Submission No 17

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

Organisation: New South Wales Bar Association

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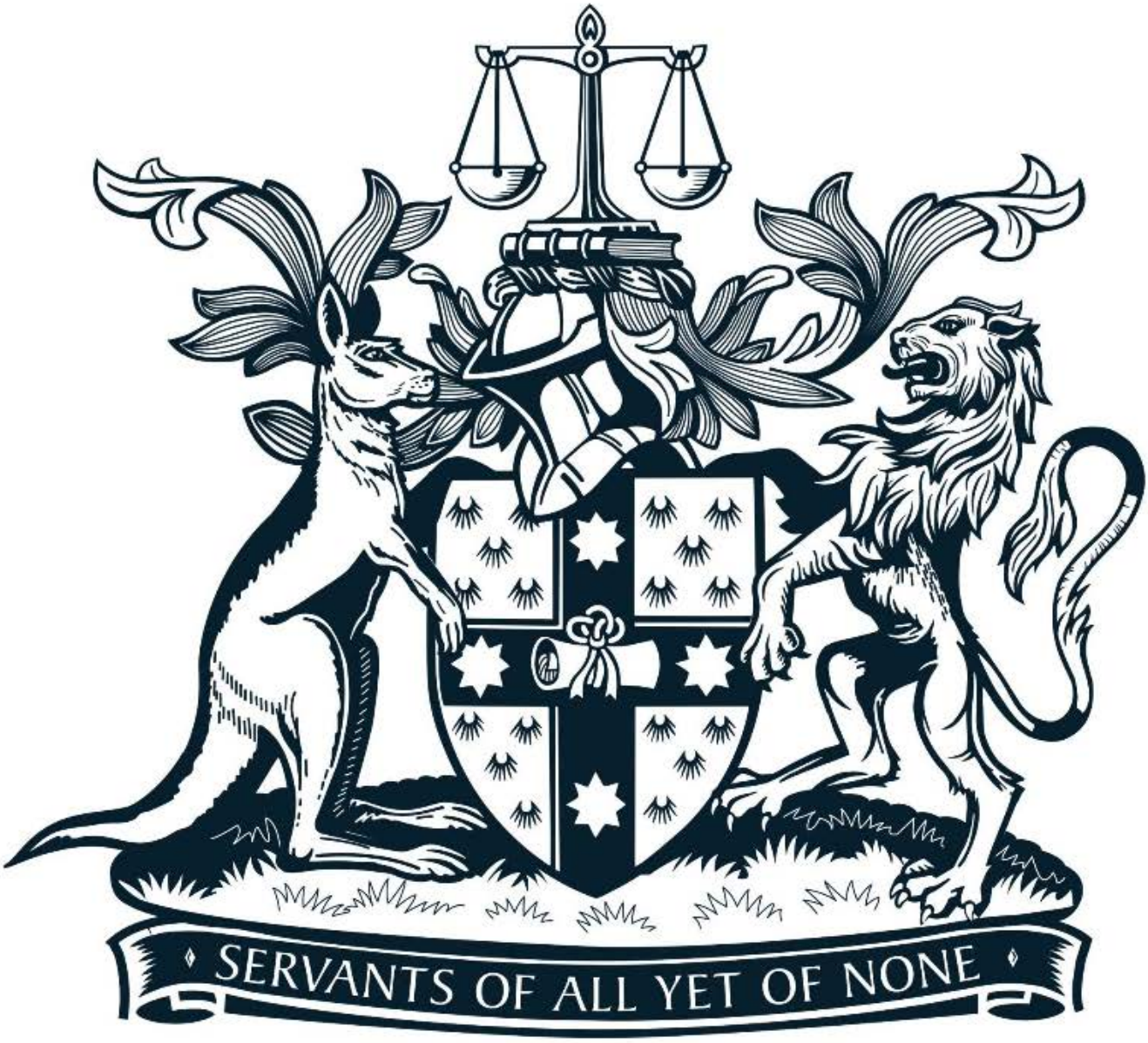

Committee on the Independent Commission Against Corruption – Review of Aspects of the *Independent Commission Against Corruption Act 1988* (NSW)

5 August 2022

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

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NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of around 2,400 barristers who principally practice in NSW. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Public Law Section and Inquests and Inquiries Committee. If you would like any further information regarding this submission, please contact the Association's Policy and Law Reform team on 02 9232 4055.

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A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Committee on the Independent Commission Against Corruption (**the Committee**) for the invitation to provide a submission to its review on aspects of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**), the purpose of which is to determine whether the Act continues to be effective and appropriate, with particular reference to:

    (1) the time standards in place for the Independent Commission Against Corruption (**ICAC**) to finalise reports and the relevant practices in other jurisdictions;

    (2) the existing mechanism of judicial review; and

    (3) the role and powers of the Inspector of the ICAC.

2. The Association notes that the review arises out of the Committee's report on the 'Reputational impact on an individual being adversely named in the ICAC's investigations', tabled in November 2021 (**November 2021 report**).

