval.

Applications for surveillance device warrants are considered by judges of the NSW Supreme Court. Applications for telecommunications interception warrants are usually made to members of the Administrative Appeals Tribunal (Commonwealth). Applications for search warrants are considered by a magistrate or Local Court registrar.

The conduct of each preliminary investigation and investigation is monitored by the ICAC's Investigation Management Group (IMG). The IMG comprises the three Commissioners, the Chief Executive Officer, the Executive Director Investigation Division, Executive Director Legal Division and Executive Director Corruption Prevention Division. The IMG meets monthly (except in January). Reports on each investigation as well as progress reports on preparation of s 74 reports, prosecution brief preparation and progress with prosecution matters are submitted to and considered at each IMG meeting.

The ICAC considers that the ICAC Act continues to be effective and appropriate to enable the ICAC to fulfil its role.

## The public inquiry power

As noted above, one of the ICAC's powers under the ICAC Act is to conduct a public inquiry.

Section 31 of the ICAC Act provides that the ICAC may, for the purposes of an investigation and if it is satisfied that it is in the public interest to do so, conduct a public inquiry. Section 31(2) provides that, without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the ICAC is to consider:

- a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- b) the seriousness of the allegation or complaint being investigated,
- c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
- d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Under s 6(2) of the ICAC Act, a decision to conduct a public inquiry must be authorised by the Chief Commissioner and at least one other Commissioner. Since the introduction of the three Commissioner model, all decisions to conduct a public inquiry have been unanimous.

Considerations taken into account by the Commission in applying the above criteria include:

- a) whether public exposure would be likely to:
  - educate the public about serious corruption or systemic failures and issues
  - encourage others to come forward with information relevant to the investigation
  - encourage public agencies to engage in reform and/or establish public understanding of why change is necessary
- b) the seriousness and nature of the conduct alleged, for example:
  - whether the conduct involves a criminal offence or offences
  - the seniority or standing of the public official/s involved
  - the level of sophistication, organisation and planning
  - the number of persons involved and whether the alleged conduct is systemic
- c) whether the allegations are already in the public domain and the public inquiry would:
  - provide a transparent mechanism for public officials and others to be publically accountable for their actions
  - enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account
- d) the desirability of protecting the privacy of persons who may be mentioned in a public inquiry
- e) the desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

Proceedings at a public inquiry are not adversarial. In this aspect of its functions, the ICAC is like a standing royal commission. The ICAC conducts its public inquiries in accordance with the relevant rules of procedural fairness as those apply to such commissions of inquiry.

Persons required to attend a public inquiry are informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated at the time they receive their summons (this information is set out in the summons). In addition, the presiding Commissioner announces the general scope and purpose of the inquiry at the commencement of the public inquiry and the matters under investigation are outlined in more detail by Counsel Assisting the ICAC in the opening address.

Each witness who receives a summons to attend a public inquiry (or a compulsory examination) is also provided with an "Information for Witnesses" brochure which sets out general information about the ICAC and the procedure adopted by the ICAC for its hearings.

Information for people involved in public inquiries is also published on the ICAC's public website.

The ICAC has also established a restricted access portal for the purpose of:

- providing authorised persons (such as witnesses and their legal representatives and other parties deemed to have sufficient interest in the subject matter of the public inquiry to warrant access) with access to any pre-public inquiry disclosure material
- providing authorised persons – once a public inquiry has commenced – with access to relevant material, including that material proposed to be made an exhibit, lists of proposed witnesses and documents marked for identification.

The ICAC has issued standard directions that apply to the conduct of its public inquiries. These are available to the public via the Commission's public website and are reproduced in the "Information to Witnesses" brochure. The directions deal with such matters as:

- sitting times
- authorisation to appear
- legal representation
- the conduct of the public inquiry with reference to the evidence of witnesses and documentary evidence
- suppression orders
- publication of, and access to, evidence
- the submissions process
- liaison with the Commission.

The ICAC has published guidelines pursuant to s 31B of the ICAC Act. These provide guidance on the following aspects of the conduct of public inquiries:

- a) the investigation of evidence that might exculpate affected persons (being a person against whom substantial allegations have been made in the course of or in connection with the public inquiry),
- b) the disclosure of exculpatory and other relevant evidence to affected persons,
- c) the opportunity to cross-examine witnesses as to their credibility,
- d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- e) any other matter the ICAC considers necessary to ensure procedural fairness.

Persons substantially and directly interested in any subject-matter of a public inquiry may be authorised by the ICAC to appear at the public inquiry or a specified part of the public inquiry (s 32). The ICAC may also authorise a person giving evidence at a public inquiry or a person substantially and directly interested in any subject matter of the public inquiry to be represented by an Australian legal practitioner at the public inquiry or a specified part of the public inquiry. The ICAC is required to give a reasonable opportunity for a person giving evidence at a public inquiry to be legally represented (s 33).

If it is in the public interest to do so, the ICAC may decide to hold part of a public inquiry in private (s 31(9)). A direction may also be made under s 112 of the ICAC Act that certain specified evidence not be published.

The 2005 Review concluded (at paragraph 6.5.25) that:

...public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.

The 2015 Review was of the same view. It noted (at paragraph 9.4.6) that:

In particular, the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should be exercised in private.

The 2015 Panel did not consider any change to or further restrictions upon the ICAC's powers to hold a public inquiry should be introduced.

With respect, the ICAC endorses the views expressed in the 2005 Review and 2015 Review concerning the power to conduct a public inquiry.



## Part 2: Time standards for finalisation of investigation reports

The ICAC Act makes provision for various kinds of ICAC reports. These are:

- reports to an authority or Minister under s 14(2);
- investigation reports under s 74;
- special reports under s 75;
- annual reports under s 76; and
- reports relating to authorities under s 77.

The ICAC is unaware of any issues concerning the timeliness of reports under ss 14(2), 75, 76 or 77 and understands that the Committee's interest in time standards for finalisation of reports concerns s 74 investigation reports. Accordingly, this submission is limited to examining the timelines for completion of such reports.

Before examining timelines in detail, it is useful to briefly set out the relevant statutory requirements and the process involved in the drafting of s 74 investigation reports.

### Section 74 reports – the statutory requirements

Section 74 of the ICAC Act provides that the ICAC may prepare reports in relation to any matter that has been or is the subject of an investigation. The ICAC is required to prepare such reports in relation to any matter referred to the ICAC by both Houses of Parliament and in relation to matters where the ICAC has conducted a public inquiry.

