Submission No 18

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

Name: The Hon. Adjunct Professor Joseph Campbell QC

Date Received: 11 August 2022

Submission to the Committee on the Independent Commission Against Corruption

This submission relates to a matter that was self-referred to the Committee on the Independent Commission Against Corruption ("***the Committee***") on 9 June 2022. The terms of reference are:

> That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on aspects of the Independent Commission Against Corruption Act 1988 to determine whether the Act continues to be effective and appropriate, with particular reference to:
>
> 1) the time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions;
> 2) the existing mechanism of judicial review;
> 3) the role and powers of the Inspector of the ICAC.

The present reference has grown out of Report 4/57 of the Committee entitled "Reputational Impact on an individual being adversely named in the ICAC's investigations"[1] (hereinafter called "***the November 2021 Report***". A government response to that report[2] supported the Committee continuing to explore and report on the three issues identified in the present terms of reference, together with "the threshold for the conduct of a public hearing applying to similar bodies".

Question 1 -Time Standards for ICAC to Finalise Reports

This question in the present inquiry of the Committee is prompted by Recommendation 6 in the November 2021 report, namely:

> "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."

In its commentary leading to that recommendation the 2021 Report expressed particular concern about "the passage of time between any final hearing and the delivery of a report in a matter by the ICAC"[3], and said:

> The Committee notes that most, if not all, courts and tribunals now have time standards in place for finalising matters. They are generally developed by the relevant head of jurisdiction in consultation with court or tribunal members and are monitored by the head of jurisdiction.[4]

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[1] Report tabled 25 November 2021, ISBN 9781921686191, accessible at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2595

[2] Letter from the Attorney-General, Mr Mark Speakman to the Clerk of the Parliaments, Mr David Blunt dated 24 May 2022 and its enclosure, accessible at https://www.parliament.nsw.gov.au/tp/files/82170/Government%20response%20to%20the%20Independent%20Commission%20Against%20Corruption%20-%2024%20May%202022.pdf

[3] 2021 Report para 3.49

[4] 2021 Report para 3.50

Evidence before the Committee has raised a question of whether it would be desirable to have a statutory requirement of reporting inside 12 months from the close of submissions[5].

If they are to be used as a standard for comparison with ICAC, it is important to understand what form the time standard adopted by courts and tribunals take, and what mechanisms and procedures are used in the courts and tribunals for promoting compliance with those standards. It is also important to bear in mind the fundamental difference that there is between a court or tribunal, and ICAC.

I do not know what was the scope of the enquiries that led the authors of the 2021 Report to make the statement quoted at footnote 4 above. The published statistics of the Supreme Court of NSW do not relate to the time between a final hearing of a case and delivery of judgment – instead they relate to the time from commencement of a case to the delivery of judgment or other final disposal of the case. In its 2020 *Annual Review* (the latest one publicly available) the Court said[6]:

> **Measurement against benchmarks**
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> The Court's performance in dealing with cases in a timely way is reported in terms of the age of the pending caseload. Measurement of the age distribution within a pending caseload helps the Court to assess more quickly whether delay reduction strategies are successful and to identify areas where further case management would be beneficial. Courts and other organisations may use different methods to measure the age of cases or the timeliness of case handling, and this can produce statistics that are not necessarily comparable. To cite criminal cases as an example, some courts report performance by measuring the time between committal and the commencement of trial, while the Australian Bureau of Statistics produces national statistics that measure the time from committal to either acquittal or sentencing. Unless noted otherwise, the information in Appendix (I) concerning age of pending cases uses the same definitions of commencement and finalisation as are used by Productivity Commission in its *Report on Government Services*.
>
> Appendix (I) shows the position this Court reached at 31 December for each reported year with regard to the age of its pending caseload. For criminal matters (including criminal appeals) the method of measurement aligns with the method used by the Productivity Commission's Report on Government Services, except where cases are diverted to the Mental Health Review Tribunal. For the Court of Appeal, the reporting method aligns with the methods used by the Productivity Commission but is confined to those cases lodged in the Court of Appeal (whereas the Productivity Commission's figures cover all civil cases that are appellate in nature, not just those lodged in the Court of Appeal). For civil cases in the Common Law and Equity Divisions, the Court's reporting differs from the Productivity Commission's methods in three ways: firstly, the Court reports separately for each Division; secondly, for cases that are appellate in nature but heard in the Common Law or Equity Division, the Court reports those cases within the appropriate Division and not in combination with Court of Appeal cases; and thirdly, the Court reports all pending cases, whereas the Productivity Commission's counting rules allow for exclusion of some particular case types and of pending cases that have been inactive for at least 12 months.

[5] Transcript of evidence to the Committee 2 May 2022 p 27

[6] Supreme Court of New South Wales Annual Review 2020 p 37 - 38 accessible at https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Annual_Review_2020.pdf

> Appendix (I) allows comparison of the Court's position with the national benchmarks for 'backlogs' as set by the Productivity Commission. Those benchmarks are applicable to Australia's supreme courts and district/county courts, regardless of the case-mix of those courts. With regard to criminal non-appeal cases, the range of charges routinely brought in criminal lists of supreme courts varies across the country. This Court hears only criminal cases involving charges of murder or manslaughter or where there is otherwise the potential for a life sentence to be imposed; for such cases a 12-month timeframe from committal to sentencing is challenging. With civil non-appeal cases, it is worth noting that every supreme court in the country has difficulty meeting the backlog benchmarks (see Table 7A.21 of the latest *Report on Government Services* published by the Productivity Commission). The Report on Government Services also reports on case finalisation times, but that measure is not included here. The Court prefers the age profile of pending cases (the Productivity Commission's 'backlog' concept) as a reporting measure because it has a logical link to desired outcomes: when courts finalise an increased number of aged cases, the age profile of the pending caseload usually improves over that period whereas finalisation-time results usually worsen.

Appendix (1) of the Review[7] gives statistics showing the filings (net new cases), final disposals, and pending cases as at 31 December for each of the Divisions and separate lists within the Supreme Court. It also shows, for each of the Divisions of the Court and for the Court of Criminal Appeal, the total number of cases pending, the number of cases pending that are 12 months old or less, and the number of cases that are 24 months old or less. Each of those figures is quoted in both absolute numbers, and as a percentage of the total number of cases pending in that Division or Court. The Review also cites the national standard (that 90% of cases should be disposed of within 12 months, and 100% within 24 months), so that a comparison can be made between the performance of the NSW Court and the national standard. While this is a time standard for finalising matters, it is not the type of standard that was envisaged in the November 2021 Report, namely a standard for the time between a final hearing and the issue of a report.

The Supreme Court of NSW and delays in reserved judgments

The Supreme Court of NSW has issued a policy concerning delays in reserved judgments[8]. In summary, it provides that if a party is concerned "that a reserved judgment has been outstanding for an unreasonably long time" that party can make an inquiry to the head of the relevant Division, with a copy to the Chief Justice, (or the inquiry can be made to the Chief Justice, if the delay concerns the Court of Criminal Appeal). The policy statement continues:

> "The inquiry should include the following details:
> - the name and brief description of the proceedings and the case number
> - your role in proceedings (e.g. plaintiff/defendant; legal representative for the first plaintiff/second defendant; cross-claimant/defendant)
> - the length of the proceedings
> - the date upon which the judicial officer reserved judgment
> - any urgency as to the reserved judgment
>
> The letter should be copied to all parties to the proceedings.

[7] At pages 52 - 56

[8] *Delays in Reserved Judgments* issued by the then Chief Justice 27 October 2021, accessible at https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Delays%20in%20reserved%20judgments%2027%20Oct%202021.pdf

> The head of jurisdiction or the Chief Justice will discuss each inquiry with the judicial officer/s involved in the reserved decision. However, at no time will the head of jurisdiction reveal the inquirer's identity to the judicial officer/s concerned.
>
> The head of jurisdiction will provide the inquirer with a written response within two weeks of receipt. If this response does not satisfactorily resolve the concerns, the inquirer may write to the Chief Justice. A copy of the original letter and the head of jurisdiction's response shall be attached to this request."

It is to be noted that the policy document is one that provides information about an available procedure, but no particular length of time is stated as the threshold for a party to invoke this procedure – the threshold is "an unreasonably long time", a matter which is necessarily dependant on the circumstances of the individual case. The procedure is not one to which any legal force or sanction is attached – it is merely an administrative practice that the court applies. Also, the procedure that is envisaged is not spelled out in any detail, beyond that the head of jurisdiction or the Chief Justice will discuss the delay with the judge involved. It seems to be envisaged that what will happen concerning any inquiry will be very much dependent on the circumstances of the individual case.

It might be that, after discussion with the judge, the head of jurisdiction or Chief Justice is satisfied that there has been no undue delay, or that the reason for the delay is not attributable to any lack of application by the judge in question (such as that the judge has been ill, or that other cases on which the judge is reserved have proved very time-consuming to resolve). Regardless of the reason for the delay, the head of jurisdiction or Chief Justice might obtain an estimation from the judge of how long it should take to finalise the judgment, and whether the judge needs to be given more time out of court than the judge would usually be given[9], to enable the judgment to be written. Inevitably giving the judge more time out of court will impose extra pressure on other judges to hear cases, or might result in cases that have been filed and are ready for hearing not being given a date for hearing – it is part of the responsibility of a head of jurisdiction to balance the competing needs of litigants to have a hearing date for cases that are ready for hearing, and a judgment in cases where there has been a hearing. What can be done concerning any individual complaint about delay on the part of a particular judge will thus be dependent on what the work pressures are on judges in the entire Division to which the judge being complained about belongs.

The "written response" that the head of jurisdiction provides within two weeks will often be an estimate of when the judgment will be delivered. If, as a result of the inquiry, the work-load within the Division had been reallocated amongst the judges, or a brake had been applied to the listing for hearing of cases, that is probably not the sort of information that would be provided to an inquirer.

If the inquirer is not satisfied with the response of the head of Division, his or her only course of action is to write to the Chief Justice. Nothing is laid down in the procedure about what the Chief Justice will then do. Presumably the Chief Justice will satisfy himself or herself whether the head of Division has done what is possible to have the judgment delivered as soon as possible, and if the Chief thinks it necessary he or she might instigate a further re-

[9] A court roster will usually provide for a judge to be sitting in court for a particular number of days per week or fortnight, and for the judge to be in chambers writing judgments or preparing cases that are coming up for hearing for the balance of the week or fortnight. Giving the judge more time out of court involves altering the proportions that usually exist in a roster between a judge's days in court and days out of court.

allocation of work amongst the judges or a greater delay in the listing of new cases for hearing. But that is all that is possible. There is no fixed number of weeks or months within which a judgment must be delivered.

