

**Submission  
No 16**

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

**Organisation:** Rule of Law Institute of Australia

**Date Received:** 4 August 2022

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By email: [icaccommittee@parliament.nsw.gov.au](mailto:icaccommittee@parliament.nsw.gov.au)

Dear Mr Williams,

**Submission to the Committee on the Independent Commission Against Corruption (ICAC) inquiry into Review Aspects of *the Independent Commission Against Corruption Act 1988*.**

The Rule of Law Institute of Australia (the Institute) thanks the Committee for the opportunity to make a submission regarding the *Independent Commission Against Corruption Act 1988* and the time standards in place for ICAC to finalise reports.

The Institute is an independent, non-partisan, not for profit formed to promote and uphold the rule of law in Australia. Its work is supported by over 600 members. The objectives of the Institute include promoting good governance in Australia by the rule of law and encouraging transparency and accountability in State and Federal Government.

**Summary**

It is beyond argument that the ICAC is not meeting its own time standards.

While that needs to be remedied, it is the view of the Institute that the Commission's internal difficulties need to be viewed in context. They are part of a bigger problem: systemic delays in bringing wrongdoers to justice after they have been dealt with by ICAC.

The Institute urges the Committee to consider remedies that streamline that entire process by eliminating bottlenecks at the Commission.

This submission outlines problems with all parts of the system - starting with ICAC and extending to the Office of Director of Public Prosecutions (DPP) and the courts. Those problems are the result of procedures imposed by the Independent Commission Against Corruption Act.

We suggest several possible changes aimed at eliminating structural inefficiencies that, we submit, have delayed criminal justice for people who have been accused of corruption by ICAC.

## What is the Rule of Law and Why is it relevant to ICAC?

As written on the Attorney General of Australia's website<sup>1</sup>:

*The **rule of law** underpins the way Australian society is governed. Everyone- including citizens and government- is bound by and entitled to the benefit of laws.*

The Magna Carta in 1215 established the Rule of Law and the idea that all citizens, including those in power, should be fairly and equally ruled by the law. It began the tradition of respecting the law, limiting government power, providing a fair and prompt trial and the protection of human rights that we enjoy in Australia today. Relevantly, clause 40 of the Magna Carta states:

***To no one** will we sell, to no one will we refuse **or delay**, right or justice*

This is reflected in Article 9 of the International Covenant on Civil and Political Rights:

*Anyone arrested or detained on a criminal charge shall be brought **promptly before a judge or other officer authorised** by law to exercise judicial power and shall be entitled to trial **within a reasonable time or to release**.*

The Institute considers that ICAC must have practices that are consistent with the Rule of Law. In particular, ICAC must ensure they do not cause undue delays to justice nor impact the right to a fair and prompt trial.

## ICAC's Failure to meet Time Standards

The Commission's latest annual report<sup>2</sup> says it has key performance indicators for the timeliness of its investigations. It aims to complete 80 per cent of preliminary investigations within 120 days. But the proportion of preliminary investigations actually completed within 120 days has declined from 87.5 per cent in 2019-20<sup>3</sup> to 62.5 per cent in 2020-21.<sup>4</sup>

Once a matter is escalated to a formal "operation", the Commission aims to complete 80 per cent these matters within 16 months. But that target is not being met. The percentage of operations completed within 16 months has decreased from 30 per cent in 2019-20<sup>5</sup> to 20 per cent in 2020-21.<sup>6</sup>

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<sup>1</sup> <https://www.ag.gov.au/about-us/what-we-do/rule-law>

<sup>2</sup> ICAC annual report, 2020-21, page 34

<sup>3</sup> ICAC annual report 2019-20, table 16, page 33

<sup>4</sup> ICAC annual report 2020-21, table 15, page 35

<sup>5</sup> ICAC annual 2019-20, table 18, page 30

<sup>6</sup> ICAC annual report 2020-21, table 17, page 36

The average time taken to complete a full investigation has increased from 558 days in 2019-20<sup>7</sup> to 807 days in 2020-21.<sup>8</sup>

These figures suggest ICAC's performance, when measured against its own key performance indicators, has deteriorated sharply, which the Commission attributes to special factors including the pandemic.

**However, research by the Rule of Law Education Centre suggests that examining the role of ICAC in isolation - without considering the Commission's broader impact on the justice system - might leave an incomplete impression.**

That research, which is attached to this submission, has found delays of up to seven years in securing convictions against wrongdoers who have been found corrupt by ICAC after public inquiries.