Section 74(7) requires all such reports to be furnished to the Presiding Officer of each House of Parliament "as soon as possible after the Commission has concluded its involvement in the matter". Section 74(8) provides that the ICAC may defer making a report if it is desirable to do so in the public interest, except as regards a matter referred to ICAC by both Houses of Parliament.

Sections 74A, 74B, 74BA, 74C and 74D deal with the matters the ICAC is authorised or not authorised to include in a report.

Sub-section 76(2)(ba)(vi) of the ICAC Act requires the ICAC to include in each annual report details of the time interval between completion of each public inquiry conducted during the reporting year and the furnishing of a report on the matter. This sub-section was inserted into the ICAC Act by the *Independent Commission Against Corruption Amendment Act 2005* and commenced on 1 July 2005. The ICAC commenced reporting in compliance with the sub-section in its 2005-06 annual report.

### Section 74 reports – the submissions process

At the conclusion of the taking of evidence in a public inquiry, Counsel Assisting the ICAC makes submissions setting out what findings and recommendations it is contended by Counsel Assisting are available on the evidence before the ICAC to be made by the ICAC. These submissions are usually written.



Relevant parties have the opportunity to make submissions in response.

On occasion, provision may also be made for cross-party submissions and for submissions in reply from Counsel Assisting.

In cases where there has been no public inquiry, and no Counsel Assisting has been appointed but it is intended to make a report under s 74 of the ICAC Act, then the ICAC lawyer with carriage of the matter is responsible for preparing the submissions to be sent to the relevant parties.

Where systems deficiencies have been identified during the course of the investigation corruption prevention submissions are also prepared by ICAC officers and provided to relevant entities.

## Section 74 reports – the drafting and review process

Given the nature of ICAC s 74 reports and the impact adverse factual and corrupt conduct findings can have on individuals, including by way of reputational harm, it is both necessary and appropriate that the ICAC have robust processes in place to ensure that the ICAC observes procedural fairness and that reports are factually accurate, the reasoning in the reports is logical and objectively reasonable, all findings are soundly supported by the available evidence (including identification and consideration of any exculpatory evidence) and only relevant matters have been taken into account when reaching findings.

It is relevant to note that, to date, there have been no successful challenges to ICAC reports on the basis of failure to provide procedural fairness or that findings are not soundly based.

For a public inquiry, the responsible Commissioner for a s 74 report is the Commissioner or Assistant Commissioner who presided at the inquiry. Otherwise, the reporting Commissioner is the Chief Commissioner or Commissioner with special responsibility for the investigation.

The responsible Commissioner is responsible for the production of a s 74 report. As a general practice, the responsible Commissioner delegates the task of preparing a draft of the report in respect of:

- the content of the corruption exposure content, executive summary, summary of investigation and results and background chapters of the report, to the case lawyer
- the content of the corruption prevention chapter, to the corruption prevention (CP) case officer.

The responsible Commissioner retains throughout the report drafting and preparation process the responsibility for determining findings and recommendations, including recommendations under s 74A(2) of the ICAC Act.

Prior to commencing the draft report, the case lawyer and CP case officer:

- in conjunction with the responsible Commissioner identify the issues that need to be addressed in the report and how contentious issues will be resolved
- liaise with each other to ensure work is not unnecessarily duplicated and that terminology, names and titles are consistent, and
- liaise with the Communications Officer Publishing and Media and the Manager Communications and Media for advice on the report structure, style and any initial editorial assistance that may be required.

In preparing to draft the report, the case lawyer is required to review all the evidence before the public inquiry (as contained in the transcript and the exhibits) and also all submissions received by the ICAC. This is necessary to ensure that all the relevant evidence is identified and dealt with in the report. The case lawyer will need to make reference back to these sources from time to time to ensure all relevant issues are dealt with accurately.

As a general rule, the case lawyer will, in consultation with the responsible Commissioner, prepare an outline structure for the report before commencing actual drafting.

Once drafting has commenced, the case lawyer will generally consult regularly with the responsible Commissioner, Executive Director Legal or other ICAC officers on the content of the draft report.

Timelines for completion of the draft report are discussed below.

Once the case lawyer has completed the draft corruption exposure chapters, the case lawyer is required to make a copy available to the Executive Director Legal for initial review and feedback. This is often done on a chapter-by-chapter basis, rather than waiting until the entire report has been drafted. A copy is also provided to the relevant Chief Investigator responsible for the investigation for any feedback. The case lawyer incorporates any changes required by the Executive Director Legal into the draft before making a copy available to the CP case officer.

The CP case officer is required to make a copy of the draft CP chapter available to the Executive Director Corruption Prevention, case lawyer and relevant chief investigator for review. The case lawyer is required to ensure the content of the CP chapter meets relevant legal requirements (including procedural fairness), and there is consistency between the draft exposure chapters and the draft CP chapter, and to liaise with the CP case officer for that officer to make any necessary changes.

The case lawyer is responsible for collating the draft CP chapter into the s 74 report. The case lawyer is then required to review the entire draft to:

- identify any matters that were not the subject of evidence and not covered by submissions but may relate to an issue that should be covered in the report
- ensure there is a proper evidentiary basis for the content of any chapter and in particular any findings that have been made
- ensure it complies with statutory and other legal requirements and that a statement under s 74A(2) of the ICAC Act is included in relation to each affected person
- ensure that s 74A statements are appropriately made and that such action would be available<sup>3</sup>
- ensure any response required by s 79A of the ICAC Act is accurate
- ensure that nothing in the draft infringes s 18 of the ICAC Act (publication during court proceedings)
- procedural fairness has been afforded to relevant affected persons.

Once this review is completed by the case lawyer, the report is again provided to the responsible Commissioner to consider and settle in light of the case lawyer's review.

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<sup>3</sup> For example, statutory limitation periods in relation to prosecutions should be checked to ensure that they would not have expired by the time the report is published. Care should also be taken to ensure that where statements for consideration of prosecution are made, the most appropriate common law or statutory charge is nominated.

Once the draft report is finalised, it is provided to the Chief Commissioner, the other Commissioners, the Chief Executive Officer, the Executive Director Legal, the Executive Director Investigation and the Executive Director CP for review ("Review Panel"). The relevant case lawyer and CP case officer also attend the Review Panel meeting.