Other courts and delays in reserved judgments

Other Australasian superior courts do not have any firm requirements for the time between reservation of judgment and delivery of judgment. The Supreme Court of Victoria issued a protocol for Reserved Judgments in October 2016[10], which is similar to the one that NSW has now adopted. The Victorian protocol also include a statement:

> "It is the aim of the Court that, as far as practicable, the delivery of a judgment occur within three months from the date from which the judgment was reserved save where the judge otherwise indicates."

This statement falls far short of a legislative requirement for delivery within any particular time, and explicitly recognises that there will be cases concerning which the general aim of judgment delivery within three months is not practicable.

In Queensland the Supreme Court has issued a statement about delays in reserved judgments[11]:

> "The Judges of the Supreme Court maintain a protocol that—except in exceptional cases—where a judgment has been reserved, the judgment should be delivered within three months of the hearing conclusion or the last receipt of submissions (excluding court vacation periods).
>
> Where there is concern about delay in the delivery of a judgment, a party's legal representative may contact the President of the Queensland Law Society or the President of the Bar Association of Queensland.
>
> The President may then approach the Chief Justice to enquire when the judgment delivery may occur. They don't disclose the identity of the party initiating the approach.
>
> The Chief Justice will consult with the Judge concerned and notify the President who, in turn, will notify the legal representatives."

That this is a "protocol" rather than a legislative requirement, and that it is subject to an exception for "exceptional cases" (which is not a particularly demanding barrier)[12], means that the three month standard is a seriously-meant aspiration, but not a rigidly binding requirement.

Similarly the Federal Court has issued a statement:

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[10] Text accessible at https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/protocol-for-reserved-judgments

[11] Text accessible at https://www.courts.qld.gov.au/court-users/practitioners/reserved-judgments

[12] "To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, routinely or normally encountered" ***R v Kelly (Edward)*** [2000] 1 QB 198 (at 208), cited in ***San v Rumble (No 2)*** [2007] NSWCA 259 at [59]. As well, what is exceptional can depend not just on relative numerical frequency, but also on being not what would ordinarily be found in the particular qualitative circumstances _ ***R v Buckland*** [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913), as cited in ***San v Rumble (No 2)*** at [59}

> "If a practitioner is concerned about a delay in delivering a reserved judgment in a case in which he or she is acting, the practitioner should raise the matter with the President of the Bar Association or Law Society of the State or Territory in which the case was heard, providing the name of the parties, the name of the judge or judges whose decision is reserved and the date on which the decision was reserved.
>
> The President will refer the inquiry to the Chief Justice without disclosing the identity of the practitioner expressing concern. The Chief Justice will look into the matter and, if appropriate, take it up with the judge or judges concerned. Complaints of this nature can also be made directly by letter addressed to the Chief Justice. If the letter is to be sent to the Chief Justice, as with all correspondence with the Court, all parties to the proceeding should be supplied with a copy.
>
> The Court has a goal of delivering each judgment within three months from the date on which the judgment was reserved."

The Federal Circuit Court has a similar procedure for a litigant to complain about delay in delivery of a judgment[13], and a "benchmark" of three months after receipt of submissions for the handing down of a reserved judgment[14]. Tasmania has a practice direction, which enables a litigant to enquire about a reserved judgment, but says[15]

> "However, given (inter alia) the constantly changing and often unpredictable demands on judicial time, the differences in the priorities for the delivery of judgments in different cases and the difference in the time required for the writing of judgment in different cases, the judges do not regard it as appropriate or useful to settle a time-table governing the delivery of reserved judgments."

The New Zealand practice is[16]:

> All judges aim to deliver decisions as promptly as possible. The judges of the High Court expect that 90% of decisions will be delivered within three (3) months of the last day of hearing or receipt of the last submission. This period does not include court vacations. On occasion a judge may advise the parties at the hearing that the judgment will take longer than three months to deliver due to the complexity of the case or other pressing matters of court business.

Informal internal procedures can be used in a court as a means of encouraging the prompt production of judgments. When I was a judge in the Equity Division of the Supreme Court it was clearly understood that if a judge was getting behind in the writing of judgments he or she could tell the Chief Judge, who would try to make available some extra time out of court to be devoted to judgment writing. In the time when I was a member of the Court of Appeal a judge could similarly approach the President for extra time out of court to write judgments. There was, though, always a reluctance for a judge to approach the Chief Judge or the President in this way, because it would have the practical effect shifting the burden of hearing an extra one or more cases onto one's colleagues, or slowing down the overall rate of

[13] https://www.fcfcoa.gov.au/policies-and-procedures/judicial-complaints
[14] https://www.fcfcoa.gov.au/policies-and-procedures/complaints-policy
[15] https://supremecourt.tas.gov.au/wp-content/uploads/2018/11/SCTPD0505.pdf
[16] https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-judgment-delivery-expectations-inquiry-process-and-recent-judgment-timeliness/

disposition of cases in the court. As well in the Court of Appeal a list of reserved judgments outstanding more than a particular number of months – I do now remember now how many months – would be circulated periodically by the President of the Court of Appeal amongst the judges of the Court of Appeal. The list (known informally and only half-jokingly as the "shame list") was circulated in advance of a meeting of the judges of that court, along with a detailing of which judges had sat on the hearing of each particular case, who had the responsibility for writing the first judgment in that case, and on what date judgment had been reserved. In the Court of Appeal it is usual for a roster to not only allocate particular judges to hear a case on a particular day, but also to nominate one of those judges as the one who will have responsibility for producing the first draft judgment. The judge who had responsibility for writing the first of the judgments would be expected to state, at the meeting, when he or she expected to have the judgment ready for circulation to the other judges who had sat on the bench. The peer pressure, and one's own sense of professional responsibility, was usually quite effective in stopping judgments being too delayed in delivery, even if it meant researching and writing them at weekends. But there was no rigid standard, such as three months, that was invariably applied.

Differences between court proceedings and an ICAC investigation

It is well enough recognised that ICAC is not a court, but the simple statement "ICAC is not a court" goes nowhere near capturing all the differences that there are between an investigation by ICAC and litigation in a court, that have an effect on the time an investigation takes to complete.

Litigation in a court takes the form of a contest between the plaintiff and the defendant. An ICAC investigation does not take the form of a contest between parties. Rather, it is an investigation that aims to find out the facts about some particular topic. It is often conducted on the basis that at the outset no-one is claiming to already know what those facts are – the point of having the investigation is to find out the relevant facts.

A court case is always one in which there is a particular person or group of persons, who makes an allegation that some other person or group of person has engaged in a particular type of conduct, in consequence of which the court should, applying established standards of the law, grant some particular remedy or group of remedies. The premise on which a court case starts is that the plaintiff claims to already know the facts that he or she alleges, and can prove them, and that the law allows the court to grant the remedy that the plaintiff seeks.

Sometimes the litigation shows that one or both parts of that premise is mistaken, either because the plaintiff fails to prove one or more of the facts alleged, or because even if those facts are proved the law does not require the court to grant the remedy that the plaintiff seeks, or because the defendant proves some extra facts which show that the plaintiff is not entitled to the claimed remedy.

The scope of the factual enquiry that a court engages in in litigation is limited. It is limited by the requirement that the facts that the plaintiff alleges must be ones that, if they were true, would lead to a remedy that is of a type that the court has power to grant, or the facts that the defendant alleges must be ones that, if they were true, would provide a reason recognised by the law for refusing to give the plaintiff a remedy. All that the court decides is the truth or falsity of facts that the plaintiff alleges, and the defendant does not admit, or the truth or falsity of the special facts that the defendant alleges as part of its defence and the plaintiff

does not admit. The court hearing works under rules where the party that alleges a fact must prove it, or fail to make out that element of its claim or defence. In an ICAC hearing there are no parties, and there is no concept of anyone bearing an onus of proof.

ICAC inquiries are very variable in nature. When ICAC commences an investigation it is not possible to know with confidence where it might lead or how complex it might prove to be, and therefore how long it might take. Some investigations, once they have been completed, can be seen to have been comparatively simple and straight-forward, involving investigating the conduct of a small number of people, where the issues are few and simple to investigate and do not expand in the course of the investigation. Others turn out to be much more complex, involving numerous people and complex issues, and new issues might emerge and new avenues of factual investigation might be seen to be desirable as the inquiry progresses. Sometimes it is possible to predict at the start of an investigation that it will be a complex one, and for that prediction to turn out to be correct. However, what looks like it will be a comparatively simple investigation at the time the investigation starts can turn out to be a complex one[17].

When the Commission conducts an investigation it has multiple functions to perform, as set out in s 13 (2):

> The Commission is to conduct its investigations with a view to determining—
> (a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a)[18], has occurred, is occurring or is about to occur, and
> (b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and
> (c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

It also has the functions set out in s 13 (3):

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[17] In ICAC's answer to questions on notice from the ICAC Committee given on 2 May 2022, page 10 - 11 (accessible at https://www.parliament.nsw.gov.au/ladocs/other/17253/Answers%20from%20ICAC.pdf) reasons for an investigation being complex were stated to be:

- Multiple public officials
- Multiple private individual implicated
- Multiple and complicated financial arrangements.
- Multiple and complicated company and trust structures.
- Multiple search warrants (4 to 10)
- Seizure and examination of multiple telephones and computers
- Telecommunication Interceptions – multiple interceptions.
- Controlled Operations
- Prolonged surveillance of multiple persons of interest.
- Large number of witnesses.
- Regional NSW travel to conduct multiple interviews.
- Multiple Compulsory Examinations.
- The conclusion of an investigation may progress (none which can be anticipated at escalation) to
    - Possible lengthy public inquiry
    - Prosecution briefs involving multiple persons and offence.
    - Large and complex briefs of evidence to the DPP.

[18] The "other conduct referred to in subsection (1) (a)" is conduct liable to allow, encourage or cause the occurrence of corrupt conduct, and conduct connected with corrupt conduct

> The principal functions of the Commission also include—
> (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
> (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

It also has a statutory obligation under s 16 to work in conjunction with certain other bodies which have public functions.