When measured from the first day of a public hearing by ICAC to the day on which wrongdoers are sentenced by a court, the delay has almost doubled - up from two years and six months in 2012 to four years and nine months in 2017. That research, which covers the years 2012 to 2017 found that the average delay over the six year period was three years and ten months. The research identified one person who is still waiting to be sentenced seven years after the start of a public hearing that resulted in a finding of corruption.

It is the view of the Institute that examining time standards at ICAC without considering these factors could lead the Committee to overlook systemic issues that require remedies - or at least further investigation.

### **Example of Delays to Justice**

This became apparent to the Institute after an examination of the delay in bringing to justice some of the state's most notorious wrongdoers. As stated in the Magna Carta, speedy justice is a right for all individuals, no matter their status, occupation, religion, gender, or alleged crime.

This has persuaded the Institute of the need to reform the ICAC Act to ensure there is no repeat of the problems that affected the criminal prosecution of Eddie Obeid, his son Moses and Ian Macdonald after they had been investigated at length by ICAC.

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<sup>7</sup> ICAC annual report 2019-20, table 18, page 33

<sup>8</sup> ICAC annual report 2020-21, table 17, page 36

The reforms we suggest are aimed at streamlining the flow of information from ICAC to the Office of the Director of Public Prosecutions in a way that would reduce the Commission's legal costs and help it close the most important inquiries much faster. They might also ease the burden on the Supreme Court which is obliged to provide a fair trial for serious wrongdoers who have been investigated by ICAC.

In July last year, the Supreme Court's Justice Elizabeth Fullerton handed down guilty verdicts in a conspiracy case against the Obeids and Macdonald. That judgement concerned events that took place up to fourteen years in the past at the time the case was finalised. They had been known to ICAC for more than a decade.

The Crown indictment, which is reproduced in Justice Fullerton's judgement, accused Macdonald and the Obeids of conspiring "between about 1 September 2007 and about 31 January 2009".<sup>9</sup> The Commission received a tip off in February, 2011, which is outlined in the report on this affair that was produced by ICAC in July, 2013 - almost two and a half years after the Commission learned of these events.

ICAC's report from an inquiry known as Operation Jasper, dated July, 2013, says at page 14:

*"In February 2011, the Commission received an allegation by a private individual that confidential information regarding the 2008 public tender for the awarding of the Mount Penny mining tenement, in the Bylong Valley, had been "leaked" to members of the Obeid family."*

Last July, ten years after that information was provided to ICAC, Justice Fullerton reached the same conclusion.

**It is the view of the Institute that the delay in bringing the Obeids and Macdonald to justice might have been eased if the ICAC Act had required the Commission to give the highest priority to the interests of justice.**

Once the Commission had verified the information it had received in 2011 and had assembled sufficient evidence to show that an offence might have been committed, it could have avoided some delays by suspending its inquiry and immediately providing that material to the DPP.

Proceeding with a public hearing after taking evidence from the Obeids and Macdonald at private compulsory examinations merely added to the delay in bringing them to justice - and legal costs that were ultimately met by taxpayers.

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<sup>9</sup> R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 17) [2021] NSWSC 585 (Fullerton's judgement).

It also complicated the task confronting Justice Fullerton who had to ensure these men received a fair trial after sensational allegations at the public hearings were reported in the media. She ordered a temporary stay on proceedings in the hope that this would ease the prejudicial impact of adverse publicity on potential jurors. Ultimately, however, she abandoned her plans for a jury trial.

## Recommendations

The deterioration in ICAC's performance when measured against its KPIs needs to be remedied. **It is the view of the Institute that one way of doing this is to oblige the Commission to provide the DPP with evidence of possible criminal conduct at the earliest possible moment.**

That could require the Commission to adopt the approach of the Coroners Court and suspend an inquiry at any stage once it is clear that an indictable offence may have been committed. Section 78 of the Coroner's Act provides an appropriate model for changes to the ICAC Act.

*If at any time during an inquiry a coroner forms the opinion that the evidence shows there is a reasonable prospect that a jury would convict a known person of an indictable offence, the coroner is empowered to suspend the inquiry.*

Once that takes place the Coroner is required to give the DPP all depositions and provide the name of the person concerned and the particulars of the relevant indictable offence.

The logic of this procedure should apply equally to ICAC: there is a public interest in conducting inquiries and uncovering facts. But there is a greater public interest in bringing serious wrongdoers to justice without delay.

There is an equally important public interest in protecting their right to a fair trial by avoiding actions that could cause prejudicial publicity and taint the pool of potential jurors. The Commission is an investigator, not a court. But it deals with matters that can come before the courts. It should therefore be required, as part of its statutory responsibilities, to give priority to the Rule of Law and requirements of the justice system.

