

**Submission
No 6**

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

Organisation: UNSW Law Society

Date Received: 28 July 2022

29 July 2022

MP Leslie Williams
Committee on the Independent Commission Against Corruption

Clerk of the Legislative Assembly and
Clerk of the Parliaments, NSW Legislative Council
6 Macquarie Street
Sydney NSW 2000

Dear Committee,

UNSW LAW SOCIETY SUBMISSION REGARDING THE EFFECTIVENESS AND APPROPRIATENESS OF THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988* (NSW).

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Committee Secretary of the Senate Legal and Constitutional Affairs Committee.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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INTRODUCTION

At the forefront of New South Wales' anti-corruption commissions stands the Independent Commission Against Corruption ("ICAC"). The UNSW Law Society notes that ICAC is an independent 'watchdog' committed to promoting integrity whilst exposing and preventing corrupt conduct within the public sector.¹ We acknowledge the importance of ICAC's inquisitorial investigative authority in upholding the rule of law and ensuring transparency and accountability in Australian Parliamentary processes. Whilst ICAC must be permitted to function effectively and independently in its investigative functions, issues pertaining to public interest must also be taken into account. Specifically, it is essential that ICAC's findings and operations accurately reflect objective facts and circumstances, and that the Commission is capable of making nuanced distinctions in its determination of corrupt conduct findings.

The effectiveness and appropriateness of ICAC must be assessed in relation to its ability to satisfy the objectives of the *Independent Commission Against Corruption Act 1988* (NSW) ("the Act"). Such a notion was encapsulated by Premier Nick Greiner, stating,

*"it would...be crass and naive to measure the success of the Independent Commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State."*²

This submission will assess ICAC's ability to inquire into and report on aspects of the Act, with particular reference to Term of Reference ("TOR") 2. That is, we intend to evaluate whether the Act continues to be effective and appropriate in light of the existing mechanism of judicial review that is available.

TERM OF REFERENCE 2

The current available mechanisms for judicial review by the Supreme Court are outlined by s 36B of the Act and supplemented by jurisprudence. There are five grounds for judicial review, and thus grounds for review are limited in scope.³ What transpires in reality is that courts have a limited ability to hold ICAC to account for its findings and decisions.⁴

¹ Sarah Withnall Howe and Yvonne Haigh, 'Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review's Ability to Guard the Guardians' (2016) 75(3) *Australian Journal of Public Administration* 305, 305.

² Michael Bersten, 'Making the ICAC Work' (1990) 1(2) *Current Issues in Criminal Justice* 67, 80.

³ *Duncan v ICAC* [2014] NSWSC 1018 (McDougall J), [35].

⁴ Sarah Withnall Howe and Yvonne Haigh, 'Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review's Ability to Guard the Guardians' (2016) 75(3) *Australian Journal of Public Administration* 305, 305.

Whilst this may not impact the effectiveness of ICAC in achieving its objectives, it does mean that the appropriateness of the ICAC's decisions cannot be adequately held to account via judicial review.⁵ Thus, judicial review cannot be relied upon as a mechanism to ensure that ICAC is operating in accordance with its legislative objectives. According to Howe and Haigh, three key limitations arise in respect of the capacity of judicial review to hold ICAC to account:

1. Firstly, confidentiality provisions such as s 50 in the Act, which precludes an applicant from accessing the information obtained during the investigative stages of the operation, and therefore restricts the court's ability to supervise ICAC's findings.⁶ A potential avenue of reform for this limitation could include an external review that remained confidential, separate from the courts;⁷
2. Secondly, the limited availability of remedies that courts can provide; and
3. Finally, the limited role of courts in that courts cannot initiate review, and thus have a reactive role.⁸ Consequently, applicants must have sufficient funds and resources to commence a review.