It has a statutory obligation to delay making a report on an investigation, if court proceedings are on foot, in the limited circumstances identified in s 18 (2):

> If the proceedings are proceedings for an indictable offence and are conducted by or on behalf of the Crown, the Commission must, to the extent to which the Commission thinks it necessary to do so to ensure that the accused's right to a fair trial is not prejudiced—
> (a) ensure that, as far as practicable, the investigation is conducted in private during the currency of the proceedings, and
> (b) give directions under section 112, having effect during the currency of the proceedings, and
> (c) defer making a report to Parliament in relation to the investigation during the currency of the proceedings.

The conduct of an investigation is not always completely in the hands of the Commission. Section 53 gives the Commission power to refer the matter for investigation to another body, and if it does so it has only a power to recommend to that authority what time limits should be complied with concerning the referred topic of investigation:

> (1) The Commission may, before or after investigating a matter (whether or not the investigation is completed, and whether or not the Commission has made any findings), refer the matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances.
> (2) The person or body to whom a matter is referred is called in this Part a ***relevant authority***.
> (3) The Commission may, when referring a matter, recommend what action should be taken by the relevant authority and the time within which it should be taken

If the Commission is not satisfied with progress made by the relevant authority, ICAC's power is only one under s 55, to refer its dissatisfaction to the relevant Minister, after giving the relevant authority natural justice:

> (1) If the Commission is not satisfied that a relevant authority has duly and properly taken action in connection with a matter referred under this Part, the Commission shall inform the relevant authority of the grounds of the Commission's dissatisfaction and shall give the relevant authority an opportunity to comment within a specified time.
> (2) If, after considering any comments received from the relevant authority within the specified time, the Commission is still not satisfied, the Commission may submit a report to the Minister for the relevant authority setting out the recommendation concerned and the grounds of dissatisfaction, together with any comments from the relevant authority and the Commission.
> (3) If, after considering any comments received from the Minister for the authority within 21 days after the report was submitted to that Minister under subsection (2), the Commission is

> still of the opinion that the recommendation should be adopted, the Commission may make a report as referred to in section 77.

The one thing that is more within the control of the Commission is how long it takes from close of submissions to delivery of report. Even then, it sometimes happens that the process of writing, and drawing together the various pieces of evidence that have been gathered, can sometimes show that there is some factual area that requires further exploration, so there is a need to re-open the evidence, and take further submissions about the effect of the new evidence. This is one area where there is a significant difference between the Commission and a court. If, as a judge writes a judgment, it becomes apparent that some critical fact has not been proved, that does not mean that an opportunity should be given to re-open the evidence – what happens is that the case is decided on the basis of the evidence that has been given, so the party who would have benefitted from proof of the missing fact does not have that benefit. If this means that some element of a plaintiff's cause of action has not been made out, the plaintiff loses the case, because the plaintiff has the onus of proving whatever facts are necessary to make good its cause of action. If the unproved fact is one that a defendant needs to make out a defence, then that defence will fail, because the defendant has the onus of proving the facts that are needed to make out a positive defence.

In ICAC, by contrast, there is no onus of proof on anyone. If it becomes apparent that there is an unexplored factual area, and that factual area is one that should be explored if the topic that the Commission is investigating is to be investigated properly, the Commission has no alternative, if it is to do its job properly, but to re-open the taking of evidence. The Inspector accepted, in his evidence to this Committee on 2 May at p 23, that there are reasons why ICAC takes longer to reach a decision than a court does. While I do not claim any particular knowledge about the internal workings of ICAC, and would defer on this question to anyone with greater knowledge on that topic, an aim of producing a report within 12 months from the last submission seems prima facie reasonable.

The need to invite submissions from any person concerning whom the Commission is contemplating making an adverse finding[19], and to then give a further opportunity to other interested people make submissions in response to any submissions made as a result of that invitation[20], means that in the course of the inquiry what appears to be "the last submission", and therefore the starting point of any 12-month period for producing a report, can change. However, once a report has been delivered, it will be possible at that time to know whether it was produced within 12 months of the last submission. As well, as a practical guide to action, it seems to be workable for the report-writer to proceed on the basis that once what may well be the last submission has been made, then, provided no need arises to seek further submissions, the task of report writing should be carried out on the provisional basis that it must be completed within 12 months.

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[19] S 79A ***ICAC Act*** forbids the Commission from including in any report made under s 74 any adverse finding against a person unless the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding. Section 74 covers the full range of reports that ICAC can make to Parliament.

[20] If X, a person who was given the opportunity to make submissions about why a proposed adverse finding should not be made, raised in response allegations that other people (Y and Z) had engaged in certain conduct, ordinary principles of natural justice, or (if X's allegations concerning Y and Z were such that the Commission came to be considering making adverse findings against them, section 79A) might then require that Y and Z be given the opportunity to make submissions concerning the allegations that X had made concerning them.

There is a serious question about what sort of legislation it would be that would impose such a time limit. A law that requires some sort of action, and does not say what happens if the requirement is not complied with, or is not the type of law concerning which the common law provides for the consequences of non-compliance, is pointless tokenism. Creating what looks like a legal obligation, when there is no consequence for breach of that obligation, is just a charade, a pretence. It would clearly not be appropriate to impose the time limit for delivery of the final report by the type of law whose breach resulted in a criminal penalty, or whose breach resulted in an obligation to pay a civil penalty, or an obligation to pay damages to anyone[21].

In my view, if there were no other requirement to promote timeliness in the delivery of reports, the only legislatively imposed consequence for delay in finalising a report ought to be that there was an obligation to include in the annual report of the Commission a list of those inquiries concerning which the final report was delivered more than twelve months from the making of the final submission, together with such comments concerning items in that list as the Commission wished to make. This would provide a standard of timeliness that was only a little more than an aspiration, but would enable the Commission to provide such explanation as it wished concerning the reasons for delay, and was appropriate to be publicly disclosed. In achieving timeliness in delivery of reports there is no alternative than to rely to a large extent on the integrity and sense of professional and public duty of the people appointed as Commissioners.

However, there is already a requirement for the annual report of the Commission to include details of:

> "the time interval between the completion of each public inquiry conducted during the year and the furnishing of a report on the matter."[22]

From that, information about whether the report appeared more than 12 months after the making of final submissions would inevitably appear. Even now, there is nothing to stop ICAC from including in its annual report whatever comments or explanation it wished to make about why any particular period of time passed between the making of final submissions in any investigation and the delivery of the report. If it were thought desirable to have some legislative recognition of a time period that ICAC should usually aim for in delivering a report it would be possible to add to the legislative provision just quoted words such as "together with such comments as the Commission wishes to make concerning any report where 12 months or more has elapsed between the completion of the inquiry and the furnishing of the report."

[21] It would also be incompatible with s 109 ***ICAC Act***, which protects from legal liability any action of the Commission, a Commissioner, the Inspector or any person acting under the direction of any of them if the action was done in good faith for the purpose of executing the ***ICAC Act*** or any other Act.
[22] S 76 (2) (ba) ***ICAC Act***

Question 2 – Effectiveness and Appropriateness of the Act concerning Judicial Review of ICAC Decisions

Judicial review of a decision of ICAC might take place under a statutory power, or under an inherent power of the Supreme Court.

Judicial Review of Commission Decisions

A tentative suggestion in the November 2021 Report was:

> "… the Committee is 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."

Codification of Judicial Review?

In my view any attempt to codify in legislation the existing mechanism of judicial review, "to make its existence clearer and better understood to the wider public" is fraught with danger, likely to not be successfully achieved, and likely to create more problems than it solves. The very idea has a touch of hubris to it, and fails to understand and take into account the complexity of "the existing mechanism of judicial review".

The existing mechanism of judicial review of nearly all[23] of the decisions of ICAC that are amenable to judicial review is one whose substance arises under the common law. It has a partial statutory basis in s 69 ***Supreme Court Act***:

(1) Where formerly—
  (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
  (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

  then, after the commencement of this Act—
  (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
  (d) shall not issue any such writ, and
  (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
  (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to—
  (a) the writ of habeas corpus ad subjiciendum,
  (b) any writ of execution for the enforcement of a judgment or order of the Court, or
  (c) any writ in aid of any such writ of execution.

[23] Decisions of ICAC under s 36B or s 100B ***ICAC Act*** are amenable to judicial review that has a basis in statute, not in the common law, and are considered below at pages 23 to 26

(3) The jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes, if the Court is satisfied that the ultimate determination of a court or tribunal in any proceedings has been made on the basis of an error of law that appears on the face of the record of the proceedings—
   (a) jurisdiction to quash the ultimate determination of the court or tribunal, and
   (b) if the Court determines that, as a matter of law, only one particular determination should have been made by the court or tribunal, jurisdiction to make such judgment or orders as are required for the purpose of finally determining the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

Section 69 wisely does not try to spell out the substance of the way in which the Court's judicial review jurisdiction will work. Rather, it presupposes the continuing existence of the principles on which the superior courts of common law in England exercised control over inferior administrative bodies, through the use of certain writs, of which certiorari, mandamus and prohibition were the most common,[24] and other court orders[25]. Jurisdiction to act in accordance with those principles was conferred on the Supreme Court of NSW[26], and that jurisdiction continues to exist[27]. All that s 69 does is to alter the procedural mechanisms through which those principles shall continue to be applied.

An order in the nature of certiorari was available, under the common law, to quash a decision that has legal consequences[28]. In ***Greiner v ICAC***[29] the majority of the Court of Appeal[30] accepted that that relief in the nature of certiorari could not be given concerning a decision of ICAC because the fact that a body like ICAC had formed an opinion that certain conduct was corrupt, and had reported that opinion to Parliament was not a decision that had the relevant sort of legal consequences. However in ***Greiner*** the majority held that a declaration could be made that a particular determination of ICAC, made in a report to Parliament, was made in excess of jurisdiction and was a nullity[31]. That continues to be the law.

Standing as a prerequisite to judicial review

It is not everyone who is entitled to seek judicial review of a decision of an administrative body. It is only a person who the court recognises as having standing to seek the review who can do so. The court has developed principles concerning who has standing to seek review of

[24] Those writs were applicable concerning many different types of administrative action. Other writs existed to deal with certain specific types of alleged administrative misbehaviour, such as the writ of habeas corpus to deal with allegations that a person had been unjustifiably imprisoned,

[25] By the time the ***Supreme Court Act*** was passed injunctions, both negative (requiring that something not be done) and mandatory (requiring that some action be taken), and declarations that certain purported decisions were made in excess of jurisdiction and thus were a nullity, had become part of the Court's armoury of remedies for controlling administrative action.