3. This submission addresses each of these terms of reference in turn below. In summary, the Association's view is that:

    (a) the ICAC should be required to publish time standards for the furnishing of reports in relation to matters in which the ICAC has conducted a public inquiry, but specific time limits or standards should not be legislated;

    (b) the existing mechanism of judicial review of the ICAC's findings is appropriate and should not be codified in legislation. Such codification is unlikely to achieve additional clarity and would lack the flexibility of the common law; and

    (c) the Inspector has sufficient powers under the ICAC Act to obtain information related to complaints and to provide forms of redress where affected persons suffer reputational harm (which powers are not limited to the publication of the Inspector's reports online). The Association would oppose an expansion of the Inspector's powers to allow merits review of the ICAC's findings.

B. Substantive Submissions

1. TIME STANDARDS

(a) Introduction and overview

4. In its November 2021 report, the Committee recommended that it review whether there should be time standards in place for the ICAC to finalise reports. The Committee was "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" (at [3.49]). While acknowledging that the work the ICAC does is "vital", the Committee was also conscious that the ICAC's processes "take a significant toll on all those involved and that all who are involved should know the outcome of inquiries in a reasonable timeframe" (at [3.49]).

5. The question is whether the ICAC should have time standards and, if so, who should develop them, what those standards should be, whether they should be legislated, and whether there should be exceptions to those standards.

6. The Association's view is that the ICAC should be required to publish information setting out time standards that it adopts for finalising and furnishing the reports required in matters in which the ICAC has conducted a public inquiry, and should be required to explain in the relevant report any departure from those standards.

(b) Reasons in favour of time standards

7. It is a well-known legal maxim that "justice delayed is justice denied".[1] Chief Justice Gleeson said that "[u]ndue delay in decision-making, whether by courts or administrative bodies, is always to be deplored".[2] In the context of courts, it has been recognised that "[c]ompelling parties to await judgment for an indefinitely extended period prolonged the stress caused by litigation and weakened public confidence in the whole judicial process".[3]

8. There is no doubt that delay in the finalisation of the ICAC's reports also has the potential to prolong the stress caused by the investigation to those affected by it. In addition, given some of the conduct that the ICAC investigates could constitute or involve criminal conduct[4], any delay in the finalisation of the ICAC's proceedings may have a consequential delay on the prosecution of individuals for criminal offences. Such delays have the potential to undermine the effectiveness of those investigations and future prosecutions.

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[1] See recently, eg, *Clayton v Bant* (2020) 95 ALJR 34 at [60] (Gordon J). See also *R v Lawrence* [1982] AC 510 at 517 (Lord Hailsham of St Marylebone LC).

[2] *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [5].

[3] *Goose v Wilson Sandford & Co* [1998] EWCA (Civ) 245, quoted in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [166] (Callinan and Heydon JJ).

[4] Section 9, *Independent Commission Against Corruption Act 1988.*

9. Presently, the only time "standard" set out in the ICAC Act is that a report required under s 74 (which applies to reports in relation to matters as to which the ICAC has conducted a public inquiry and reports in relation to a matter referred to the ICAC by both Houses of Parliament) shall be furnished "as soon as possible" after the ICAC has concluded its involvement in the matter. The ICAC is also authorised by s 74(8) of the ICAC Act to defer making a report if it is satisfied that it is desirable to do so in the public interest (except as regards a matter referred to the ICAC by both Houses of Parliament).

10. Broadly speaking, there would be two benefits of setting time standards for the finalisation of reports by the ICAC. *First*, a time standard would provide those affected by an investigation with an indication as to when to expect the finalisation of the inquiry. In this regard, where there is no published time standard, the stress caused by a lengthy investigation may be exacerbated by the uncertainty as to when the inquiry is likely to end. *Secondly*, a time standard would provide a clear benchmark for the ICAC to work towards, which may foster more timely reports, and would call for some explanation from the ICAC if not met.

11. As the Committee noted in its November 2021 report (at [3.50]), some courts have time standards in place for the delivery of judgments. For example, each of the Federal Court,[5] the Federal Circuit and Family Court of Australia,[6] and the New South Wales Land and Environment Court[7] aim to deliver judgment within three months from the date on which the judgment was reserved. Other courts have policies in place for inquiries to be made about delay in the delivery of judgments. For example, the New South Wales Supreme Court has a policy which allows parties or legal representatives to make an inquiry where a "reserved judgment has been outstanding for an unreasonably long time".[8] Each of these policies has been adopted by the relevant court and has not been imposed by legislation.

(c) **Difficulties in setting time standards**

12. There are at least two difficulties in imposing time standards on the ICAC.

13. *First*, as the Committee discussed in its November 2021 report (at [3.45]-[3.48]), the length of investigations depends on the complexity of the investigation and the resources available to the ICAC. The Chief Commissioner of the ICAC observed that, if the ICAC had more resources, time frames could be reduced, but that "due to current limitations [the ICAC] could not operate more efficiently than at present" (at [3.45]). The Committee acknowledged that "funding and resources is an ongoing concern for the ICAC" (at [3.48]).