The Review Panel usually has two weeks in which to review the draft report, but this period may be extended if the report is particularly long or complex or one or more members have other work commitments that require further time. The role of the Review Panel is to review the draft s 74 report to ensure:

- procedural fairness has been afforded to relevant affected persons
- all findings, opinions and recommendations in the report are supported by the evidence set out in the report, and
- the report is otherwise accurate, complete and logically set out.

In some cases, such as during the COVID19 pandemic, the Review Panel members may not be able to meet in person. In such cases members provide feedback via email.

After the Review Panel has met and discussed the draft report, the case lawyer makes any agreed changes to the report. The report then proceeds to the editing stage.

The ICAC's Senior Communications Officer and Editor ("editor") is responsible for editing draft reports to ensure compliance with the ICAC's Publications Style Guide and any other agreed editing requirements. The time taken to edit a report varies depending on the length and complexity of the report and the editor's other commitments. As a general rule, editing takes between five to ten days.

After the initial edit is completed, the editor submits the draft report to the case lawyer Executive Director Legal and, if the report contains a corruption prevention chapter, the CP case officer and Executive Director CP, with any changes and comments marked-up. These officers consider the mark-ups and respond to the editor. This process takes between two to four days.

The report then goes to layout. The ICAC Design and Digital Communications Officer (the "designer") is responsible for laying out the draft report to get it ready for printing. This includes selecting the cover design for the report. The layout process takes from three to five days.

Once layout is complete, the report goes to the Manager Communications and Media for proofreading. Proofreading takes between two to four days.

Once proofreading has been completed, the report is provided to the reporting Commissioner for a final review and approval of proofreading corrections. Approved changes are then incorporated into the report. This process takes between two to four days but is dependent upon the availability of the reporting Commissioner.

Finally, the report is sent to an external contractor for printing. Printing and delivery of the final report usually takes between six to seven days.



## Section 74 reports – monitoring progress

Progress in drafting of corruption exposure chapters of a report by the case lawyer is monitored on an ongoing basis by the Executive Director, Legal. Progress in drafting the corruption prevention chapter by the CP case officer is also monitored on an ongoing basis by the Executive Director, CP.

The responsible Commissioner also monitors progress to ensure that findings and recommendations, including recommendations under s 74A(2) of the ICAC Act are appropriate and reflect the evidence and take into account the submissions received by the ICAC.

In addition, progress is monitored by the ICAC's IMG (see Part 1 of this submission), which meets monthly (except in January). A written report on progress with each draft report is provided to the IMG for consideration.

The purpose of the monitoring is to identify any likely delay in completion of the draft report and, where possible, put in place measures to alleviate any likely delay.

## Section 74 reports – timelines for drafting

In 2006-07, the ICAC set a key performance indicator (KPI) for the completion of s 74 reports. The goal was that 80% of reports be furnished to the Presiding Officers within 90 days of completion of the public inquiry. The goal was set at 80% of reports rather than 100% of reports to allow for the likelihood that more complex reports would take longer to complete.

In 2010-11, this KPI was revised to provide that 80% of reports be furnished to the Presiding Officers within 60 days of completion of the public inquiry where the duration of the public inquiry evidence was five or less days and 90 days otherwise. The revision was made to distinguish between what was then the number of less complex matters where the duration of the public inquiry was five or less days (see Appendix 1) and more complex matters, where it would take longer to draft and complete a report.

The KPI was revised again in 2016-17 to provide that 75% of reports be furnished to the Presiding Officers within 60 days of completion of the public inquiry where the duration of the public inquiry evidence was five or less days and 90 days otherwise.

In relation to each of the above KPIs it is necessary to note that the ICAC only considers that a public inquiry is complete once the last submission has been received. This is because all submissions are an integral part of any public inquiry and must be considered, along with the evidence gathered during the course of the public inquiry, in planning for and drafting the report. It may also be the case that additional issues come to light as a result of the submissions process that require further action. For example, submissions in response to the submissions of Counsel Assisting may raise issues that require further consideration by the presiding Commissioner with a view to determining whether further submissions should be sought from Counsel Assisting or others or even whether the public inquiry should be reconvened to take further evidence to clarify any outstanding issue.

Appendix 1 sets out the times for finalisation of s 74 reports for the period 1 July 2009 to 30 June 2022.

As demonstrated by the figures in Appendix 1, of the 32 reports furnished between 2010-11 (when the first revised KPI was introduced) and 2021-22 where the duration of the public inquiry evidence

was five days or less, only 12 were furnished within the KPI period of 60 days or less from the conclusion of the public inquiry (being the last day on which submissions were received). This represents 38% of such reports, which is well below both the revised 2010-11 KPI and the further revised 2016-17 KPI.

Similarly, of the further 32 reports furnished between 2010-11 and 2021-22 where the duration of the public inquiry evidence was more than five days, only 12 were furnished within the KPI period of 90 days or less from the conclusion of the public inquiry (being the last day on which submissions were received). This also represents only 38% of such reports, which is also well below both the revised 2010-11 KPI and the further revised 2016-17 KPI.

The reasons for these failures to meet the relevant KPI targets are discussed in the next section.

## Section 74 reports – impacts on completion times

As noted above, once a report has been drafted, it goes to the Review Panel and then goes through the editing and production stages. These processes can generally take between 27 to 48 days. These periods however may be extended depending on the availability of those involved in the various processes and other competing priorities.

Assuming the timeframes for review, edit and production are met, in order to meet the current KPI where the duration of the public inquiry is five or less days it would be necessary for 75% of draft reports to be drafted, settled by the responsible Commissioner and ready to go to the Review Panel between 12 to 3 days after receipt of final submissions (60 days less the 27 to 48 days taken up by the Review Panel, editing and production processes).

In order to meet the current KPI where the duration of the public inquiry was more than five days it would be necessary for 75% of draft reports to be drafted, settled by the responsible Commissioner and ready to go to the Review Panel between 42 to 63 days after receipt of final submissions (90 days less the 27 to 48 days taken up by the Review Panel, editing and production processes).

Various matters can impact on the time taken to draft a report before it is ready to be considered by the Review Panel. The two most important are the complexity of the public inquiry evidence that must be reviewed and the availability of resources to undertake that review and the drafting of the report.