[26] Initially by the ***New South Wales Act 1823 (UK)*** (Act 4 Geo IV c 96), and the ***Australian Courts Act 1828 (UK)*** (Act 9 Geo IV c 83)

[27] Section 22 ***Supreme Court Act 1970 (NSW)*** continued "the Supreme Court of New South Wales as formerly established as a superior court of record".

[28] ***Hot Holdings Pty Ltd v Creasy*** (1996) 185 CLR 149 at 159-165

[29] (1992) 28 NSWLR 125

[30] Gleeson CJ and Priestley JA

[31] ***Greiner v ICAC*** at 148 per Gleeson CJ, at 192-3 per Priestley JA

a decision. In broad terms, a person lacks standing if he has no interest in the subject matter beyond that of any other member of the public. If no private right of his is interfered with he has standing to seek review of a decision only if he has a "special interest" in the subject matter of the action[32] . Both what is a private right, and what counts as a special interest, for the purposes of the law about standing, are matters of considerable complexity, that cannot be easily and accurately summarised into a layman's guide to the law[33].

Excess of Jurisdiction as the Basis of Judicial Review

If a plaintiff is able to establish standing to seek judicial review, the review of an administrative finding by the Supreme Court is an inquiry into whether the administrative body concerned has acted outside the powers conferred upon it. The court can grant judicial review if the administrative body is given power to make a finding of a certain type only if certain preconditions exist, but the body has made a finding of the relevant type even though the preconditions do not exist. The common law has a variety of presumptions that when Parliament has conferred on a body power to make certain types of decision, that power is to be exercised in a particular way. One such presumption[34] is that a power to make certain findings or take certain action against a person is subject to a requirement that the body exercise natural justice (sometimes called procedural fairness) in making such a finding or taking that sort of action.

In ***Hossain v Minister for Immigration & Border Protection***[35], Kiefel CJ, Gageler and Keane JJ summarised the general principles involved in the judicial review of administrative actions that were authorised by statute, namely that the administrative body had acted outside the jurisdiction that its enabling statute conferred on it:

> [23] Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with

[32] ***Australian Conservation Foundation Inc. v. The Commonwealth*** (1980) 146 CLR 493, at pages 503, 531, 537, 547-548

[33] In the ***Australian Conservation Foundation*** case Mason J described the law concerning standing as a "difficult field" when he said, at 548 ""In this difficult field there is one proposition which may be stated with certainty. It is that a mere belief or concern, however genuine, does not in itself constitute a sufficient locus standi in a case of the kind now under consideration."

[34] ***Twist v Randwick Municipal Council*** (1976) 136 CLR 106, at 109.9, 112-113; ***J. v Lieschke*** (1987) 162 CLR 447, at 456.4 - .7. The presumption can fail to apply to a particular type of decision if legislation makes clear that the presumption is not to apply concerning a particular type of decision. However, there is nothing in the ***ICAC Act*** that says that ICAC is freed from the requirement to accord procedural fairness to people involved in its investigations.

[35] [2018] HCA 34; 264 CLR 123 ,132 at [23 – [26]. The following quotation omits footnotes to their Honours' judgment. The decision was one of a 5-member bench, so the joint judgment of Kiefel CJ, Gageler and Keane JJ will contain the ratio decidendi of the case.

> those statutory preconditions and conditions to have "such force and effect as is given to it by the law pursuant to which it was made".
>
> [24] Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all". To that extent, in traditional parlance, the decision is "invalid" or "void".
>
> [25] … jurisdictional error is an expression not simply of the existence of an error but of the gravity of that error. … the unavoidable distinction between jurisdictional errors and non-jurisdictional errors is ultimately "a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised".
>
> [26] Although ultimately correct in the result, the majority in the Full Court was therefore wrong to distinguish between a decision involving jurisdictional error and a decision wanting in authority. They are one and the same.

The grounds on which a decision-maker could have engaged in jurisdictional error include failing to take into account a relevant consideration. That simple-sounding test is one that can be quite complex to apply. A "relevant consideration" is one that the statute in question requires a decision maker to take into account if the decision-maker is to act validly. What is a "relevant consideration" is decided in part by construction of the statute that creates the decision-making power – but that task can itself be complex. Also, a decision that fails to follow some requirement of the enabling statute is not always one made outside jurisdiction:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."[36]

The High Court has now disapproved the traditional distinction between mandatory and directory provisions in a statute as a way of deciding whether failure to adhere to a statutory requirement has the consequence that the resulting decision is void:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute": ***Tasker v Fulwood*** [1978] 1 NSWLR 20 at 24."[37]

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[36] ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; 194 CLR 355 at [91] per McHugh, Gummow, Kirby and Hayne JJ

[37] ***Project Blue Sky*** at [92] – [93]

Further, whether there has been a failure to take into account a "relevant consideration" is not something which is decided in the abstract by reference only to the words of the statute which creates the decision-making power. It is not as though one construes a statute, and derives a list of relevant considerations that always must be complied with. As well,

> "discernment of the *extent* of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a *magnitude* which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute."[38]

Further, how the decision-maker has gone about dealing with a particular consideration, in making a particular decision, can be relevant to whether the decision-maker has really "taken it into account". Thus, the factual context in which the power comes to be exercised, and the particular decision which it is proposed be made in that factual context, can also generate matters which are relevant to be considered if the power is to be exercised. If a decision maker fails to squarely address the substance of the case of a person affected by the decision, and fails to give reasons which could rationally support the rejection of that case, the decision maker has failed to take into account a material consideration[39]. It is an "established principle" that

> "if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the [plaintiff] that may give rise to jurisdictional error."[40]

There is a well-established ground for the grant of certiorari for "fraud"[41], "a ground in which "fraud" is to be understood in a broad sense and as encompassing matters such as acting for an improper purpose."[42]. Deciding whether a decision-maker has acted for an "improper purpose", concerning a decision made under a statute, requires both a construction of the empowering statute, to decide what the statute admits as being a proper purpose and what it regards as an improper purpose, and a factual decision about what were the purposes of the particular decision-maker. Even if, as is likely, a decision of ICAC could not be the subject of certiorari on this ground[43], it could still be the subject of a declaration of the type made in ***Greiner***, if the relevant type of fraud were to be made out.

An error of law by a decision-maker can be a ground on which a decision can be set aside on judicial review. However, that a decision maker has made an error of law does not

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[38] ***Hossain*** at [27} per Kiefel CJ, Gageler and Keane JJ (emphasis added)

[39] ***Minister of State for Immigration, Local Government and Ethnic Affairs v Pashmforoosh*** (1989) 18 ALD 77 at 80, a passage specifically approved by Mason CJ in ***ABT v Bond*** ((1990) 170 CLR at 359

[40] ***Plaintiff M1/2021 v Minister for Home Affairs*** [2022] HCA 17; (2022) 400 ALR 417 at 416-7, [27] per Kiefel CJ, Keane, Gordon and Steward JJ (footnotes omitted)

[41] ***Craig v South Australia*** (1995) 184 LR 163 at 175, 176

[42] ***Hot Holdings Pty Ltd v Creasy*** [2002] HCA 51; 210 CLR 438 at [51] per Gaudron, and Hayne JJ

[43] Because, like ICAC's finding considered in ***Greiner***, it did not affect any rights

necessarily mean that the decision is set aside -- it is set aside only when the error is one upon which the decision depends[44]. As recently explained in ***Hossain***[45]

> **[29]** That a decision-maker "must proceed by reference to correct legal principles, correctly applied" is an ordinarily (although not universally) implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.
>
> **[30]** Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome", or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was "so insignificant that the failure to take it into account could not have materially affected" the decision that was made.

Failure to accord natural justice, more commonly these days called failure to accord procedural fairness, is another basis on which ICAC could possibly engage in jurisdictional error. However, what is required to accord procedural fairness is not able to be reduced to a simple list of requirements that always applies concerning all statutorily-authorised decisions:

> "... when a claim is made that natural justice has not been accorded, regard must be paid to the legal context in which the decision-maker operates and to the law regulating the conduct of the proceedings."[46]

As well, whether a litigant, who contends that there has been a breach of procedural fairness, was represented by counsel can be relevant to an assessment of whether there has been a breach of procedural fairness[47] - counsel can sometimes have sound tactical reasons for permitting a hearing to take a course that, if counsel had not been there, could have constituted a failure to give natural justice[48].

Establishing one of the grounds on which a decision was affected by jurisdictional error does not necessarily mean that the Supreme court will give a remedy for it. In deciding whether to issue a prerogative writ the Supreme Court has a discretion to refuse relief if there was another equally effective and convenient remedy[49]. There is no absolute prohibition on the court exercising judicial review if alternative remedies have not been exercised. Rather, if alternative remedies have not been exercised, it is only in exceptional cases that the court will

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[44] ***Yates Property Corporation Pty Ltd (in liquidation) v Darling Harbour Authority*** (1991) 24 NSWLR 156 at 177.

[45] Supra, at [29] – [30] per Kiefel CJ, Gageler and Keane JJ (footnotes omitted)

[46] ***Aluminium Louvres & Ceilings Pty Ltd v Zheng*** [2006] NSWCA 34 at [20] Bryson JA (Handley JA and Bell J agreeing); to similar effect is ***South Western Sydney Area Health Service v Edmonds*** at [55] ff.

[47] ***3D Scaffolding Pty Ltd v Commissioner of Taxation*** [2009] FCAFC 75 at [25] per Emmett, Kenny and McKerracher JJ.

[48] See, eg, ***New South Wales Police Force v Winter*** [2011] NSWCA 330 at [85]

[49] ***NSW Breeding & Racing Stables Pty Ltd v Administrative Decisions Tribunal*** [2001] NSWSC 494; (2001) 53 NSWLR 559; ***Boral Gas (NSW) Pty Ltd v Magill*** (1993) 32 NSWLR 501.

grant judicial review[50]. Because the Supreme Court's jurisdiction in administrative review is exercised on the same principles as the prerogative writs were issued, though through a simplified procedural mechanism, that remains the case. So far as ICAC is concerned, the possibility of seeking a review of a decision by the Inspector is an alternative remedy to seeking judicial review from the Court, but there will be a question in each particular case whether it is an equally effective and convenient remedy to seeking judicial review from the Court. It is not the type of question whose answer can be simply expressed in a code. Nor are the discretionary considerations ones susceptible of being reduced to a code.

