

**Submission
No 12**

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

Organisation: Office of the Inspector of Law Enforcement Conduct Commission
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The Hon Leslie Gladys Williams MP
Chair
Committee on the Independent Commission Against Corruption
NSW Parliament House
6 Macquarie Street
Sydney NSW 2000

Lodged via NSW Parliament online submission portal

Re: Review of aspects of the Independent Commission Against Corruption Act 1988

Dear Ms Williams,

1. Thank you for your invitation to make a submission to the Committee on the Independent Commission Against Corruption (ICAC) in its 'Review of aspects of the *Independent Commission Against Corruption Act 1988*' (ICAC Act).
2. I was appointed Inspector of the Law Enforcement Conduct Commission (LECC) from 1 July 2022. As the Committee is aware, I was the Inspector of the ICAC in New South Wales from 2017-2022 and that experience informs this submission. I am also Inspector of the Independent Commissioner Against Corruption in the Northern Territory (ICAC NT) until late next year.
3. I also carried out the independent review of the ICAC Act completed in January 2005 and the independent panel review of the jurisdiction of the ICAC which I conducted with the Hon. Murray Gleeson AC in 2015.
4. In turn I will address each of the Committee's terms of reference.

The time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions

5. There has been much public commentary on the amount of time that it takes the ICAC to finalise its reports. There is a widespread view that the ICAC takes too long to finalise reports about its investigations. I share that concern and regret that I was unable, while Inspector, to improve the situation.
6. In the Committee's report 4/57 published in November 2021 on its reputational impact inquiry, the following finding and recommendation was made:

Finding 9

The Committee is concerned 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.

Recommendation 6

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.

7. The matters that I raise in respect of time standards are guided by Recommendation 6.
8. I believe that there should be time standards in place for the ICAC to finalise reports. Delay in the finalisation of reports poses reputational and other risks to the ICAC itself as well as to persons the subject of its enquiries. It is of concern that delay may detrimentally impact the welfare of affected persons and other witnesses.
9. The time standards currently applied by the ICAC for finalisation of investigations and reports are informed by workforce and process reviews conducted by KPMG but are ultimately created by the ICAC itself.
10. By comparison, the ICAC NT has certain Key Performance Indicators (KPIs) imposed on it by the Northern Territory Government's Agency Budget Statements. They are set out on page 19 of its 2020-21 Annual Report and include time standards for certain functions. However, the budget papers do not impose a time standard for the finalisation of its reports on investigations. I understand that other like agencies, such as the Victorian Independent Broad-Based Anti-Corruption Commission (IBAC), also have performance measures imposed by way of budget papers. To which, see pages 13-14 of the IBAC 2020-21 Annual Report.
11. I note that those agencies themselves would be best placed to explain the details of their current standards and furthermore, to express views about their efficacy based on their experiences.
12. I am not aware of a legislated time standard imposed on an Australian integrity agency to finalise reports about investigations. I doubt whether legislated time limits are feasible because each ICAC investigation is unique, and its activities are not really suited to application of general rules. If a timeframe were to be legislated, there should be careful consideration of the consequences for a failure to comply.
13. On the question of what the standards should be, I do not wish to propose a specific standard as part of this submission. However, I note the motion passed by the Legislative Council on 8 June 2022 which concerned the exploration of ways for the ICAC to expedite its reports and signalled the "possible adoption of a time standard of tabling a report no more than 12 months after public hearings have concluded or final submissions are made in a matter."
14. In my view, any standard should have a measure of flexibility or an allowance for some exceptions. It should also have regard to the varied complexity of ICAC investigations.
15. As to who should develop any standards, I respectfully submit that no matter who the Committee ultimately considers should develop standards, that the standards may be most constructively developed in consultation with the ICAC.