ICAC investigations have become increasingly complex.

One example of how complexity has increased over time is demonstrated by the fact that, between 2013-14 and 2019-20, the receipt of electronic data by the ICAC increased from 10 terabytes to 52.65 terabytes, the latter being equivalent to 3.95 billion pages. This impacts upon both the length of a public inquiry (there is more evidence to examine when drafting a report) and the number of exhibits tendered (there is more material to examine when drafting a report).

Increased complexity is also demonstrated by the substantial increase in the number of days spent in gathering evidence in a public inquiry since the ICAC established KPIs for report preparation.

Appendix 1 sets out the number of hearing days for each public inquiry. For reports published in the period 2009-10, the average number of public inquiry days was 4.4. There was a general increase in the average number of days in most of the following years. For reports published in the 2016-17



period, the average was 17.8 days per public inquiry, while for reports published in the 2017-18 period, the average was 19 days per public inquiry. This reduced slightly for reports published in the 2018-19 period to 13.5 days but by 2020-21 the average number of public inquiry days for reports published in that period had increased to 47.5 days. For reports published in 2021-22, the average was 29.5 days for each public inquiry.

This increase in the length of public inquiries generally reflects the more complex issues being dealt with in public inquiries and the greater number of witnesses usually involved. This added complexity impacts upon the time it takes to properly deal with relevant issues by those drafting the report.

Resourcing is also an important constraint. While, ideally, those involved in drafting a report should be quarantined from other work to ensure they are able to progress with drafting in a timely manner, this has rarely been possible, particularly over the last 10 years. Each ICAC investigation (including preliminary investigations) is assigned a case lawyer. Each ICAC investigation involving CP issues is also assigned a CP case officer. There are always more investigations than case lawyers or CP case officers. This means that both case lawyers and CP case officers are assigned to multiple investigations. While steps are taken to reduce the involvement in other investigations of those involved in drafting reports, the limited number of case lawyers and CP case officers means it has not proven possible to eliminate such involvement altogether. This means that work on drafting a report must be undertaken in conjunction with work on one or more other investigations. In addition, there is other work, such as preparation of briefs of evidence for the DPP and liaison with the DPP with respect to ongoing prosecutions that may also be required on the part of a case lawyer.

Where the responsible Commissioner is occupied with other matters, which might include preparing for or presiding at a public inquiry associated with another investigation, there may be a delay in settling the report.

Drafting times are also impacted by staff turnover. In some cases, the case lawyer responsible for a public inquiry has left the ICAC before drafting the report. This necessitates the allocation of another lawyer, who is not familiar with the matter, to the task. It takes longer for a newly allocated lawyer to get across the investigation and prepare for drafting the report.

The resourcing issue was exacerbated in 2016-17 as a result of a significant reduction in grant funding from the Department of Premier and Cabinet. This resulted in the loss of a number of ICAC staff, including a case lawyer position.

The Commission unsuccessfully sought additional funding in 2019-20 and 2021-22 for additional staff which would have permitted the Commission to engage additional legal staff to address resourcing issues.

For 2022-23, the ICAC will receive additional funding which will permit the recruitment of an additional two case lawyer positions. This will enable a redistribution of workload so that those involved in the drafting of reports will be better able to be quarantined from other work thereby allowing them to mainly concentrate on preparing the draft report. This should result in a significant improvement to drafting times.

There are other reasons the furnishing of a report may be delayed, but these only affect a minority of reports.

The furnishing of reports for operations Indus (2013-14) and Nestor (2016-17) was deferred because the ICAC was satisfied that, in each case, it was desirable to do so in the public interest until they could be furnished together with other reports.

The reports for operations Spicer (2016-17) and Credo (2017-18) were delayed due to litigation and legislative changes and, in the case of the Operation Credo report, the need to defer furnishing the report because of the currency of prosecution proceedings (see s 18 of the ICAC Act).

## Section 74 reports – ICAC proposed new timelines

Based on the figures in Appendix 1 for the period 2010-11 to 2021-22:

- 87 was the average number of days taken to furnish those 32 reports where the duration of the public inquiry evidence was five days or less;
- 184.5 was the average number of days taken to furnish those 32 reports where the duration of the public inquiry evidence was more than five days.

Given the additional funding provided to the ICAC for 2022-23 and the consequent increase in available human resources for the drafting of investigation reports, the ICAC considers it is appropriate, in light of the above figures, to revise its KPI for report completion times to provide that 80% of reports be furnished to the Presiding Officers within 80 days of completion of the public inquiry where the duration of the public inquiry evidence was five or less days and 180 days otherwise. This will provide the necessary flexibility for dealing with contingencies that can arise from time to time that affect report delivery.

This is on the basis that the completion date for a public inquiry continues to be the last date on which submissions were received.

The ICAC does not consider it is appropriate to establish a KPI requiring that 100% of reports be furnished within the relevant periods. This is because there needs to be some in-built flexibility to take account of unplanned and other factors that may delay the furnishing of a report such as unusual complexity of a matter, litigation, staff changes and the decision to defer a report in the public interest.

The ICAC does not consider it necessary or appropriate to legislate any timeframe for completion of s 74 reports beyond the present requirement in s 76(7) that such reports be furnished “as soon as possible” after the ICAC has concluded its involvement in the matter.

## Part 3: Mechanisms of judicial review

The ICAC is subject to the supervisory role of the Supreme Court of New South Wales exercised under the *Supreme Court Act 1970*. The Supreme Court has jurisdiction to ensure that the ICAC conducts its operations in accordance with law.

The relevant grounds of potential judicial review of an ICAC report were summarized by McDougall J in *Duncan v ICAC*:<sup>4</sup>

- 1) there is a material error of law on the face of the record (which includes the reasons given for the decision – see s 69(4) of the *Supreme Court Act 1970* (NSW));
- 2) the reasoning is not objectively reasonable, in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all the material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences therefrom;
- 3) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;
- 4) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and
- 5) there has been a material denial of natural justice.

As a history of litigation involving the ICAC demonstrates, these avenues of review are well understood and readily utilised by those seeking to challenge ICAC powers or the exercise of ICAC statutory powers. Litigation has involved challenges to decisions to not investigate a matter, to conduct an investigation and to conduct a public inquiry. Challenges have also been made to findings made by the ICAC in its s 74 reports. Appendix 2 sets out a sample of some of the relatively more recent litigation involving the ICAC or ICAC officers which demonstrates the broad avenues of judicial review sought by various litigants.