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[5] See https://www.fedcourt.gov.au/feedback-and-complaints/reserved-judgments.

[6] See https://www.fcfcoa.gov.au/policies-and-procedures/complaints-policy.

[7] See https://www.lec.nsw.gov.au/lec/feedback-and-complaints.html

[8] See https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Delays%20in%20reserved%20judgments.%2023%20Sept%202020.pdf.

14. It would be futile to set time standards with which the ICAC could not comply due to resource limitations. As Brennan J said in *Jago v District Court (NSW)* (1989) 168 CLR 23 (at 41):

> … it is a truism that justice delayed is justice denied. In Lord Bacon's words (quoted by Dr Kenny, op cit, p 607) "[j]ustice is sweetest when it is freshest". Therefore, within the limits of their resources, the courts so mould their procedures as to avoid unnecessary delays in the disposition of cases both criminal and civil. But the avoidance of delay in administering justice is not the sole concern of the courts. The courts do not have command of all of the resources which are necessary to secure prompt justice and, if they were to assume a responsibility beyond their capacity, they would offer a hope of protection which they are unfitted to fulfil. The furthest which a court can go is to regulate its procedures to avoid unnecessary delay, to do what can be done to achieve fairness in a trial and to prevent the abuse of its process. (emphasis added)

15. *Secondly*, there is a difficulty in determining the point at which any time standard should start to run. The ICAC does not conduct "final hearings" in the way that courts generally do. Rather, in some but not all cases, the ICAC conducts "public inquiries" for the purposes of an investigation. In other words, a public inquiry is a tool that may be used by the ICAC in aid of its investigative functions. Where a public inquiry is conducted, there is a common misconception that the investigative phase of an inquiry by the ICAC finishes at the conclusion of the public inquiry. However, there may be several months of further investigation that takes place after the conclusion of a public inquiry. For example, a public inquiry might reveal evidence that requires further investigation (with or without a further public inquiry). In addition, by reason of the requirement of the ICAC to afford procedural fairness, it may be necessary or appropriate for persons affected by an investigation to be given a significant period of time to respond to submissions made by counsel assisting as to adverse findings that should or could be made in the ICAC's report. It thus may be difficult to determine when the investigation phase ends and where the deliberation/reporting stage begins for a particular investigation. In general, however, insofar as public inquiries are concerned, the finalisation of the process of making submissions (by both counsel assisting and affected persons) may provide an appropriate "end point" of the investigation from which a time standard could run for the publication of the ICAC's report.

(d) Time standards in other jurisdictions

16. In its November 2021 report (at [3.51]), the Committee recommended that it should examine the practice of like bodies in other jurisdictions in considering whether there should be time standards in place for the ICAC reports.

17. The Association has not identified any legislative provision which imposes a particular length of time by which a commission equivalent to the ICAC in another jurisdiction must report.[9] However, as will be seen below, there are a number of provisions which are directed to ensuring that investigations are finalised as quickly as possible, and to providing some transparency about the timeframes for inquiries.

18. In Queensland, the Crime and Corruption Commission (**CCC**) is governed by the *Crime and Corruption Act 2001* (Qld) (**the Queensland Act**). There is a provision which requires the Commission to publish information about timeframes. Section 35B of the Act provides:

> *(1) The chief executive officer must publish, on a publicly accessible website of the commission, information about the commission's systems and procedures for dealing with complaints about corruption.*
>
> *(2) The information published on the website must include the following—*
>
> *(a) the standard timeframes adopted by the commission for assessing, investigating and completing its dealing with complaints about corruption;*
>
> *(b) the standard procedures adopted by the commission for assessing and investigating complaints about corruption;*
>
> *(c) how the commission monitors the progress of complaints about corruption being dealt with by the commission to ensure they are being dealt with in a timely way;*
>
> *(d) what action the commission takes if the standard timeframes are not met for a complaint about corruption being dealt with by the commission to ensure the complaint is dealt with in a timely way.*

19. The CCC's website states:[10]

(a) The CCC aims to "assess" a complaint within four weeks, but that "it may take longer if [the CCC] need[s] to get further information or documents".

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[9] The Association has only reviewed the legislation governing the general anti-corruption body in each jurisdiction, that is: *Crime and Corruption Act 2001* (Qld); *Independent Commissioner Against Corruption Act 2017* (NT); *Integrity Commission Act 2018* (ACT); *Corruption, Crime and Misconduct Act 2003* (WA); *Independent Broad-based Anti-corruption Act 2011* (Vic); *Independent Commission Against Corruption Act 2012* (SA); and *Integrity Commission Act 2009* (Tas). The Association did not identify any relevant provisions in the Victorian or Western Australian legislation.

[10] See https://www.ccc.qld.gov.au/complainants/what-happens-your-complaint and https://www.ccc.qld.gov.au/complainants/our-charter-service.

(b) If the CCC decides to investigate a complaint itself, "investigations often take up to 12 months to complete, with complex investigations taking more than 12 months".

