

**Submission
No 7**

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

Organisation: Office of the Inspector of the Independent Commission Against
Corruption

Date Received: 29 July 2022

SUBMISSION TO THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

Introduction

1. Thank you for your invitation to make a submission to the review of aspects of the *Independent Commission Against Corruption Act 1988* inquiry which has the following terms of reference
 - a. to determine whether the Act continues to be effective and appropriate, with particular reference to
 - i. the time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions
 - ii. the existing mechanism of judicial review
 - iii. the role and powers of the Inspector of the ICAC.
2. As you know, I have been in the position of Inspector for a few weeks. Accordingly, my submission largely raises issues rather than provides an opinion. Where I express a preferred position, that reflects my preliminary views without the benefit of experience in the role of the Inspector. As my views mature, I will be pleased to share them with the Committee.

Time standards

3. I note that in its recent report on 'Reputational impact of an individual being adversely named in the ICAC's investigations' November 2021, the Committee expressed concern that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years and recommended that

The Committee review whether there should be time standards in place for the ICAC to finalise reports, who should develop them, what those standards should be, whether they should be legislated and whether there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.
4. I observe that the Chief Commissioner gave evidence to the Committee on 18 September 2020 that the length of time a report is finalised depends on complexity and resources (transcript, page 47). The latest ICAC Annual Report also describes a number of factors the Commission attributes to delays.
5. My view is that the time frames set out in the ICAC's Annual Report 2021 for many of the identified Operations (in Table 22), are unacceptable and unfair to those who may have been adversely named during the proceedings.
6. I make the following observations about the matters being considered by the Committee.
7. First, the identification of the causes for the time frames is important in determining how to reduce them.
8. Secondly, do the time frames begin after the public hearings have finished, after Counsel Assisting serves their submissions or some other time? My preliminary view is that after the public hearings are complete and before Counsel Assisting serves their submissions is an appropriate time. The Commissioner directs when they should be served and when submissions in reply should be provided. Thus, the ICAC controls those time frames, including in granting any extensions.

9. Thirdly, as operations differ in their complexity and the volume of material to be considered, any time frames need to be flexible.
10. Finally, the desired outcome of the breach of any timeframe set needs to be identified. It may be that legislating any time frame may have unintended consequences for the validity of any findings or recommendations.
11. I have been contemplating conducting an audit to determine these matters and formulate recommendations to reduce the delays. I look forward to reviewing submissions to the Committee's inquiry and, in due course, the Committee's findings and recommendations.

The existing methods of judicial review

12. I have had the opportunity to read my predecessor's annual and special reports and the Review of the Jurisdiction of the Independent Commission Against Corruption by The Hon Murray Gleeson AC and Mr McClintock SC dated 30 July 2015 (the Review).
13. The Review considered the question of whether provision should be made in the Act, or in other legislation, such as the *Supreme Court Act 1970*, for general merits review of findings of corrupt conduct.
14. The Review did not recommend that course because it would involve an inappropriate confusion of administrative and judicial powers. The Review stated that 'to provide for merits review would add to the problem of misunderstanding as to the ICAC's role. It would make it look even more like a court' [3.4.8].
15. Further, the Review noted that 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 an investigation*' [3.4.4].
16. I respectfully agree with the conclusion reached by the Review and the reasons stated.
17. In relation to the grounds for judicial review available against the ICAC, the Review referenced *Duncan v ICAC* [2014] NSWSC 1018 at [35], affirmed on appeal by Beazley P (as her Honour then was) in *Duncan v ICAC* [2016] NSWCA 143 at [463]
 - (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 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.*
18. It noted that the ground not available is that the decision was wrong because it was affected by a mistake of fact.
19. I note that the Committee is open to consider whether the existing mechanism of judicial review could be codified in legislation to make its existence clearer and better understood by the wider public.
20. My initial thoughts about codifying the existing mechanism of judicial review are to approach this with caution. It may have the effect of precluding any new grounds developed by the courts being

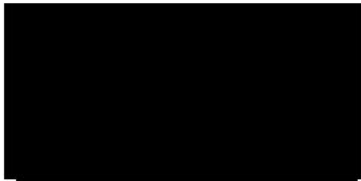
available to subsequent litigants. Further, it is unlikely that a prospective litigant would consider judicial review proceedings without the benefit of legal advice.

Inspector's Powers

21. In the short time I have been in the position of Inspector, I have not formed a view on the adequacy of the powers of the Inspector.
22. However, I make three observations on this topic. First, I note that the Review in 2015 did not agree that the role or powers of the Inspector needed to be expanded [11.1.10].
23. Secondly, I understand that my predecessor had advocated for the inclusion of the Inspector as an eligible authority under the Telecommunications (Interception and Access) Act 1979 (Cth) for the purpose of auditing the Commission's intercepted material. That amendment has not been made.
24. Finally, and related to the role of the Inspector, I note the recent Ombudsman Legislation Amendment Bill 2022 has the effect of removing an inconsistency between Schedule 1 of the Ombudsman Act 1974 and section 111C of the ICAC Act. The proposed amendment is intended to resolve this inconsistency and enable the Ombudsman to investigate the conduct of an ICAC commissioner, officer or former officer referred to the Ombudsman by the Inspector of the ICAC, consistent with section 111C of the ICAC Act.

Conclusion

25. I look forward to hearing the views of others during the course of the Committee's Inquiry and ultimately the findings and recommendations of the Committee about all of these important matters.



Gail Furness SC
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29 July 2022