This submission has merely skimmed the surface of some of the considerations that are involved in judicial review. However, it should be enough to show that the existing principles of judicial review are too complex to be reduced to a code.

Merits review of a decision of ICAC?

The call for a "merits review process" arises from some people against whom evidence has been given, or findings made, that they assert are wrong. There are several different types of procedure that might be called a "merits review process". One is to have a complete rehearing of the case, including calling again all the evidence. To have a complete rehearing of an ICAC investigation would be enormously wasteful of resources, and it is hard to see any justification for it.

Another possibility is to have the sort of rehearing that an appellate court conducts of a decision by a trial judge, where the appeal is conducted on the basis of the transcript of the evidence on the court below, and the appellate body can reverse findings if it is persuaded that they are wrong. However, in a hearing of that kind, an appeal cannot reverse certain unfavourable findings that have been made by a judge. If a judge does not believe a witness, and says so, that finding will often not be able to be overturned on appeal. If a judge makes findings of fact that depend in part on the judge's impression of a witness then unless it can be shown that the judge has misused the advantage that he or she inevitably has from seeing and hearing the witnesses the appeal court will not alter those findings of fact[51]. Thus, even if there were a body that could conduct such a hearing concerning an ICAC report with which someone was dissatisfied, it would not be able to correct many of the findings that those who seek a "merits review process" would wish to have corrected.

A separate problem is that it would not be possible to have a court conduct a merits-based review of an ICAC finding. There are severe difficulties, amounting in my view to an impossibility, in a court engaging in a merits review of a decision of ICAC. ICAC is empowered to adopt some procedures that are completely different to those of a court engaged in deciding litigation. Section 17(1) ***ICAC Act*** says:

> The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate

[50] ***R v. Chief Constable of the Merseyside Police; ex parte Calveley*** (1986) 1 QB 424.

[51] ***Abalos v Australian Postal Commission*** (1990) 171 CLR 167, at 178 – 179; ***Devries v Australian National Railways Commission*** (1993) 177 CLR 472, at 479.2 - .5***. State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*** [1999] HCA 3; (1999) 73 ALJR 306 esp at 321 para 63

In some respects, ICAC is not only empowered, but required, to adopt procedures that are completely different to those of a court. Section 17(2) ***ICAC Act*** says:

> The Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and compulsory examinations and public inquiries shall be conducted with as little emphasis on an adversarial approach as is possible.

Important as the differences from court procedures that arise under s 17 are, they do not release ICAC from the obligation to apply rules of law in arriving at its decisions, and in particular do not free it from requirements of procedural fairness[52].

The scope of the evidentiary material that ICAC can consider is much wider than the evidentiary material that a court can consider. This arises in part from s 17(1) entitling ICAC to consider material that would not be admissible under the rules of evidence. It arises in part from the ***ICAC Act*** revoking certain privileges against answering questions or producing documents that a witness in a court case can invoke, with the result that ICAC can compel the production to it of a range of evidence that could not be required to be made available to a party in court proceedings, let alone admitted into evidence in those proceedings. In a court a witness or a person called upon to produce documents or answer questions can invoke certain privileges, including a privilege against self-incrimination, legal professional privilege[53], a "without prejudice" privilege, a privilege relating to protection of the identity of police informers, and a public interest privilege. When such a privilege is invoked in a court the person invoking it cannot be required to answer any question or produce any document that falls within the scope of the privilege. In conducting an investigation ICAC has power under s 21 ***ICAC Act*** to require a public authority or public official to produce a statement of information, and power under s 22 ***ICAC Act*** to require any person (whether or not a public authority or public official) to produce documents or things. When exercising either of those powers s 24 ***ICAC Act*** requires ICAC to give effect to some but not all of the grounds of privilege that would be available in a court – it is required to give effect any ground of privilege that would be applicable in a court, except that ICAC need not give effect to

(a) any rule which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
(b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
(c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official or a former public authority or public official[54].

Section 23 ***ICAC Act*** confers on ICAC a power to enter and search premises used by a public authority or public official and to obtain documents there. In exercising those powers ICAC must similarly give effect to some but not all of the grounds on which a privilege could be claimed in a court of law. However, it need not give effect to any of the grounds of objection

[52] ***South Western Sydney Area Health Service v Edmonds*** [2007] NSWCA 16 at [88]-[91]
[53] In some circumstances it is a common law legal professional privilege, in others it is a client legal privilege that arises under the ***Evidence Act 1995 (NSW).*** The difference does not matter for the purpose of the present discussion.
[54] S 24(3) ***ICAC Act***

identified in s 25(3) (a) (b) or (c) ***ICAC Act***, which are in identical terms to s 24(3) (a) (b) and (c) ***ICAC Act***, just quoted.

In court proceedings any witness or person required to produce documents can invoke a privilege against self-incrimination. However, under s 26 ***ICAC Act*** there is a partial abrogation in ICAC inquiries of the privilege against self-incrimination:

(1) This section applies where, under section 21 or 22, the Commission requires any person—
  (a) to produce any statement of information, or
  (b) to produce any document or other thing.
(2) If the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement nor the statement, document or thing itself (if produced) may be used in any proceedings against the person (except proceedings for an offence against this Act or except as provided by section 114A (5)).
(3) They may however be used for the purposes of the investigation concerned, despite any such objection.

All of the privileges available in a court of law, except legal professional privilege, are inapplicable in a compulsory examination or public inquiry conducted by ICAC. Also, the scope of the legal professional privilege that can be invoked at a compulsory examination or a public inquiry is much narrower than the legal professional privilege that is available in a court hearing[55]. This situation arises from section 37 of the ***ICAC Act***, which provides:

(1) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse—
  (a) to be sworn or to make an affirmation, or
  (b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a compulsory examination or public inquiry, or
  (c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.

(2) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

(3) An answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A) is not (except as otherwise provided in this section or section 114A (5)) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.

(4) Nothing in this section makes inadmissible—
  (a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or

[55] It is a consequence of s 37(5) ***ICAC Act*** that legal professional privilege can be claimed at a compulsory examination or public inquiry concerning confidential communications between a legal practitioner and a client "for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission", but not concerning any other type of confidential communication between the legal practitioner and the client.

(b) any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or
(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

(5) Where—
(a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A), and
(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission,
the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

If a court were to conduct a merits-based review of an ICAC decision, that could be done properly only if the court could consider and weigh all of the evidentiary material that ICAC had considered and weighed. But that could be done only if the court were to act in a way totally unlike the way a court usually acts – by ignoring the law of evidence, by not following procedures that are usually followed in a court, and considering material that is privileged and would normally never be available to a court.

The inappropriateness of a court conducting a merits-based review of a finding by ICAC is borne out by judgment of Harrison J in ***Kazal v Independent Commission Against Corruption*** [56]:

> [25] Even though some of the Commission's powers are analogous to those exercised by courts, the Commission is possessed of an investigative role with fewer constraints than ordinarily attend the conduct of court proceedings. For example, the Commission is not bound by the rules or practice of evidence and can inform itself in such manner as it considers appropriate: compare *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [15] . The Commission shall exercise its functions with as little formality and technicality as possible, with compulsory examinations and public inquiries de-emphasising the adversarial approach. The Act contains a statutory abrogation of the privilege against self-incrimination and other grounds of privilege that might otherwise be claimed by witnesses giving evidence to the Commission.
>
> [26] The existence and scope of these extra powers demonstrate that the legislature did not intend to constrain the Commission by reference to the rules and procedures that apply in courts. The absence of those constraints is consistent with the Commission's role as 'primarily an investigative body and not a body the purpose of which is to make determinations … as part of the criminal process': *Balog*[57] at 633. It is also consistent with that role that the Act makes provision to ensure that the conduct or outcome of its investigations should not bind or otherwise prejudice subsequent legal proceedings …

[56] [2013] NSWSC 53 at [25] – [26], cited with approval by N Adams J in ***Kazal v ICAC*** [2019] NSWSC 556 at
[57] [His Honour's reference is to ***Balog v ICAC*** [1990] HCA 28; (1990) 169 CLR 625]

There is an additional serious inhibition on a court engaging in a review of the merits of a decision of ICAC. It emerges from s 111 ***ICAC Act***:

(1) This section applies to—
  (a) a person who is or was an officer of the Commission, and
  (b) a person who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and
  (c) a person who conducts a review under section 104D, but only in relation to the person's functions under that section, and
  (d) a person or body referred to in section 14 (3), 16 (4) or 53 (6)[58], and
  (e) a person who is or was an officer of the Inspector.

(2) A person to whom this section applies shall not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act—
  (a) make a record of any information, or
  (b) divulge or communicate to any person any information,
being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act.
Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

(3) A person to whom this section applies shall not be required—
  (a) to produce in any court any document or other thing that has come into the person's possession, custody or control by reason of, or in the course of, the exercise of the person's functions under this Act, or
  (b) to divulge or communicate to any court any matter or thing that has come to the person's notice in the exercise of the person's functions under this Act,
  except for the purposes of a prosecution or disciplinary proceedings instituted as a result of an investigation conducted by the Commission in the exercise of its functions.

The people identified in s 111(1) include all the people likely to have knowledge of an investigation within ICAC, and to have knowledge of the full scope of the evidentiary material that was available to ICAC in the course of that investigation. The effect of s 111(3) is that[59] such people cannot be compelled to produce documents to a court[60], nor can they be compelled to give evidence to a court of anything that they have learned in the course of their functions in acting in connection with ICAC. Section 111(3) is not limited to documents that

[58] This footnote is not part of section 111, but is included to help the reader to understand section 111 (1) (d). Section 14 ***ICAC Act*** empowers ICAC to gather and assemble evidence that might be admissible in a criminal prosecution, and to gather information relating to the exercise of the functions of a public authority, and to furnish that evidence or information to certain governmental or public authorities. Section 14(3) provides that if ICAC furnishes the evidence or information to a person on the understanding that the information is confidential, that person is bound by the secrecy provisions of section 111. Section 16 requires ICAC, as far as practicable, to work in co-operation with certain law enforcement agencies, and certain other bodies with public functions. Section 16(4) provides that if ICAC furnishes information to such a person or body on the understanding that the information is confidential, that person or body is bound by the secrecy provisions of section 111. Section 53 empowers ICAC to refer any matter to another relevant authority for investigation, and to communicate information to that authority. Section 53(6) provides that if ICAC furnishes information to such a person or body on the understanding that the information is confidential, that person or body is bound by the secrecy provisions of section 111.