(c) If someone is "unhappy with the service provided … by the CCC (e.g. timeliness, manner of communication)", the person can "submit [their] concerns to the CCC for attention and response" (with a link to the CCC's "compliments and complaints page").

(d) If someone remains dissatisfied with how their complaint was handled, the person "may be able to raise [their] concerns with the Parliamentary Crime and Corruption Committee".

(e) The CCC "will monitor and review [its] service performance, report regularly to the PCCC, and will review its [Charter of Service] every three years".

20. The Queensland Act contains other provisions requiring the Commission to conduct its functions and deal with complaints "expeditiously" (for example s 35(1)(a) and s 46(1)(a)).

21. In the Northern Territory, the Independent Commissioner Against Corruption is established by the *Independent Commissioner Against Corruption Act 2017* (NT). The Northern Territory ICAC can refer a matter that has come to its attention that may involve improper conduct to a "referral entity" (s 25)"[11]. The Northern Territory ICAC also has the power to conduct an investigation as a "joint investigation" with a "referral entity". For a joint investigation, the Northern Territory ICAC must enter into an agreement with the referral entity setting out the arrangements for the joint investigation, relevantly including "proposed timelines for the joint investigation" (s 38(2)(b)).

22. In the Australian Capital Territory, the ACT Integrity Commission is established by the *Integrity Commission Act 2018* (ACT) (the **ACT Act**). Under s 218, the ACT Integrity Commission must publish an annual report, and is required as part of that report to provide some information about the time taken for complaints to be dealt with, but there is no provision stipulating, or requiring a time standard to be set, for the completion of a final report. However, the ACT Act also imposes an obligation to keep a complainant updated about the progress of a complaint (s 72).

23. Other provisions in the ACT Act are directed to ensuring that the Commission minimises delay. The Commission can enter into a memorandum of understanding or agreement with another entity to assist in "avoiding delay and unnecessary duplication of statutory functions" (s 56; see also s 142(1)(e)).

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[11] The term "referral entity" is defined in s 25 of the Act. Except for certain specific public officers (where the referral entity is specifically identified), the referral authority is the entity the ICAC considers appropriate for the public officer or public body's role or function at the time of referral or at the time the conduct is alleged to have occurred.

24. In South Australia, the Independent Commission Against Corruption is established by the *Independent Commission Against Corruption Act 2012* (SA). The South Australian Commission is to perform its functions in a manner that "deals as expeditiously as is practicable with allegations of corruption in public administration" (s 7(4)(b)).

25. Finally, in Tasmania, the Integrity Commission is established by the *Integrity Commission Act 2009* (Tas). The Tasmanian Integrity Commission is to perform its functions and exercise its powers in such a way as to "ensure that all matters of misconduct or serious misconduct are dealt with expeditiously at a level and by a person that it considers appropriate" (s 9(1)(f)). In addition, the Board of the Integrity Commission may determine that an inquiry be undertaken by an Integrity Tribunal under Pt 7 of the Act (s 58). The Integrity Tribunal has the power to give "any directions it considers necessary to ensure that the inquiry is conducted fairly and expeditiously" (s 68(5)).

(e) The Association's recommendation

26. The Association would support, in principle, the publishing of time standards for the finalisation of reports by the ICAC following a public inquiry. The uncertainty as to when a report concerning a particular investigation will be published has the potential to exacerbate the impact on those affected by the investigation. The publication of a time standard may assist in minimising that impact by providing a time by when those individuals can expect the finalisation of the investigation. It would also provide an accountability mechanism in respect of the performance of the ICAC's functions.

27. However, the Association does not support legislated time standards, which could be unworkable and inappropriately inflexible in that they would be unable to be moulded to the circumstances of particular investigations. Rather, the ICAC should be responsible for setting applicable time standards that are made publicly available (for example, on the ICAC's website). As noted above, this recommended approach is similar to the one taken by a number of courts and by the CCC in Queensland.

28. If a time standard is not met in the context of a particular investigation, the ICAC should be required to provide an explanation for why the time standard has not been met in its report in relation to the investigation. The ICAC should not be required to provide any explanation before that time as there may be operational or other reasons as to why providing such an explanation is not in the public interest. That approach would not, however, mean that a person aggrieved by perceived unreasonable delay in furnishing a report is without remedy. It would remain open to such a person to complain to the ICAC Inspector in relation to such a delay (one of the ICAC Inspector's principal functions is to deal with delay in the conduct of investigations: see ICAC Act s 57B(1)(c)).

29. The Association is aware that there may be good reasons why a significant period of time may elapse between the end of a public inquiry and the publication of the ICAC's report in relation

to the investigation for the purposes of which a public inquiry was conducted. For example, time may elapse due to the conduct of further investigations after a public inquiry has concluded, resourcing constraints, the time necessary to comply with the obligations of procedural fairness and/or the sheer volume of work associated with preparing a report in relation to an investigation which may be complex and may have spanned several years. The furnishing of a report may also need to be delayed in order to avoid possible prejudice to another ongoing investigation. In these cases, it may not be possible or appropriate for the ICAC to comply with the relevant time standard. However, these contingencies could be addressed in the general information published by the ICAC as to its time standards and explained in its report when those general time standards are not met.