In the case of the Obeids and Macdonald, ICAC's own procedures took almost two and a half years when measured from the time of the tip-off in February, 2011, to the time of the Jasper report in July, 2013. The greatest contributor to the delays in this case seems to have been the task confronting the DPP once it received the material that had been assembled by ICAC.

ICAC is not bound by the rules of evidence and can coerce people to answer questions and produce documents. But section 37 of the ICAC Act means material produced under coercion cannot be used

as evidence against that person in subsequent civil and criminal proceedings. In order to prepare a case based on admissible evidence, prosecutors must therefore go over much of the same ground and build a case that meets the requirements of the justice system.

Justice Fullerton's judgement shows that prosecutors did not produce their first indictment against the Obeids and Macdonald until July 13, 2017. That was four years after ICAC produced its report on Operation Jasper in July, 2013. It was not until almost six years after ICAC's Jasper report that the DPP produced a final, amended version of that indictment<sup>10</sup> on April 8, 2019, by which time pre-trial hearings were under way.


The DPP clearly had difficulty preparing a case based on the material from ICAC. This suggests that a long-term solution to this sort of delay might require more than merely adopting procedures modelled on the approach in the Coroners Act.

It might also require the Commission to more closely align its procedures with the requirements of the justice system by winding back and eventually eliminating the use of coercion - at least for those matters in which criminal proceedings are foreseeable. That would ease concerns among prosecutors about the admissibility of some of ICAC's evidence.

Another option would be to remove responsibility for investigating serious indictable offences from ICAC and allocate that task to an agency that adheres to the requirements of the justice system. This could be done as soon as the nature of the conduct under investigation becomes apparent.

This would relieve the Commission of the burden of dealing with some complex matters thereby freeing resources to ensure the remaining matters are dealt with in a timely manner.

Yours faithfully



**Chris Merritt**  
Vice President

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<sup>10</sup> Fullerton's judgement, *ibid*; paragraph 3

## NSW ICAC (Independent Commission Against Corruption) Summary of Investigations

These findings include data from the 28 NSW ICAC Investigation Reports published from the years 2012 to 2017\*. In summary, 136 individuals were found to have been involved in corrupt conduct with 29% going on to being sentenced by the Courts. The average time from the date of Public Inquiry to Sentencing was almost 4 years (3 years and 10 months).

### 1. Time from Public Inquiry to Date of Sentencing

The first aim of the research was to investigate the length of time in-between the public inquiry and the date of sentencing for the individuals who have been found corrupt by ICAC. From the years 2012 to 2017, the average length of time from Public Inquiry to Court Sentence is **3.9 years or 3 years and 10 months**. Figure 1 shows the breakdown of this number from year to year:

	2012	2013	2014	2015	2016	2017
Time from Public Inquiry to Sentencing	2 years 6 months	3 years 1 month	3 years 4 months	3 years 8 months	5 years 8 months	4 years 9 months

The data showed that it can take anywhere from 1 year and 9 months (Mr Au in Operation Barrow 2012) to over 6 years (Mr Chacra in Operation Yancey 2016) from the time of Public Inquiry to date of sentencing. These figures do not take into account those individuals who are still waiting to be sentenced such as Mr Andjic in Operation Yancey 2016 whose Public Hearing was over 7 years ago.

### 2. Individuals found to have engaged in Corrupt Conduct but not criminally charged

The second aim of the research was to investigate what percentage of people who received a corrupt finding were also sentenced through the court system. From the years 2012 to 2017, only **29%** of people who were found corrupt through an ICAC investigation were then sentenced in the court system. Figure 2 shows the breakdown of this number from year to year:

	2012	2013	2014	2015	2016	2017
% Individuals found corrupt but not sentenced	20%	14%	23%	77%	25%	45%

For example, in Operation Jarek in 2012, 41 individuals were found to have been involved in corrupt conduct, but only 6 (14%) of these individuals were sentenced.

#### Methodology

The information for this report was sourced from the NSW ICAC website: [ICAC Past Investigations](#) page, under each individual operation's page. The information about the investigation and Public Inquiry was found in the official report for each investigation, while the information about the DPP and trial was found under the *Recommendations for Prosecutions* drop-down menu on the operations' page. The information collected includes: the Name of the Operation, the individual investigated, when the public inquiry was conducted, the result of the investigation, when the DPP (Director of Public Prosecutions) served the court notices, the crimes which the individuals were charged with and the result of the trial, including their date of sentencing. \*Note: The years 2018 and onwards are not included in these data sets as cases are still going through the court system