Details of all active litigation matters and their outcomes are published in the ICAC's annual reports.

There is no merits review of an ICAC finding.

The issue of whether there should be such a review was considered by the Independent Panel, comprising the Hon Murray Gleeson QC and Bruce McClintock SC, in its 30 July 2015 report *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*. The following was set out at paragraphs 3.4.4, 3.4.5 and 3.4.8:

The reason no merits review is available is the administrative nature of the process. What is involved is not a judicial decision; it is an investigator's report of his or her findings and opinions at the conclusion of the investigation.

To make merits review available in respect of ICAC reports would require either a substantial alteration to the character of the Supreme Court's jurisdiction under the *Supreme Court Act*,

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<sup>4</sup> *Duncan v ICAC* [2014] NSWSC 1018 at [35].

which, in turn, would have consequences in respect of other administrative bodies, or the creation of a new form of internal or external review.

.....

In addition to the risk of confusion of judicial and administrative functions, the Panel considers that to provide for merits review would add to the problem of misunderstanding the ICAC's role. It would make it look even more like a court.

The Panel specifically noted that it did not recommend provision be made for a general merits review of ICAC findings.

The issue of merits review was also considered by Bruce McClintock SC in his 2005 report *Independent Review of the Independent Commission Against Corruption Act 1988*. As stated at page 157 of that report:

*To give effect to it [merits review], it would be necessary for another independent body of greater standing than ICAC to re-examine findings of fact made by ICAC. Were this right to be exercised routinely, it could prove to be a costly proposal of dubious benefit, given the capacity of the Supreme Court to review findings of ICAC on the administrative law grounds of illegality, irrationality or procedural unfairness, the ability of the proposed Inspector to investigate allegations of misconduct by ICAC and the capacity of ICAC itself to review its own findings.*

With respect, the ICAC agrees with that the views expressed in the 2005 and 2015 reports and submits that nothing has changed since the 2015 report such as to give rise to any reconsideration of the position taken by the Independent Panel.



## Part 4: The role and powers of the Inspector

The Committee reviewed possible accountability mechanisms suitable for adaptation for ICAC in a 2000 report.<sup>5</sup> The Committee concluded that the ICAC Act should be amended to provide for the establishment of an Inspector of ICAC to be modelled on the Inspector of the then Police Integrity Commission. The establishment of such an Inspectorate was supported by Bruce McClintock SC in his January 2005 report *Independent Review of the Independent Commission Against Corruption Act 1988*. The Independent Commission Against Corruption Amendment Act 2005 amended the ICAC Act to include provision for an Inspector of the ICAC.

The principal functions of the ICAC Inspector are set out in s 57B of the ICAC Act. They are to:

- audit the operations of the ICAC for the purpose of monitoring compliance with the law of NSW
- deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or ICAC officers
- deal with (by reports and recommendations) conduct amounting to maladministration (including delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or ICAC officers
- assess the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities.

The Inspector has extensive powers. These include the power to:

- investigate any aspect of the ICAC's operations or any conduct of ICAC officers
- require ICAC officers to supply information or produce documents or other things relating to the ICAC's operations or conduct of ICAC officers
- require ICAC officers to attend before the Inspector of the ICAC to answer questions or produce documents or other things relating to the ICAC's operations or the conduct of ICAC officers
- investigate and assess complaints about the ICAC or ICAC officers
- recommend disciplinary action or criminal prosecution against ICAC officers.

The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the minister, in response to a complaint made to the Inspector or in response to a reference by the Committee or any public authority or public official.

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<sup>5</sup> Accounting for Extraordinary Powers (May 2000) Report No 2/52nd Parliament.



A memorandum of understanding, entered into on 2 November 2017, sets out arrangements for liaison between the ICAC and the Inspector concerning referral of matters, access to information and points of contact between the ICAC and the Inspector's office.

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:

- a) any matters affecting the ICAC, including, for example, its operational effectiveness or needs, and
- b) any administrative or general policy matter relating to the functions of the Inspector, and
- c) any other matter relating to the exercise of a function to audit, deal with or assess any matter that the Inspector considers warrants the making, in the public interest, of a special report.

The Inspector is also required to prepare annual reports.

Reports made by the Inspector are made public by a Presiding Officer and are published on the Inspector's website.

Subject to one matter the ICAC considers that the powers granted to the Inspector are appropriate to enable detection of misuse of powers and for allegations of misuse of power to be effectively investigated.

That matter is identified in the Inspector's October 2020 report *Telecommunications (Interception and Access) Act 1979 (Cth) – Serious Gap in Inspector's Powers*. It concerns the long-standing deficiency in the current statutory scheme under the *Telecommunications (Interception and Access) Act 1979* whereby the Inspector is unable to access ICAC telecommunications interception material for the purpose of conducting an audit (as opposed to conducting a specific investigation). Although this is a matter for the Commonwealth Government, the ICAC supports amendment of that Act to enable the Inspector to audit its telecommunication interception records.

## Part 5: Other matters

This Part of the submission sets out the ICAC's recommendations for consideration to be given to certain amendments to the ICAC Act to enhance the ICAC's effectiveness.

### Proposed amendment to the ICAC Act to compel provision of digital passwords

The ICAC recommends that consideration be given by the Committee to recommending the ICAC Act be amended to include a power whereby a Commission officer entering onto premises during the execution of a search warrant or under an authority granted pursuant to s 23 of the ICAC Act may compel a person to provide access information for their digital device.

The ability of the ICAC to access electronic data from digital devices is essential to ensure the effective and efficient conduct of investigations.

As noted in Part 3 of this submission, there has been a significant increase in the amount of electronic data collected during the course of investigations. This is because of the increased use of electronic devices by the community in general, including those involved in investigations. Information obtained from digital devices is of significant importance in most investigations to establish what happened and who was involved. The ability however to prevent access to such information through the use of an access password or PIN can adversely impact upon the ICAC's ability to access such information.

For example, in a recent operation the ICAC lawfully executed a search warrant and located an electronic device which, it was suspected, contained information relevant to the investigation. The information however could only be accessed by using a password. The ICAC officers executing the search warrant did not have power to compel the owner of the device to provide the password.