The existing mechanism of judicial review

16. This matter was dealt with at [3.4] of the Report of the Independent Panel-Review of the Jurisdiction of the ICAC in which I prepared with the Hon. Murray Gleeson AC in 2015, as follows:

- 3.4.1 *As an administrative body, 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 both an inherent and a statutory jurisdiction to ensure that the ICAC carries out its functions and performs its duties in accordance with law. The decision in Cunneen was an exercise of that jurisdiction.*
- 3.4.2 *There is an important difference between the kind of judicial review referred to in paragraph 3.4.1 and an appeal of the kind that exists in respect of a judicial decision. The presently relevant grounds of potential judicial review of an ICAC report were summarised by McDougall J in *Duncan v ICAC* as follows:*
- (1) there is a material error of law on the face of the record (which includes the reasons given for the decision...);*
 - (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.*
- 3.4.3 *What is not available as a ground of review is the most common ground in appeals from a court: that the decision was wrong because it was affected by a mistake of fact. In brief, there is no merits review of an ICAC finding.*
- 3.4.4 *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.*
- 3.4.5 *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, which, in turn, would have consequences in respect of other administrative bodies, or the creation of a new form of internal or external review.*
- 3.4.6 *The New South Wales Bar Association made a submission to the Panel which recognised the problem referred to in paragraphs 3.4.4 and 3.4.5. It argued that an appropriate form of review would be one analogous to that undertaken by the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977 (Cth), with any counterpart of section 5(1)(h) framed in more expansive language such as: “the decision was not reasonably supported by the evidence or other material before the Commission”.*
- 3.4.7 *The ground in section 5(1)(h) is “that there was no evidence or other material to justify the making of the decision”. That is not merits review. What is proposed seems more like an expanded form of what is sometimes called Wednesbury unreasonableness. It appears close to administrative oversight rather than judicial review.*
- 3.4.8 *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 as to the ICAC's role. It would make it look even more like a court.
[footnotes omitted]

17. My views on this issue have not changed. It would be a serious error, I believe, to change the existing system of administrative review and to introduce any form of merits review. I should also add that long experience has taught me that courts are not particularly good at reviewing the merits of decisions made by administrative agencies such as the ICAC.

The role and powers of the Inspector of the ICAC

18. I once more refer to the Committee's report 4/57 and turn to recommendation 8 '[t]hat the Committee review the Inspector of the ICAC's powers under the ICAC Act.' Under that recommendation on page 36 the Committee reported:
- 4.25 *While the Committee is satisfied with the Inspector's use of their current powers, it recommends a review of the Inspector's powers under the ICAC Act. The Inspector cannot conduct a merits review of the ICAC's findings but individuals may make a complaint under the functions outlined in paragraph 4.22.*
- 4.26 *The Committee considers that the statutory provisions regarding the Inspector's functions, as outlined in the ICAC Act, may not be sufficient in providing redress against reputational harm. The Committee heard examples where previous Inspectors have found that the conduct of the ICAC was an abuse of power or maladministration and the only options for redress for the affected individual was the publication of the Inspector's reports on their website.* [footnotes omitted]
19. In my experience as an Inspector of three separate but like Commissions, I have operated under broadly similar powers.¹ I have not encountered anything in the performance of those roles that has caused me to consider that the powers available under the respective legislation need to be expanded or otherwise modified.
20. The Inspector of the ICAC cannot conduct a merits review and for the reasons expressed in the passage from the Report of the Independent Panel quoted at [14] above, I submit that is rightly so. In addition, merits review by the Inspector could only be accommodated if there were a significant increase in staff and resources available to the Inspector.
21. My views about redress for reputational harm are set out my submission to the Committee's reputational impact inquiry dated 16 July 2020.
22. The perception that the only 'options for redress' for affected persons is the publication of the Inspector's reports on their website is not strictly accurate. Part 5A of the ICAC Act also gives the Inspector the power to make recommendations.
23. I note, however, that it does not provide for the escalation of the Inspector's recommendations if the ICAC does not take due or proper action in response to a report or recommendation. On that issue, the Committee may wish to have regard to the powers of the Inspector of the LECC, as provided in section 124 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act).

¹ See: Part 5A of the ICAC Act, Part 9 of the LECC Act and Part 7 of the *Independent Commissioner Against Corruption Act 2017* (NT).

Conclusion

24. Should the Committee wish to ask questions arising from my submission, it is welcome to contact my Office. I look forward to the Committee's report and findings in this inquiry.

Yours sincerely,



Bruce McClintock SC
Inspector, Law Enforcement Conduct Commission