Furthermore, from a policy standpoint, the limited operation of judicial review in respect of ICAC may be said to increase the efficacy of ICAC through limiting interferences with decisions ICAC makes.⁹ However, judicial review is limited to legal errors and as such, the Court cannot review the merits of ICAC's decision nor remake it. Manifestly, there is no general statutory right to appeal an ICAC finding of corrupt conduct.¹⁰ Therefore, even if an individual is found corrupt by ICAC but later acquitted by a court from any criminal charge, the original ICAC finding cannot be revoked.¹¹ Undoubtedly, such a label of corruptness is detrimental to the individual's character and tarnishes their political and social reputation. A centralised non-judicial body should not be capable of inflicting severe reputational damage upon individuals without appropriate checks and balances. Therefore, the capacity of ICAC inquiries to damage an individual's reputation warrants the availability of judicial review at a minimum, and ideally the availability of further avenues for review of ICAC decisions.¹²

Notwithstanding the above, this submission does not posit that ICAC is free from accountability, scrutiny and oversight. Indeed, aside from s 36B judicial review, ICAC is also

⁵ Ibid, 308.

⁶ Ibid, 309.

⁷ Ibid, 309.

⁸ Ibid, 311.

⁹ Bathurst AC 'New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies' in Neil Williams (ed), *Key Issues In Public Law* (The Federation Press, 2018) 40.

¹⁰ Angela Gorta, 'The NSW independent commission against corruption's experience in minimising corruption' (2003) 11(1) *Asian Journal of Political Science* 1, 1.

¹¹ Gleeson CJ and Priestley JA in Greinen in Margaret Allars, 'In Search of Legal Objective Standards: The Meaning of Greiner v Independent Commission Against Corruption' (1994) 6(1) *Current Issues in Criminal Justice* 107, 107.

¹² Bathurst AC 'New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies' in Neil Williams (ed), *Key Issues In Public Law* (The Federation Press, 2018) 40.

held accountable by the *Freedom of Information Act* 1989 (NSW) in respect of functions which are not directly related to investigations, and investigative work being scrutinised by the Parliamentary Committee on ICAC and the ICAC Inspector.¹³ Both parties are conferred broad powers under the Act to periodically review and report on ICAC's performance.¹⁴

Rather, the UNSW Law Society proposes that current mechanisms for judicial review must be expanded and/or supplemented to better protect an individual's character and political and social reputation when embroiled in an ICAC finding of corrupt conduct.

RECOMMENDATIONS

Therefore, three recommendations under this term of reference can be made:

1. The grounds of judicial review should be expanded and made more accessible to applicants to reflect the confidential decision making process of ICAC. For instance, it is currently difficult for an applicant to argue that reasoning is not objectively reasonable, or that a finding has not been substantiated by evidence, in circumstances where they have not been privy to the evidence that is put against them; or
2. Alternatively, additional review mechanisms should be made available, given the limitations of judicial review. Such review mechanisms would be less confidential in nature and allow persons the subject of an ICAC investigation to be aware of the information put against them. Failure to afford adequate review mechanisms will otherwise compromise the provision of procedural fairness to those subject to ICAC investigations;¹⁵ and
3. Establish an Australian Federal Integrity Commission (AFIC) to oversee state-level anti-corruption commissions, like ICAC. To the extent courts cannot hold ICAC accountable, an AFIC provides necessary oversight of the structure, functions and powers of the investigative watchdog.¹⁶

Thank you for allowing us the opportunity to comment on this issue. The UNSW Law Society would welcome an opportunity to engage in any further consultations on this issue.

¹³ Margaret Allars, 'In Search of Legal Objective Standards: The Meaning of Greiner v Independent Commission Against Corruption' (1994) 6(1) *Current Issues in Criminal Justice* 107, 128.

¹⁴ Tim Prenzler and Nicholas Faulkner, 'Towards a Model Public Sector Integrity Commission' (2010) 69(3) *Australian Journal of Public Administration* 251, 258.

¹⁵ Bathurst AC 'New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies' in Neil Williams (ed), *Key Issues In Public Law* (The Federation Press, 2018) 41.

¹⁶ Australian Federal Integrity Commission Bill 2021 (Cth).