30. An obligation to publish the time standards adopted by the ICAC for finalising reports could be set out in the ICAC Act. The legislation could take a form similar to s 35B of the *Crime and Corruption Act 2001* (Qld).

2. JUDICIAL REVIEW

(a) The question

31. Per the terms of reference, the Committee will inquire into and report on whether the ICAC Act continues to be effective and appropriate with reference to "the existing mechanism of judicial review". While indicating that it "considers that a merits review process should not be examined as part of a review of the ICAC Act" (at [4.48] of the November 2021 report), the Committee said (at [4.49]) that it was:

> "open to a consideration of whether the existing mechanism of judicial review could be codified in legislation, to make its existence clearer and better understood to the wider public. The Committee will determine the scope of this judicial review including but not limited to examining a merits review process, where the jurisdiction for conducting such reviews might be placed, the potential for codifying judicial review processes when the terms of reference for the judicial review are finalised".

32. The Association submits that the existing mechanism of judicial review of the ICAC's findings should not be codified in legislation. Such codification is unlikely to achieve additional clarity and would lack the flexibility of the common law and its associated potential for future development.

33. As will be explained, the existing mechanism of judicial review does provide individuals with an avenue for recourse against adverse findings made by the ICAC, but does not involve a "merits review process". The scope of judicial review could not expanded upon codification, to reflect a "merits review process" without the fundamental character of judicial review being lost.

(b) Scope of judicial review

34. While there is no right of appeal from adverse findings made by the ICAC, an application for judicial review may be brought in the Supreme Court of New South Wales. In *Duncan v Independent Commission against Corruption* [2014] NSWSC 1018 (***Duncan***), McDougall J outlined (at [35]) that declaratory relief could be granted in proceedings for judicial review where:

    (a) a material error of law on the face of the record (including the reasons given for the decision)[12] is shown;

    (b) the reasoning of the ICAC 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

[12] *Supreme Court Act 1970* (NSW), s 69(4).

based on a process of logical reasoning from proven facts or proper inferences therefrom";

(c) a finding made by the ICAC is not supported by any evidence;

(d) the ICAC failed to consider relevant matters or took into account irrelevant ones; and/or

(e) there was a denial of procedural fairness.

35. Proceedings for judicial review are concerned with the legal validity of adverse findings made by the ICAC. For that reason, they do not involve a "merits review process"; that is, a process of determining whether factual findings are correct. However, the existing mechanism for judicial review by the Supreme Court nonetheless provides an avenue for adversely affected individuals to challenge the ICAC's conclusions about them. For example, "a decision which lacks an evident and intelligible justification" will be unreasonable, in the sense referred to at [34(b)] above.[13] There will generally be a denial of procedural fairness, as referred to at [34(e)] above, where an affected individual is denied a reasonable opportunity to present his or her case in answer to allegations concerning him or her.[14] In certain circumstances, an unreasonable or extreme delay by the ICAC can form the basis for an argument that an individual did not receive a fair hearing of his or her case.[15]

36. As noted above, the relief that may be granted by the Supreme Court in such judicial review proceedings is declaratory. Thus, in *Duncan*, McDougall J granted relief by declaring that the ICAC's determination "that the plaintiff engaged in corrupt conduct within the meaning of [the ICAC Act] was not made according to law and is a nullity". In *Greiner v ICAC* (1992) 28 NSWLR 125, (***Greiner***) Gleeson CJ concluded (at 148-149) that the plaintiffs were entitled to a declaration that the findings that they had engaged in corrupt conduct within the meaning of the ICAC Act were "made without or in excess of jurisdiction"; are a "nullity"; and were "on the facts as found in the [ICAC's] report … wrong in law".

37. Relief in the form of certiorari (which would have the effect of quashing the relevant ICAC decision) is not available with respect to decisions that have no effect on legal rights and obligations.[16] The fact that a decision damages an individual's reputation will not mean, of

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[13] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ).

[14] See *Kioa v West* (1985) 159 CLR 550 at 563 (Gibbs CJ); *Cesan v The Queen* (2008) 236 CLR 358 at [71] (French CJ).

[15] See *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [10] (Gleeson CJ, Kirby J agreeing at [106]), [172] (Callinan and Heydon JJ); *Frugtniet v Tax Practitioners Board* [2019] FCAFC 193 at [39].

[16] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581 (Mason CJ, Dawson, Toohey and Gaudron JJ).

itself, that the decision has a relevant legal effect.[17] The position with respect to the ICAC has been that an order in the nature of certiorari quashing the ICAC's decision will not be granted where an individual is successful in judicial review proceedings.[18] This is a limitation of the relief available in judicial review proceedings brought against the ICAC.[19] However, there may be little practical difference between an order in the nature of certiorari and a declaration that a decision of the ICAC is a "nullity" or is "wrong in law" (see [36] above) from the perspective of an individual concerned with the reputational impact of being adversely named in an ICAC investigation.