In other cases, it may be necessary to access information on an electronic device in order to ascertain whether the device contains any information relevant to the investigation in order to make an informed decision that the device should be seized as part of the execution of the search warrant.

Other jurisdictions have varying powers to compel provision of such access information.

Provision is made in the *Crimes Act 1914* (Cth) for an order requiring a person to provide information or assistance to enable data held in a computer or data storage device to be accessed in relation to the execution of search warrants. Section 3LA(1) of that Act (which was originally introduced into the Act by the *Cybercrime Act 2001* (Cth)) provides that a constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to access data held in, or accessible from, a computer or data storage device that is:

- a) on premises for which a search warrant has been granted; or
- b) found in the course of an ordinary search of a person, or a frisk search of a person, authorised by a warrant; or
- c) has been moved under the warrant for examination or processing; or
- d) has been seized under the warrant.

That section also provides that such an order can require the specified person to provide any information or assistance that is reasonable and necessary to allow the constable to copy data held in, or accessible from, such a computer or data storage device, to another data storage device or convert such data into documentary form or another form intelligible to a constable.

In considering the need for such a power, it is relevant to have regard to the Commonwealth Attorney-General's Second Reading Speech in relation to the *Cybercrime Bill 2001*(Cth) explaining the introduction of s 3LA:

*The bill will enhance the criminal investigation powers in the Crimes Act 1914... relating to the search, seizure and copying of electronically stored data. The large amounts of data which can be stored on computer drives and disks and the complex security measures, such as encryption and passwords, which can be used to protect that information present particular problems for investigators. The proposed enhancement of search and seizure powers will assist law enforcement officers in surmounting those problems.*

.....

*A magistrate would be able to order a person with knowledge of a computer system to provide such information or assistance as is necessary and reasonable to enable the officer to access, copy or print data. Such a power is contained in the draft Council of Europe Convention on Cybercrime and will assist officers in gaining access to encrypted information.*

In Queensland, s 88A of the *Crime and Corruption Commission Act 2001* provides, in relation to the issuing of search warrants, that:

- (1) The issuer may, in the search warrant, order a specified person to do any of the following in relation to a digital device at the place –
  - (a) give a commission officer access to the device;
  - (b) give a commission officer access information for the device or any assistance necessary for the officer to gain access to device information from the device;
  - (c) allow a commission officer to –
    - (i) use access information for the device to gain access to device information from the device; or
    - (ii) examine device information from the device to find out whether the information may be relevant evidence; or
    - (iii) make a copy of device information from the device that may be relevant evidence, including by using another digital device; or
    - (iv) convert device information from the device that may be relevant evidence into documentary form, or another form, that enables the information to be understood by a commission officer.
- (2) The issuer may also, in the search warrant, order that a specified person is required to do a thing mentioned in subsection (1)(b) or (c) in relation to a digital device seized and removed from the place, after the device has been recovered.

In the Northern Territory Part 4 of the *Independent Commissioner Against Corruption Act 2017* deals with the entry onto premises used or occupied by a public body or public officer for public duties and the entry onto premises during the execution of a search warrant. Section 71(1)(g)(vi) of that Act provides that an authorised officer who enters such premises may require a person on or about the premises to:



give the authorised officer any translation, code, password or other information necessary to gain access to, or interpret and understand, anything located or obtained by the officer in the course of exercising the officer's functions under this Part.

Section 71(2) of that Act provides that a person to whom such a requirement is made must comply with the requirement to the extent the person is able to do so and, if asked a question, must do so to the best of the person's knowledge, information and belief. It is an offence not to comply. Section 71(3) provides that an offence against s 71(2) is an offence of strict liability.

The ICAC submits that an amendment to the ICAC Act, along the lines of s 71 of the *Independent Commissioner Against Corruption Act 2017*(NT) would be appropriate to ensure that the ICAC is able to access relevant electronic data protected by access passwords or codes both during the execution of a search warrant and entry onto public premises occupied or used by a public authority or public official pursuant to s 23 of the ICAC Act.

## Proposed amendment to s 111 of the ICAC Act

The ICAC recommends that consideration be given by the Committee to recommending the ICAC Act be amended to provide the option to allow information disclosed under s 111(4)(c) of the ICAC Act to be further disclosed without restriction.

Section 111 of the ICAC Act makes it an offence for certain persons to make a record of or divulge or communicate specified information.

Section 111(4)(c) of the ICAC Act permits information acquired in the course of the exercise of functions under the ICAC Act to be divulged in accordance with a direction of a Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest.

Section 111(5) of the ICAC Act provides that an authority or person to whom information is divulged under subsection (4) is subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) as if he or she were a person to whom s 111 applies and had acquired the information in the exercise of functions under the ICAC Act.

Arguably the effect of this provision is that recipients of information under a s 111(4)(c) direction are precluded from making a record of or divulging or communicating the information to any other person.

There are many occasions when it is appropriate that such restrictions apply to information provided under a s111(4)(c) direction. However, the uniform application of the s 111(5) restriction arguably results in a lack of flexibility in how the information may be used. There are circumstances where the further release of the information would not prejudice the ICAC's operations and would otherwise be appropriate. There will be circumstances where it is in the public interest to make certain information public. In such cases, there should be provision for a Commissioner or Inspector, as part of the direction, to specify that any further release of the information is not subject to the s 111 restrictions.

Such a provision is not without precedent in the ICAC Act.

Section 16(3) of the ICAC Act permits the ICAC to disseminate intelligence and information to law enforcement agencies. The s 111 secrecy provisions, however, do not apply to such disseminations

unless the ICAC specifies that the information is confidential (s 16(4)). Similarly, the ICAC may refer to any person or body a matter under s 53 of the ICAC Act. The s 111 secrecy restrictions only apply to information so referred if the ICAC specifies the information is confidential (s 53(6)).

## Proposed amendment to s 111E of the ICAC Act

The ICAC recommends that consideration be given by the Committee to recommending s 111E of the ICAC Act be amended to require the Premier, on behalf of the NSW Government, to advise the ICAC within three months of receiving any recommendation for the taking of action under s 13(3)(b) of the ICAC Act directed to the NSW Government whether there is any plan of action in response to such a recommendation and, if so, providing the ICAC with a copy of that plan.