[59] Subject to the exception contained in the closing phrase of s 111(3) commencing "except for", which would not apply in any attempted merits review of a decision of ICAC.

[60] ***A v ICAC*** [2014] NSWCA 414, 88 NSWLR 240 at [42] and {167], Bathurst CJ agreeing at [7]

have been received by ICAC from an external source, but extends to documents that are created internally within ICAC[61]. If section 111 were to be complied with a court could never obtain the evidentiary material that would enable it to conduct a merits review.

As well, s 112 enables the Commission to direct that evidence or any submission or document given to it shall not be published, or shall not be published except to such persons and in such circumstances as the Commission specifies. If ICAC had made such a direction it would provide an additional obstacle to relevant evidence being placed before a court.

All these matters combine to show that any attempt to have a court conduct a merits review process of a decision or report of ICAC simply would not work. Nor, short of having another body that was not a court repeat the entire task that ICAC has engaged in, would it be possible to have all of the types of error that might be committed in the course of an ICAC hearing, corrected on the merits. And, given the requirements that there are for Commissioners of ICAC to have significant legal experience, there is no reason to believe that another body going over the same ground as ICAC had done would do a better job.

Judicial review authorised under the ICAC Act

The Supreme Court has a jurisdiction conferred under the ***ICAC Act*** itself to review a small number of very specific types of decision of the Commission.

Section 35 ***ICAC Act*** gives the Commission power to summons a person to appear before the Commission at a compulsory examination or public inquiry, to give evidence or to produce documents or other things. If a person has been served with a summons requiring him or her at attend to give evidence, but has failed to appear, s 36 (1) ***ICAC Act*** enables the Commission to issue a warrant for the arrest of the person.

However, it is not necessary for the Commission to wait until a person served with a summons has failed to appear before it issues a warrant for the arrest of the person - section 36 (2) ***ICAC Act*** also enables a warrant to be issued if the Commissioner is satisfied by evidence that a person whose evidence is desired and is necessary and relevant to an investigation under the Act will not attend without being compelled to do so, or is planning to leave the State. Section 36 (6) provides that such a warrant "authorises the arrest of the witness and his or her being promptly brought before the Commission and detained in a prison or elsewhere for that purpose until released by order of a Commissioner."

Section 36A empowers a Commissioner to order that the release of a person who has been so arrested occur on conditions, such as that the witness attend before the Commissioner until excused from further attending. Section 36B provides[62]:

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[61] ***A v ICAC*** [2014] NSWCA 414, 88 NSWLR 240 at [46] and [178]. Bathurst CJ agreeing at [7]. Section 111(3) applies in terms only to people and not to the Commission, but as Basten JA said in ***A v ICAC*** at [42] "… the functions which are restricted or prohibited by s 111 can only be carried out by individuals as officers or agents of the Commission. Because the Commission as a body corporate cannot itself appear in court and produce documents, the section is effective to prevent that happening to the extent that it is effective to prohibit any agent, officer or other authorised person producing documents on behalf of the Commission."

[62] Sections 36A and 36B were not in the ***ICAC Act*** as it was first passed by Parliament. Schedule 4 Part 4 of the ***ICAC Act*** contains some transitional provisions relating to the time when 36A and 36B commenced to apply, but those sections commenced so long ago that the transitional provisions are unlikely to have any ongoing effect.

(1) A witness who has not been released by a Commissioner under section 36 (6) or whose release under that subsection is subject to one or more conditions may apply to the Supreme Court for a review of the decision not to release or failure to release the witness or of the terms of one or more of those conditions.

(2) The Supreme Court may affirm or set aside a decision by a Commissioner not to release the witness or any condition imposed by a Commissioner on the release of the witness. The Supreme Court may also or instead make any order that a Commissioner may make in relation to the detention or release of the witness. The Court may do so also where a Commissioner has not made any decision within a reasonable time on the release of the witness.

(3) Such an order is taken to be an order of a Commissioner.

Section 100 ***ICAC Act*** gives a Commissioner power to summons a person to appear before the Commission to show cause why the person should not be dealt with by the Supreme Court for contempt of the Commission. If a person who has been summonsed fails without reasonable excuse to appear, the Commission can issue a warrant to arrest the person, and hold him or her in prison pending his or her appearance in the Supreme Court. A Commissioner has power under s 100A to order the release of the person detained, subject to conditions, before the person has appeared in the Supreme Court. Section 100B[63] gives the Supreme Court power to review such a decision of a Commissioner:

(1) An offender who has not been released by a Commissioner under section 100A or whose release under that section is subject to one or more conditions may apply to the Supreme Court for a review of the decision not to release or failure to release the offender or of the terms of one or more of those conditions.

(2) The Supreme Court may affirm or set aside a decision by a Commissioner not to release the offender or any condition imposed by a Commissioner on the release of the offender. The Supreme Court may also or instead make any order that a Commissioner may make in relation to the detention or release of the offender. The Court may do so also where a Commissioner has not made any decision within a reasonable time on the release of the offender.

(3) Such an order is taken to be an order of a Commissioner.

Who Conducts the Review?

If a "review" is sought under s 36B or 100B whether the review was decided in the Court of Appeal or by a single judge would depend on whether the Commissioner who made the order in question was a former judge. Section 48(1)(a) ***Supreme Court Act 1970*** includes in the definition of "specified tribunal"

(vi) a judge or member functioning or purporting to function under any Act giving power to a judge or member, whether as judge or member or as a designated person,

[63] Sections 100A and 100B were not in the ***ICAC Act*** as it was originally passed by Parliament. Schedule 4 pat 4 of the ***ICAC Act*** contains some transitional provisions relating to the time when s 100A and 100B commenced to apply, but those sections commenced so long ago that the transitional provisions are unlikely to have any ongoing effect.

(vii) a tribunal or other body (not including the State Parole Authority) that was constituted by one or more judges or members when exercising the functions, or purporting to exercise the functions, to which the proceedings in the Court relate…

Section 48 (1) (b) ***Supreme Court Act*** says:

(b) In paragraph (a) (vi) and (vii), ***judge or member*** means a person who is or has been—
(i) a Judge or associate Judge, or
(ii) a judge or member of any body referred to in paragraph (a) (i)–(iv), or
(iii) a Justice of the High Court or a Judge of the Federal Court of Australia or a Supreme Court of another State or Territory.

The term "Judge", with a capital J, in para (b) (i) means a judge of the Supreme Court[64], while "judge" with a lower-case j in para (b) (ii) means a judge of any description, and thus the people who fall within para (b) (ii) are judges and former judges of the Land and Environment Court, the Dust Diseases Tribunal and the District Court[65].

Clause 1 of Schedule 1 of the ***ICAC Act*** states the qualifications for being a Commissioner of ICAC as that the person "is qualified to be appointed or has been" a judge of the Supreme Court of an Australian State or Territory, a judge of the Federal Court or a judge of the High Court, but that a person who presently is the holder of any judicial office of the State or elsewhere in Australia is not eligible to be appointed. A person is qualified to be a judge of the Supreme Court of NSW if that person is an Australian lawyer of at least 7 years standing[66]. Thus, a Commissioner who made an order of which review was sought under s 36B or s 100B might be a former judge of an Australian superior court, or might be a person who had never been a judge of such a court but who was qualified to be appointed as such a judge.

Under s 48(2) ***Supreme Court Act***, it would be the Court of Appeal that decided a review under s 36B or s 100B of a decision made by a Commissioner who was a former judge of the Supreme Court, or a former judge of the Land and Environment Court, the Dust Diseases Tribunal or the District Court. If the Commissioner who made the decision in question was not a former judge of one of those courts, but was qualified to be a Commissioner by virtue of being qualified to be appointed as a judge of the Supreme Court, the review would be decided by a single judge of the Supreme Court.

Having different review bodies, depending on the identity of the person from whose decision the review is sought, is not unusual. It happens concerning the rights of appeal or review from any body some of whose members are judges or former judges, and some of whose

[64] S 19(1) ***Supreme Court Act 1970***

[65] Because those are the bodies referred to in s 48 (1) (a) (i) – (iv) ***Supreme Court Act***

[66] ***Supreme Court Act 1970*** s 26 (2). As there is not and never has been a Commissioner who is a judge of an Australian superior Court other than the Supreme Court of NSW there is no practical point, for the purposes of this submission, in listing the qualifications to be a judge of any Australian superior court other than the Supreme Court of NSW. Following amendments made by the ***ICAC and LECC Legislation Amendment Act 2022*** (NSW), the ***Independent Commission Against Corruption (Commissioner) Act 1994*** enables a person to be appointed as a Commissioner if that person was a judge of the Supreme Court or the District Court before being appointed as a Commissioner, and whose resignation as such a judge took effect immediately before the appointment as a Commissioner took effect. One of the qualifications for being a District Court judge is being an Australian lawyer of at least 7 years standing (s 13 (1) (a) ***District Court Act 1973***), so any District Court judge who has resigned is necessarily qualified to appointed as a Commissioner.

members are not. It might sometimes result in there being an additional appellate step before a final decision is reached – if the initial right of review is to a single judge of the Supreme Court, a party might attempt to appeal to the Court of Appeal against that judge's decision. However concerning the sort of issues likely to be raised in an application for review under s 36B or 100B it is likely that an appeal to the Court of Appeal from the decision of a single judge would not exist as a matter of right, but only by leave of the Court of Appeal[67].

What principles are applied on the review?

Concerning a right to have a "review" of a decision Mason CJ, Brennan and Toohey JJ have said:

> "But what emerges from the judicial decisions and, for that matter, from statutes is that 'review' has no settled pre-determined meaning; it takes its meaning from the context in which it appears."[68]

The nature of the "review" by the Supreme Court, and its powers upon conducting any such "review" are set out in s 36B and s 100B ***ICAC Act***[69]. I have not been able to find any case in the Supreme Court where either of those sections has been considered. I am not aware of any problem or controversy that has arisen concerning their application. There is no occasion to amend them in any way.