38. A person to whom the ICAC owes obligations of procedural fairness is likely to be able to obtain a writ of prohibition to prevent a report being published in breach of the rules of procedural fairness.[20] In practice, however, the availability of prohibition is constrained, because once the ICAC's report is published, it is too late to seek this remedy. In circumstances in which some aspects of the rules of procedural fairness are breached (for example, the requirements concerning the affording of an opportunity to comment), an affected person may not become aware of the breach prior to publication of the ICAC's report,[21] with the result that he or she can obtain neither prohibition nor certiorari (though declaratory relief will probably remain available and, as already noted (at [37] above), there may be little functional difference between a declaration and certiorari if the nature of the declaration is, for example, that the ICAC's decision is "wrong in law").

(c) Codification

39. The right to seek judicial review of the ICAC's decisions, and the grounds on which such review may be sought, are not presently sourced in legislation, although Part 59 of the *Uniform Civil Procedure Rules 2005* (NSW) regulates certain aspects of procedure in connection with judicial review proceedings.

40. There are some examples of the codification of judicial review in other jurisdictions:

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[17] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581 (Mason CJ, Dawson, Toohey and Gaudron JJ). There remains some uncertainty as to whether certiorari may lie to quash a decision which does not itself affect legal rights but which precedes an exercise of power that does directly affect legal rights in circumstances where the first decision is taken into account by the ultimate decision-maker. That point was left open by the High Court in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [100]. An example of such a decision in the ICAC context arises from the operation of s 114A of the ICAC Act, which provides that where the ICAC finds that a public official has engaged in corrupt conduct, disciplinary proceedings may be taken and the authority determining those proceedings is not required to investigate whether that conduct has occurred: see s 114(3)(a) of the ICAC Act.

[18] *Greiner* (1992) 28 NSWLR 125 at 148 (Gleeson CJ).

[19] The Hon T F Bathurst CJ AC, James Spigelman Oration: New Tricks for Old Dogs: the Limits of Judicial Review of Integrity Bodies (26 October 2017) at [43]-[68].

[20] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581.

[21] An analogous point was made by Basten JA in *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 at 462.

(a) The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) addresses judicial review of "decisions" which are "of an administrative character" and which are made "under an enactment" in the Federal Court and Federal Circuit and Family Court of Australia (although common law judicial review also remains available in those jurisdictions). Some States and Territories have adopted generalist judicial review statutes which are equivalents of the ADJR Act.[22] Section 5 of the ADJR Act provides that a "person who is aggrieved by a decision" of an administrative character made, proposed to be made, or required to be made under a relevant enactment may apply for review on the grounds enumerated therein. The grounds in s 5 of the ADJR Act are, for the most part, a restatement of the grounds available at common law.[23] Although some attempts were made to reform particular grounds of review (in particular the "no evidence" ground", see s 5(1)(h) and (3)), these have given rise to considerable uncertainty and additional litigation concerning questions of statutory construction.[24]

(b) In Tasmania, s 79 of the *Integrity Commission Act 2009* (Tas) provides that a determination of the Integrity Tribunal under s 78 may be reviewed under the *Judicial Review Act 2000* (Tas). The latter Act is similar to the ADJR Act, in so far as it enumerates the available grounds of review in s 17(2) (read with s 20).

41. Where it has occurred, the codification of judicial review has not been without its difficulties. *Firstly*, the statutory definitions applying to the 'gateway' provisions to the ADJR Act (which applies only to "decisions" (or "conduct" leading to a decision) which are "of an administrative character" and which are made "under an enactment" have generated a "profusion"[25] of litigation addressing objections to the relevant courts' jurisdictions to award relief under the ADJR Act, in circumstances where no such jurisdictional objection would be available at common law.

42. *Secondly*, understanding the precise scope of the articulated grounds of review is not necessarily straightforward – particularly in terms of the relationship of those grounds to common law jurisprudence and the limits of the broad catch-all grounds of "was otherwise contrary to law" and was an "exercise of a power in a way that constitutes abuse of the power".[26] While it is necessary that codified grounds of review be broadly stated, the result may be that the meaning

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[22] See the *Judicial Review Act 2000* (Tas); *Judicial Review Act 1991* (Qld); *Administrative Decisions (Judicial Review) Act 1989* (ACT).

[23] See *Kioa v West* (1985) 159 CLR 550 at 576 (Mason J).

[24] See eg *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; see also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) at [5.290]-[5.340].

[25] Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) at [2.250].

[26] ADJR Act, s 5(1)(j), (2)(j); Aronson, 'Is the ADJR Act hampering the development of Australian administrative law?', (2005) 12 *Australian Journal of Administrative Law* 79 at 80.

of those grounds is no more clear to the wider public than a statement of the common law (see [34] above).