Section 13(1) of the ICAC Act sets out the ICAC's principal functions, one of which, is to "to examine **the laws governing**, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and **to secure** the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct" (s 13(1)(d), emphasis added). By their nature, ICAC recommendations aimed at introducing or amending NSW laws, cannot be implemented by an individual public authority. Implementation typically requires consideration by the Government.

Section 111E of the Act requires a public authority to advise the ICAC in writing within three months of receiving any recommendation for the taking of action under s 13(3)(b) of the ICAC Act whether any plan of action in response to the recommendation and, if so, of the plan of action. The section is in the following terms:

- (1) As soon as practicable after making a recommendation under section 13(3)(b) for a specified public authority to take action to reduce the likelihood of corrupt conduct occurring, the Commission must furnish a copy of the recommendation to the authority and to the Minister for the authority.
- (2) The public authority must inform the Commission in writing within 3 months (or such longer period as the Commission may agree to in writing) after receiving the recommendation, whether it proposes to implement any plan of action in response to the recommendation and, if so, of the plan of action.
- (3) A public authority that informs the Commission of such a plan must provide a written report to the Commission of any progress in implementing the plan—
  - (a) 12 months after informing the Commission of the plan, and
  - (b) if the plan is not then fully implemented, 12 months after that.

Although s 13(1)(d) makes reference to measures "to secure" revisions to methods of work or procedures, it should also be noted that public authorities and public officials are not required to agree with or implement any of the ICAC's corruption prevention recommendations. The responses however and any resulting plans of action are routinely published on the ICAC's website and represent a valuable transparency measure.

In some recent matters, such as the ICAC's reports on its investigations into the regulation of lobbying, access and influence in NSW (Operation Eclipse) and political donations facilitated by Chinese Friends of Labor in 2015 (Operation Aero), recommendations were directed to the NSW Government rather



than individual public authorities. It is likely that future reports will also contain recommendations directed to the NSW Government rather than individual public authorities.

Where recommendations made pursuant to s 13(3)(b) are directed to the NSW Government, s 111E does not apply. This means that the NSW Government is presently not under any statutory obligation to inform the ICAC whether it intends to implement any changes arising from the ICAC's recommendations or, if it does intend to implement changes, to provide any plan of action outlining how those changes will be implemented. For example, the Operation Eclipse report contained a number of recommendations directed to the NSW Government. Although the report was furnished in June 2021, as of 30 June 2022 the ICAC has not received any response from the NSW Government as to whether or not any of the actions recommended by the ICAC will be implemented.

Extending s 111E as recommended above, would be consistent with the ICAC's principal functions and enhance the transparency over important corruption prevention initiatives.

# Appendix 1: Section 74 report preparation times – 1 July 2009 to 30 June 2022

**NOTE:** A public inquiry is complete as at the date of receipt of final submissions.

Financial year in which report was furnished	Public inquiry operation	Date public inquiry complete	Date investigation report tabled	Days from end of PI to furnishing to Parliament
2009-10	Tambo (7 days)	19/6/09	9/9/09	82
2009-10	Chaucer (3 days)	3/7/09	24/9/09	83
2009-10	Argyle (4 days)	21/7/09	4/11/09	106
2009-10	Columba (9 days)	19/10/09	9/12/09	42
2009-10	Segomo (8 days)	24/10/09	15/3/09	45
2009-10	Calpurnia (4 days)	3/2/10	25/3/10	50
2009-10	Corsair (2 days)	24/3/10	10/6/10	78
2009-10	Centurion (1 day)	6/4/10	13/5/10	37
2009-10	Coral (2 days)	16/4/10	2/6/10	47
2010-11	Vargas (4 days)	6/5/10	1/9/10	118
2010-11	Cicero (3 days)	17/5/10	27/7/10	71
2010-11	Corinth (4 days)	21/5/10	13/7/10	53
2010-11	Avoca (3 days)	11/6/10	12/8/10	62
2010-11	Kanda (5 days)	12/7/10	8/9/10	58
2010-11	Challenger (4 days)	23/11/10	15/12/10	22
2010-11	Magnus (25 days)	8/4/11	20/4/11	12
2010-11	Halifax (11 days)	18/8/10	10/11/10	81
2010-11	Siren (18 days)	1/11/10	22/3/11	141
2010-11	Syracuse (4 days)	27/10/10	7/12/10	41
2010-11	Danby (2 days)	18/2/11	12/5/11	83
2010-11	Churchill (4 days)	1/4/11	22/6/11	82
2011-12	Charity (16 days)	18/4/11	31/8/11	135
2011-12	Carina (2 days)	13/7/11	3/11/11	113
2011-12	Napier (12 days)	25/8/11	12/12/11	109
2011-12	Vesta (8 days)	14/9/11	16/12/11	93
2011-12	Barcoo (3 days)	30/9/11	18/1/12	110
2011-12	Barrow (3 days)	3/5/12	14/6/12	42
2012-13	Jarek (14 days)	13/6/12	29/10/12	138
2012-13	Crusader (5 days)	23/7/12	30/8/12	38
2012-13	Petrie (4 days)	20/4/12	27/9/12	160
2012-13	Citrus (8 days)	6/9/12	24/10/12	48
2012-13	Stark (4 days)	7/11/12	27/3/13	140
2012-13	Drake (2 days)	30/11/12	25/1/13	56
2013-14	Jarilo (7 days)	20/5/13	31/7/13	72