Question 3 – Role and Powers of the Inspector

The role and powers of the Inspector are found in ss 57A – 57G, 77A, 77B, 104C, 109, 111, 111D, and Schedule 1A of the ***ICAC Act***.

This question was prompted by Recommendation 8 of the November 2021 Report ("that the Committee review the Inspector of the ICAC's powers under the ICAC Act"), and the commentary on that recommendation at p 36 of the Report. At that page, the Report said[70]:

> [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[71].

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[67] Under s 101(2)(r) ***Supreme Court Act*** an appeal to the Court of Appeal lies as of right only concerning a final judgment or order that involves an amount at issue to or of the value of $100,000 or more, or a claim to a right valued at $100,000 or more. The terms on which a person ought be permitted to be at liberty – which is the subject of any review under s 36B or 100B - is a right not capable of being valued, and therefore leave to appeal is needed concerning a decision concerning it. In this respect it is analogous to a barrister's right to practice (***Clyne v NSW Bar Association*** (1960) 104 CLR 186 at 205) or the claims involved in litigation about the adoption of a child (***Re DG and the Adoption Act*** [2007] NSWCA 241: 244 ALR 195 at [21]; ***GKD v Director-General, Attorney General's Department; GKD v Director-General, Department of Family and Community Services*** [2012] NSWCA 219: ***Re Sarah*** {2013} NSWCA 37)

[68] ***Brandy v Human Rights and Equal Opportunity Commission*** [1995] HCA 10; 183 CLR 245 at 261

[69] Those sections are set out at page 25 above

[70] Footnotes omitted

[71] The "functions outlined in paragraph 4.22" of the Report were:

> "The Inspector's functions include the ability to:

> [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.
>
> [4.27] Mr Atkinson told the Committee that there were 'serious flaws in the complaints process [of the Inspector]'. In particular, he raised concerns about the difficulties in providing sufficient information related to the complaint to the Inspector.

A footnote to the last sentence quoted above in para 4.27 referred to p 10 of a submission that Mr John Atkinson had made, which is accessible through a hyperlink in that footnote.

Scope of the Inspector's Review

Section 57B ***ICAC Act*** provides:

(1) The principal functions of the Inspector are—
  (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
  (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
  (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
  (d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

(2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.

(3) The Inspector is not subject to the Commission in any respect.

(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is—
  (a) contrary to law, or
  (b) unreasonable, unjust, oppressive or improperly discriminatory, or
  (c) based wholly or partly on improper motives.

(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time—
  (a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and
  (b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

> • investigate and assess complaints about the ICAC or its officers;
> • investigate any aspect of the ICAC's operations or any conduct of ICAC officers (except auditing of telephone intercepts which requires Federal Government legislative change to the *Telecommunications (Interception and Access) Act 1979 (Cth)*);
> • require ICAC officers to produce documents or attend before him to answer questions; and
> • recommend disciplinary action or criminal prosecution against ICAC officers. "

The notion of an "audit" under s 57B (1) (a) extends to both examining whether the practices and procedures of the Commission were ones appropriate to enabling the Commission to operate within its jurisdiction, and conducting checks on a sample of individual cases to see whether the law of the state (relevantly, here the limits that the administrative law imposed so far as the Commission operating within its jurisdiction were concerned) had been observed. Any review of an individual case under para (a) would not be wider than a judicial review of that case would be.

As well there is some scope for an Inspector to investigate an individual case if a complaint is made that there has been the type of conduct referred to in s 57B (1) (b) or (c). But in para (b) the words "other forms of misconduct" would be read *eiusdem generis* to (ie, as referring to misconduct that is of the same type as) abuse of power and impropriety. "Abuse of power" and "impropriety" are not enough to enable a merits review of a decision to be made, even of the type that an appellate court makes.

There is a question of construction of s 57B (4) – clearly conduct is maladministration if it is of kind described in subsection (4), but does that leave open the possibility that something could be maladministration if it was maladministration in the ordinary meaning of the word (ie conducting some administrative task wrongly or badly) or in the extended sense adopted by s 57B (1) (c) (ie with delay or unreasonable invasions of privacy) even if it was not of the kind described in subsection (4)? It is arguable that that possibility is left open because subsection (4) does not say that conduct is maladministration if *and only if* it is of the type described in subsection (4). Even if that possibility is ultimately held to be correct, for a decision to not be the preferable one on the evidence as a whole is not enough to amount to "maladministration", in the ordinary sense of the word – it is just a mistake. Further, I would incline to construing subsection (4) as though it said "if and only if". There would be no point in confining conduct that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives to being "maladministration" only if it was action or inaction of a serious nature, but leaving open the possibility that conduct that did not fit within subsection (4) but was maladministration in the ordinary sense of the word could be investigated even if it was not of a serious nature. On the construction of subsection (4) that I favour, s 57B (1) (c) would not enable the Inspector to conduct a merits review of a decision of ICAC, even of a type that an appellate court makes.

What that leave the Inspector with is power to review a decision of ICAC for the purpose of seeing whether it is made within the limits of the statutory powers conferred on ICAC, involves any abuse of power or impropriety or other similar form of misconduct, whether there has been any undesirable delay or invasion of privacy in making the decision, and whether there has been any action or inaction of a serious nature that is—
(a) contrary to law, or
(b) unreasonable, unjust, oppressive or improperly discriminatory, or
(c) based wholly or partly on improper motives.

In exercising his functions, the Inspector has wide powers, under s 57C ***ICAC Act:***

The Inspector—
(a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and

(c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
(d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
(e) may investigate and assess complaints about the Commission or officers of the Commission, and
(f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
(g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

By enabling the Inspector to have full access to records of the Commission and requiring officers of the Commission to provide information, s 57C ensures that the Inspector is not deprived of the full range of information needed enable him to conduct a proper review of the decision of ICAC that falls within his jurisdiction, in a way that is not possible for a court.

Inadequate Redress against Reputational Harm?

The Report showed a concern that there be adequate "redress against reputational harm" that arose from the conduct of proceedings in ICAC. There is a risk that cannot be avoided or remedied that reputational harm will sometimes arise from inquiring into whether conduct was corrupt. Corruption in public life is a matter of extreme seriousness, and the importance of exposing and preventing or minimising it needs to be balanced against the risk that an individual suffers reputational harm arising from publicity of the investigative process.

There is also a risk of reputational harm arising from proceedings in a court, but the risk of occasional reputational harm to an individual is justified by the importance of justice being administered in the open. There is recognition of the importance of open administration of justice in the privilege from defamation that is given to publication of matter in the course of giving evidence to a court[72] or in the publication of a fair report of court proceedings[73]. There is a similar recognition of the importance of ICAC's proceedings in the privilege from defamation that is given for anything contained in a report by ICAC to Parliament that is published by or under the authority of Parliament (which would include any report by ICAC[74]), or a fair report of public proceedings of ICAC[75].

So far as court proceedings are concerned, redress against harm arising from evidence or decisions that harm the reputation of a person is available in nothing like all cases, and when it is available it takes the form of an appellate court holding that the statement that has caused the reputational harm is incorrect. Nothing more extensive is called for so far as ICAC is concerned, with the Inspector having the power to disapprove of any unfavourable finding that has been made by ICAC that fits within the fairly broad grounds on which the Inspector can consider a finding by ICAC.

[72] S 27 ***Defamation Act 1995 (NSW)***
[73] S 29 ***Defamation Act 1995 (NSW)***
[74] S 27 ***Defamation Act 1995 (NSW)***. A report by ICAC to Parliament must be published , pursuant to s 78 ***ICAC Act.***
[75] This protection arises because the report is of "any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country", which report is protected under s. 29 ***Defamation Act 1995 (NSW)***, esp subsection (1) and (4) (f)

One potential source of reputational harm is from reporting of questioning that has taken place in a public hearing. The November 2021 Report stated, in its summary, that "people who are called as witnesses or persons of interest can be placed under a cloud of assumed guilt because they are linked to an ICAC investigation."[76] Whoever it might be who makes such an assumption fails to understand how an ICAC hearing operates. It is every bit as mistaken to assume that suggestions or allegations put to a witness in an ICAC investigations are established to be true as it is to assume that allegations or suggestions put to a witness in a court case are established to be true. A witness in a court case can be cross-examined vigorously in open court, and it can be put to them, in detail, that they have engaged in illegal, dishonest or disreputable behaviour. The cross-examination can be reported in the media, and those reports might cause reputational harm to the witness if a member of the public assumed that the allegations that were put in cross-examination were true. But there is no justification for the member of the public making that assumption – what the cross-examiner suggests to the witness is just an allegation, that the judge might or might not accept, and a properly informed member of the public should understand that that is so. Similarly, questions put to a witness in an ICAC inquiry are mere allegations. To the extent that members of the public might mistakenly make assumptions of guilt from a person being named or asked questions in an ICAC inquiry, the solution is to provide better public education about the nature of ICAC hearings, not to restrict the powers of ICAC or to widen the powers of the Inspector.

There are rules of professional practice that confine the ability of a cross-examiner to put allegations to a witness unless there is a basis for the allegation. The principal source of that requirement is in rule 61 of the ***Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)*** **("the Barristers Conduct Rules")**:

> **61**
> A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:
> (a) are reasonably justified by the material then available to the barrister,
> (b) are appropriate for the robust advancement of the client's case on its merits, and
> (c) are not made principally in order to harass or embarrass a person.

.
These limits on a barrister apply both to a barrister appearing in court, and in a tribunal such as ICAC. The limits on questioning apply in ICAC hearings because the definitions section of the Barristers Conduct Rules[77] includes a provision that "court":

> "means any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions [the Criminal Justice Commission/ICAC or equivalent], arbitrations and mediations.

But that a member of the public would be entitled to think that a barrister who put a suggestion of some sort of improper conduct to a witness had a basis for it falls well short of the member of the public being entitled to think that the allegation is true.

Another potential source of possible reputational damage is that the evidence that is admitted in a court proceeding or an ICAC hearing might include a document that makes a serious

[76] Summary page iv - v
[77] S 125

allegation against a person. To be admissible in a court proceeding, the author of that document need not have personal knowledge of the allegations made in the document, if the document is a business record[78]. Such a document could be received in an ICAC hearing even if it was not a business record[79]. It will be a matter of chance whether the opportunity arises to question anyone about the truth of the allegation in the document, or whether the court or ICAC makes a finding about the truth of the allegations in the document.