43. *Thirdly*, legislation setting out grounds of judicial review does not enjoy the flexibility of the common law. The Chief Justice of Australia has described the ability of the common law to change as its "hallmark".[27] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, Kirby J cautioned (at [156]-[157]) that the "inherent capacity of the common law for progress and relevancy" could be stifled by codification.[28] A clear example of this is that the ADJR Act enshrined the immunity of the Governor General from judicial review, whereas, subsequent to the enactment of the ADJR Act, the common law developed to permit review, in certain circumstances, of decisions by the Governor General.[29] The Association views the lack of flexibility as a disadvantage of codification.

44. *Fourthly*, the codification of judicial review in legislation cannot create a wholly self-contained scheme for review. That is because legislation enacted to codify a mechanism for judicial review could not validly remove the Supreme Court's jurisdiction to grant prerogative relief for jurisdictional error.[30] Thus, it would remain open to an individual to seek judicial review in the Supreme Court, at least on that ground of jurisdictional error. An appropriately worded privative clause could oust the availability of review in the Supreme Court on other grounds and might oust the availability of declaratory relief, although the law is uncertain on this issue.[31] Accordingly, an individual seeking judicial review of ICAC could invoke both the codified mechanism and the Supreme Court's supervisory jurisdiction, in the alternative. In a similar way, it is commonplace for practitioners to plead, in the alterative, reliance on the ADJR Act and reliance on s 39B of the *Judiciary Act 1903* (Cth).

45. In the view of the Association, the existing mechanism of judicial review of the ICAC's decisions should not be codified in legislation. While codification of judicial review grounds (for example under the ADJR Act) probably increased the incidence of judicial review applications in the federal courts by "advertis[ing] to the profession" a list of judicial review grounds,[32] the educative function of codification may be achieved in other ways, for example

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[27] Chief Justice Kiefel, "The Adaptability of the Common Law to Change" (Australasian Institute of Judicial Administration, 24 May 2018) at 1.

[28] See also *Viro v The Queen* (1978) 141 CLR 88 at 120 (Gibbs J) ("Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society.")

[29] ADJR Act, s 3(1) (definition of "decision to which this Act applies"); cf *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342. See also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed. 2022) at [2.260].

[30] *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [55]; *Wainohu v New South Wales* (2011) 243 CLR 181 at [5], [15] (French CJ and Kiefel J); [89] (Gummow, Hayne, Crennan and Bell JJ).

[31] The Hon T F Bathurst CJ AC, James Spigelman Oration: New Tricks for Old Dogs: the Limits of Judicial Review of Integrity Bodies (26 October 2017) at [68], [97]-[104].

[32] Aronson, Groves and Weeks, *Judicial Review of Administrative Action* (7th ed, 2022) at [2.250].

by the Legal Branch of the Department of Communities and Justice[33] (which provides legal advice and representation to witnesses appearing before the ICAC) making information about judicial review available such as on its website, or by directing attention to existing material available on the Court of Appeal's website, which was developed in order to provide assistance to those seeking to invoke the Supreme Court's supervisory jurisdiction.[34] That material is more detailed and likely to provide greater assistance to prospective litigants than a codified list of grounds of judicial review.

46. Furthermore, it would be highly unusual to codify grounds of judicial review of the ICAC's decisions within the ICAC Act itself. This is not a model which has been adopted by other Australian jurisdictions in respect of their integrity bodies. While the *Integrity Commission Act 2009* (Tas) includes a judicial review provision, as noted above, this refers to the availability of review under Tasmania's generalised judicial review statute, rather than to specific grounds of review of the Integrity Commission's decisions. There does not appear to be any reason to differentiate or segment the grounds of judicial review available in respect of the ICAC's decisions from those available in relation to other administrative decisions in NSW. Thus, if the Committee regards statutory codification of judicial review grounds as desirable, in the Association's view this should only occur in the context of the enactment of a general judicial review statute.

[33] See https://www.lro.justice.nsw.gov.au/legal-representation/about-us.

[34] See https://nswca.judcom.nsw.gov.au/judicial-review/

3. INSPECTOR'S POWERS

47. The report of November 2021 also recommended a review of the powers of the Inspector of the ICAC under the ICAC Act. Though being "satisfied with the Inspector's use of their current powers", the Committee indicated that these powers "may not be sufficient in providing redress against reputational harm" (at [4.26]). In this respect, it referred to evidence of "difficulties in providing sufficient information related to the complaint to the Inspector" and the only redress being "publication of the Inspector's reports on their website" (at [4.26]–[4.27]). It specifically noted that "[t]he Inspector cannot conduct a merits review of the ICAC's findings" (at [4.25]).

48. The Association considers that the Inspector has sufficient powers under the ICAC Act to obtain information related to a complaint:

    (a) Within Pt 5A of the ICAC Act, s 57C entitles the Inspector to "full access" to records of the ICAC and confers broad powers on the Inspector, including to investigate operations and conduct within the ICAC and to require ICAC officers to supply information, produce documents and attend to answer questions.