2013-14	Tilga (26 days)	21/12/12	26/9/13	<b>279</b>
2013-14	Indus (4 days) <sup>6</sup>	18/2/13	31/7/13	<b>164</b>
2013-14	Jasper (45 days)	19/4/13	31/7/13	<b>116</b>
2013-14	Acacia (37 days)	24/6/13	30/8/13	<b>67</b>
2013-14	Jasper & Acacia – outstanding questions <sup>7</sup>	24/6/13	18/12/13	<b>177</b>
2013-14	Torino (no public inquiry)	1/9/13	26/9/13	<b>26</b>
2013-14	Cavill (11 days)	11/4/14	30/6/14	<b>80</b>
2013-14	Meeka/Cabot (16 days) <sup>8</sup>	10/12/13	5/6/14	<b>177</b>
2013-14	Cyrus (16 days)	2/4/14	5/6/14	<b>64</b>
2013-14	Nickel (2 days) <sup>9</sup>	1/11/13	24/1/14	<b>84</b>
2013-14	Dewar (4 days)	7/2/14	28/5/14	<b>110</b>
2014-15	Spector (8 days)	18/7/14	13/10/14	<b>87</b>
2014-15	Verdi (5 days)	5/9/14	30/10/14	<b>55</b>
2014-15	Jarah (6 days)	18/3/15	3/6/15	<b>77</b>
2014-15	Misto (3 days)	21/3/15	25/6/16	<b>96</b>
2015-16	Tunic (15 days)	5/11/15	23/3/16	<b>139</b>
2015-16	Vika (5 days)	26/10/15	17/12/15	<b>52</b>
2015-16	Sonet (3 days)	26/11/15	4/3/16	<b>99</b>
2015-16	Elgar (5 days)	18/1/16	11/5/16	<b>114</b>
2016-17	Spicer (41 days) <sup>10</sup>	25/2/16	30/8/16	<b>187</b>
2016-17	Yancey (9 days)	5/3/16	22/11/16	<b>262</b>
2016-17	Nestor (3 days) <sup>11</sup>	23/6/16	23/2/17	<b>245</b>
2016-17	Greer (18 days)	12/9/16	23/2/17	<b>164</b>
2016-17	Scania (18 days) <sup>12</sup>	13/2/17	21/6/17	<b>128</b>
2017-18	Ricco (16 days)	15/5/17	26/7/17	<b>72</b>
2017-18	Artek (no public inquiry)	18/7/17	3/8/17	<b>16</b>
2017-18	Credo (22 days) <sup>13</sup>	25/2/16	3/8/17	<b>525</b>
2018-19	Tarlo (17 days)	23/1/18	19/9/18	<b>239</b>
2018-19	Yarrow (no public inquiry)	19/12/18	16/1/19	<b>28</b>

<sup>6</sup> Completion of report postponed to coincide with furnishing of Jasper report.

<sup>7</sup> Completion of report was dependent on receiving senior counsel's advice. Although counsel was briefed in September 2013, final advice was not received until 4 December 2013.

<sup>8</sup> Delay caused by Christmas break.

<sup>9</sup> Delay caused by Christmas break.

<sup>10</sup> Completion of report impacted by litigation, review of the ICAC Act and legislative change.

<sup>11</sup> Furnishing of report deferred to coincide with furnishing of Greer report.

<sup>12</sup> Report delayed due to resignation of case lawyer and need for new lawyer to review evidence/submissions before commencing draft.

<sup>13</sup> Completion of report impacted by litigation, review of the ICAC Act and legislative change.

2018-19	Estry (10 days)	30/4/19	3/6/19	<b>34</b>
2019-20	Gerda (14 days)	26/3/20	26/5/20	<b>61</b>
2020-21	Mistral (no public inquiry)	22/3/21	11/5/21	<b>50</b>
2020-21	Eclipse (7 days)	18/2/20	22/6/21	<b>490</b>
2020-21	Dasha (88 days)	25/10/19	22/3/21	<b>514</b>
2020-21	Avon (no public inquiry)	18/6/20	27/11/20	<b>162</b>
2020-21	Cygnnet (no public inquiry)	20/3/20	27/8/20	<b>160</b>
2021-22	Ember (23 days)	11/5/20	20/5/22	<b>739</b>
2021-22	Aero (36 days)	28/1/21	28/2/22	<b>396</b>
2021-22	Lancer (no public inquiry)	31/7/21	19/10/21	<b>80</b>

## Appendix 2: Selection of ICAC litigation matters

CASE	ISSUE
Kazal v ICAC [2019] NSWSC 556	Declaration sought that defendants had engaged in misfeasance in public office and a declaration that an ICAC report was ultra vires and findings the plaintiff gave false or misleading evidence were not made according to law and were a nullity.
Lazarus v ICAC [2018] NSWSC 997	Claim for removal of investigation report, removal of references to the relevant investigation and damages due principally to failure by the ICAC to engage a handwriting expert during the course of its investigation and public inquiry.
Knightsbridge North Lawyers Pty Ltd v ICAC [2018] NSWSC 387	Declaration sought that the ICAC's decision to conduct an investigation and hold a public inquiry were infected by jurisdictional error and void and of no effect.
Lazarus v ICAC [2017] NSWCA 37	Challenge to the validity of the <i>Independent Commission Against Corruption Amendment (Validation) Act 2015</i> and whether it applied to appeals against conviction pending in the District Court.
Obeid v Ipp & Ors [2016] NSWSC 1376	Claim that ICAC officers had committed the tort of misfeasance in public office.
Obeid v ICAC [2015] NSWSC 1891	Claim of jurisdictional error of law or error of law on the face of the record by constructive failure to exercise power under s 111(4)(c) of the ICAC Act to certify that it was necessary to divulge certain information.
McCloy v Latham [2015] NSWSC 1879	Order sought restraining the ICAC from continuing with an investigation (Operation Spicer) on the basis of apprehended bias on the part of the presiding Commissioner.
NuCoal Resources Ltd v ICAC [2015] NSWSC 1400	Claim the ICAC failed to apply rules of procedural fairness by failure to give proper and genuine



	consideration to oral and written submissions and failure to perform the duty fully investigate.
Waterhouse v ICAC [2015] NSWSC 261	Order sought requiring the ICAC to conduct an investigation.
A v ICAC [2014] NSWSC 1167	Injunction sought to prevent the ICAC from calling upon or enforcing a summons issued under s 35 of the ICAC Act for production of documents and a declaration that the summons be quashed as invalid and be set aside.
Duncan & Ors v ICAC [2014] NSWSC 1018	Declaratory relief sought on the basis that corrupt conduct findings and certain recommendations were nullities.
Cunneen v ICAC [2014] NSWCA 421	Claim that the allegations under investigation could not constitute "corrupt conduct" for the purposes of the ICAC Act.
Kazal v ICAC [2013] NSWSC 53	Orders sought setting aside or declaring invalid or unlawful an ICAC s 74 report, that the report was made without jurisdiction or in excess of jurisdiction and was a nullity and an injunction preventing the ICAC from acting on or taking any further steps in reliance upon the report.
D'Amore v ICAC [2012] NSWSC 473	Declaration sought that ICAC's report and findings of corrupt conduct were not made in accordance with law and were void for jurisdictional error (being absence of probative evidence sufficient to support the findings, irrationality and illogicality of the reasoning in support of the findings and absence of any reasonable basis for the findings in the material before the ICAC).