The point, for present purposes, is that within the limits that the Barristers Conduct Rules impose, evidence that is harmful to a person's reputation can be admitted in a court case, and can be the subject of publicity, even though that evidence might later be not accepted by the judge, or not mentioned at all by the judge. If the evidence is not accepted or not mentioned by the judge there is no way in which the person who about whom an unfavourable suggestion has been made in the evidence can have the evidence tested or held to be incorrect by an appellate court or any other supervisory body. It is not as though the risk of reputational damage through the admission of evidence is a peculiarity of proceedings in ICAC. There is no need to have any special procedures to deal with that risk in ICAC proceedings.

Even if the evidence in court proceedings has been accepted by the judge, it is only a party to the proceedings who has a right to appeal. If the evidence affects the reputation of a person who is not a party, he or she has no redress. Even if the person to whom the evidence relates can appeal because he or she is a party, in the course of any appeal there might not be occasion for the appellate court to consider whether that particular piece of evidence is correct. That is because the appeal court will make a decision about only those matters that might show whether the judgment or order appealed against is erroneous.

Another potential source of reputational harm is from evidence accepted by ICAC, and conclusions that ICAC comes to, and inclusion of those matters in reports to Parliament. There is already a safeguard against a report to Parliament containing material that adversely but unjustifiably affects a person's reputation in s 79A ***ICAC Act***:

(1) The Commission is not authorised to include an adverse finding against a person in a report under section 74 unless—
  (a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and
  (b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.
(2) The Commission must not include in the report any information in the person's response that would identify any person who is not the subject of an adverse finding, unless the Commission—
  (a) is satisfied that it is necessary to do so in the public interest, and
  (b) is satisfied that doing so will not cause unreasonable damage to the reputation, safety or well-being of a person who is not the subject of an adverse finding, and
  (c) includes in the report a statement that the person identified is not the subject of any adverse finding.
(3) This section applies to the Inspector in the same way as it applies to the Commission, and for that purpose a reference in this section to—
  (a) a report under section 74 is a reference to a report under section 57B or this Part, and

[78] S 69 ***Evidence Act 1995.***

[79] Because of ICAC not being bound by the rules of evidence

(b) an adverse finding against a person includes a reference to an adverse finding against the Commission or an officer of the Commission.

(4) In this section—

adverse finding includes an adverse opinion.

There is a corresponding risk of reputational harm arising from the reasons for judgment in court cases, if a judge accepts evidence that is unfavourable to a person, or reaches a conclusion that harms that person's reputation. It is only if the person whose reputation has been harmed in that way is a party to the litigation that he or she will have any opportunity at all to appeal. Even if the person whose reputation has been damaged is a party to the litigation, a right to appeal does not lie as of right concerning every decision that a judge has made – in broad terms an appeal lies as of right only against a final judgment or order[80], and only if winning or losing the appeal would make a difference of $100,000 or more to the appellant[81]. If an appeal does not lie as of right, there can be an appeal only if the Court of Appeal grants leave to appeal. To be granted leave to appeal a litigant must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at[82].

Even if a party has an appeal as of right against a court decision, or obtains leave to appeal, an appeal to the Court of Appeal from a single judge is against a "judgment or order"[83]. As I have previously said:

> "A "judgment or order" in this context means an operative judicial act, ie the formal judgment or order which when entered is binding on the parties and definitive of legal rights: …[84] While error in a judgment or order might be demonstrated on an appeal by showing error in a judge's reasons for judgment, the appeal is against the judgment or order, not the reasons for judgment: ***Driclad*** at 64; ***Lake v Lake*** at 344; ***Ah Toy*** at 286."[85]

Thus, even if a party to litigation can appeal, that will not necessarily enable every finding or remark of the judge to be questioned on the appeal – it is only those findings or remarks that have an effect on the final order made that can be questioned. Further, the appellant will not

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[80] Ie not against any interlocutory decision

[81] See footnote [67] above, and ***Blackmore v Browne; Kara Kar Holdings Pty Ltd v Blackmore*** [2011] NSWCA 114 at [31]-[32]; ***Hansen v Slattery Transport (NSW) Pty Ltd*** [2011] NSWCA 193 at [2]; ***Jensen v Ray*** [2011] NSWCA 247 at [10]-[12]; ***Jardin v Metcash Ltd*** [2011] NSWCA 409 (2011) 285 ALR 677, 2011 214 IR 448 at [20]. Any legal costs payable are left out of the calculation of the $100,000: ***Gurr v Robinson*** (NSW Court of Appeal, 10 February 1986, unreported) at 2-3 per Kirby P; ***Harbrett Pty Ltd v Butler*** (NSW Court of Appeal, 14 December 1989, unreported) per Gleeson CJ, Clarke and Meagher JJA agreeing); ***Built Interiors Pty Ltd v Three Dinosaurs Pty Ltd*** [2003] NSWCA 290 at [35] (Mason P, Meagher and Ipp JJA agreeing); ***Coshott v Shipton Lodge Cobbitty Pty Ltd*** [2006] NSWCA 316 at [14] (Basten JA); ***Jardin v Metcash Ltd*** [2011] NSWCA 409 (2011) 285 ALR 677, 2011 214 IR 448 at [28]

[82] ***Carolan v AMF Bowling Pty Ltd*** [1995] NSWCA 69 per Sheller JA (followed in ***Zelden v Sewell*** [2011] NSWCA 56 at [22]).

[83] S 101 (1) ***Supreme Court Act 1970***

[84] The portion omitted from the quotation is authority for the proposition in the first sentence quoted, namely ***Driclad Pty Ltd v FCT*** (1968) 121 CLR 45 at 64; ***Lake v Lake*** [1955] P 336 at 343; ***Moller v Roy*** (1975) 132 CLR 622 at 625 632 and 639; ***Universal Tape Wholesalers Pty Ltd v AMP Fire and General Insurance Co Ltd*** (NSWCA, 8 March 1991, unreported); ***Legal Practitioners Complaints Committee v A Practitioner*** (1987) 46 SASR 126 at 127; ***Johnston v Nationwide News Pty Ltd*** [2005] NSWCA 17 ; (2005) 62 NSWLR 309 at [30], [39]; ***Ah Toy v Registrar of Companies*** (1985) 10 FCR 280 at 285–6.

[85] ***Wang & Liu v State of New South Wales*** [2011] NSWCA 321 at [23] (Handley AJA agreeing)

be able to correct many findings of fact that depended on the trial judge having heard and seen the witnesses[86].

When there are all these inhibitions on a party to a court case being able to seek to correct n appeal a factual finding with which he or she disagrees, it is hard to see why someone who claims to have suffered reputational damage from a finding of ICAC should have a more extensive opportunity to question that finding than is now available.

Even if the Inspector has found that a decision of ICAC is faulty in one of the ways mentioned in subsections (2) or (3), there is a limit to what the Inspector can do about it – his only permitted way of dealing with it, under those subsections, is by reports and recommendations. As the Committee has noted[87], it is possible for an individual to publish an inspector's report in ways such as on their website. It is hard to see why that is not a sufficient remedy. If a litigant in a court case succeeds in having an unfavourable finding reversed on appeal, that individual has no further remedy concerning the finding that has been reversed than to publicise the decision of the Court of Appeal.

Difficulties in obtaining enough evidence of improper conduct in an ICAC investigation?

Mr Atkinson's submission drew particular attention to the difficulties that a person who wants to complain to the Inspector about a decision of ICAC has in obtaining documents to demonstrate that an abuse of power has occurred in the course of the ICAC hearing. The Inspector is not obliged to investigate every complaint made to him. (I hasten to say that it would be a very unwise law that imposed such an obligation on the Inspector, because of the possibility of unmeritorious complaints being made, and it being perfectly understandable that a person who had had a finding of corrupt conduct made against him would take every step possible to dilute or remove that finding, regardless of the strength of the support for it, or the lack of justification for the expenditure of public money in reconsidering that finding.) Thus, a person who seeks to induce the Inspector to investigate some particular finding has the task of persuading the Inspector that it is appropriate to do so. If the documents that would show abuse of power are the subject of a suppression order made by ICAC, Mr Atkinson submits that the individual cannot obtain them[88].

The difficulties in the way of convincing the Inspector to start an investigation are nothing like as stark as Mr Atkinson suggests. A "suppression order" in relation to evidence is made under the provisions of a 112 ***ICAC Act***:

(1) The Commission may direct that—
  (a) any evidence given before it, or
  (b) the contents of any document, or a description of any thing, produced to the Commission or seized under a search warrant issued under this Act, or

[86] See the first paragraph following the heading "Merits Review of a Decision of ICAC?" in this submission
[87] In [4.26] of the November 2021 Report, quoted above
[88] Mr Atkinson gave as an example, at page 11 of his submission, a document that was Annexure F to his submission – but Annexure F has been redacted in the documents available through the hyperlink to the last sentence pf para 4.27 of the Committee's report, so the persuasiveness of that particular example cannot be evaluated.

(c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or
(d) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry, or
(e) any written submissions received by the Commission (including, but not limited to, submissions made by Counsel assisting the Commission),

shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

(1A) The Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.

(1B) A direction under this section does not apply to—
(a) the making of a complaint to the Inspector or the disclosure of information, documents or other things to the Inspector, or
(b) the disclosure of information, documents or other things by a law enforcement officer to the Director of Public Prosecutions in accordance with the duty of disclosure under section 15A of the *Director of Public Prosecutions Act 1986*.

(2) A person shall not make a publication in contravention of a direction given under this section. Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

(3) [a presently irrelevant exception]

Thus if a person knows that evidence has been given or a document produced to ICAC that tends to show that there has been the sort of irregularity in its proceedings that the Inspector can investigate, section 112 (1B) ensures that the person can tell the Inspector about it, and tell the Inspector the substance of the evidence or the substance of the contents of the document, notwithstanding any secrecy direction that has been given under s 112 (1). This is so even if in the first instance the person cannot produce the transcript of the evidence or a copy of the document itself to the Inspector. If the Inspector is then persuaded that there is enough in the allegation that has been made to him to warrant further investigation, s 57C entitles the Inspector to require the document or information to be made available to him, and the "except for the purposes of this Act" in s 111(2) frees any relevant officers of ICAC from any restrictions on making that document or information available to the Inspector.

J C Campbell
11 August 2022