    (b) Under s 57D of the ICAC Act, the Inspector has the general powers, authorities, protections and immunities of a commissioner under Div 1 of Pt 2 of the *Royal Commissions Act 1923* (NSW) for the purposes of any inquiry, which include powers to summon witnesses and inspect documents.

    (c) These specific powers are supplemented by incidental powers defined in standard terms by s 57F of the ICAC Act. Insofar as there are difficulties in information being provided to the Inspector in practice, these do not appear to be attributable to any inadequacy in the scope of the Inspector's powers.

49. The Association notes that the redress powers of the Inspector are not limited to the publication of reports online. In addition to the power to make a recommendation or report to the ICAC under s 57B of the ICAC Act, the Inspector may make a special report to Parliament under s 77A of that Act whereafter the Parliament may take such steps in response to the report as it thinks fit. The Inspector also has powers to refer matters to other public authorities or public officials and to recommend disciplinary action or criminal prosecution against officers of the ICAC under s 57C of the Act. These and other powers of the Inspector allow for forms of redress to persons affected by any maladministration on the part of the ICAC whether at a systematic or an individual level.

50. It is not clear whether the Committee is considering reform to empower the Inspector to conduct some form of merits review of the ICAC's findings that may be apt to cause reputational harm. If so, the Association would oppose such a proposal. Apart from the

undesirability of (in effect) establishing a "second ICAC", the conferral of merits review functions is not necessary or appropriate.

51. **First**, providing for merits review of the ICAC's findings by the Inspector would not merely require the conferral of additional powers; it would involve a significant expansion in the functions of the Inspector, requiring a corresponding increase in resources. The principal function of a body undertaking merits review is generally "to do over again" that which was done by the primary decision-maker.[35] Accordingly, if the Inspector were empowered to conduct a merits review, it would effectively be necessary to constitute and resource the Inspector as a "second ICAC". That would require the Inspector to be provided with resources, including staff, similar to those presently available to the Commissioners of the ICAC. Under ss 57AA and 57E of the ICAC Act, the Inspector may be assisted by an Assistant Inspector and staff employed or engaged for that purpose. At minimum, the powers under these provisions would likely need to be exercised to engage staff of similar number and qualifications to support merits review by the Inspector.

52. **Secondly**, merits review is not apt to provide redress against unjustified reputational harm arising from the ICAC's processes. As any such review would take place after any inquiry and report, it would not mitigate any immediate harm to affected persons from public hearings (and media reporting on such hearings). Any unjustified harm to reputation from publication of adverse findings, referrals or recommendations by the ICAC may be addressed, at least to some extent, by the publication of a report by the Inspector identifying any maladministration leading to such outcomes. Insofar as an Inspector's report is not effective in addressing such harm (for example, because it attracts less media coverage), merits review is not likely to be much more effective.

53. **Thirdly**, apart from any redress for maladministration available upon complaint to the Inspector, an affected person may seek judicial review of procedural steps and ultimate findings by the ICAC.[36] Taken together, these avenues provide forms of redress in cases where the ICAC has engaged in maladministration (including delay or unreasonable invasions of privacy) or acted unlawfully or in excess of its jurisdiction. In general, the only cases in which they provide no redress are where another person or body disagrees with a decision reached by the ICAC which is nonetheless authorised by law. Merits review could only be appropriate to deal with such cases *if* the composition, expertise or powers of the reviewing body are such that it is more likely to reach the correct or preferable decision on the facts. As the Inspector — like the Commissioners — of the ICAC have generally been drawn from the senior ranks of the legal profession (but without the investigative and other resources available to the ICAC), it is

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[35] *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [51] per Bell, Gageler, Gordon and Edelman JJ.

[36] See, eg, *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at [2] per Bathurst CJ, [36] per Basten JA, [117] (Ward JA) (identifying grounds for setting aside a summons by the ICAC) and *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [463] per Beazley P (identifying grounds on which declaratory relief may be granted as to findings by the ICAC, including denial of procedural fairness and legal unreasonableness).

not clear that the Inspector would be better placed to reach a correct or preferable decision in general.

Conclusion

54. In summary, in response to the terms of reference, the Association only supports reform in the area of time standards being published for the ICAC's reports for the reasons stated above. The Association again thanks the Committee for the opportunity to make a submission to the review.

C. The NSW Bar

1. The Association is a voluntary professional association comprised of around 2,400 barristers with their principal place of practice in NSW.[37] The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[38]

2. Barristers are independent specialist advocates,[39] both in and outside of the courtroom.[40] Barristers owe their paramount duty to the administration of justice.[41]

3. The Association would be pleased to assist the Committee with any questions it may have, through oral or further written submissions. Please contact Policy Lawyer, [redacted] at [redacted] if you would like any further information or to discuss this submission.

[37] New South Wales Bar Association, *Statistics*, as at 5 August 2022 <https://www.nswbar.asn.au/the-bar-association/statistics>.

[38] New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>.

[39] *Barristers' Rules* rule 4(c).

[40] See *Barristers' Rules* rule 11(c)(d).

[41] *Barristers' Rules* rules 4(a), 23.