

**Submission  
No 4**

## **REVIEW OF THE INDEPENDENT COMPLAINTS OFFICER SYSTEM (2023)**

**Organisation:** NSW Independent Commission Against Corruption

**Date Received:** 27 October 2023



INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

## **Submission by the Independent Commission Against Corruption to the Review of the Independent Complaints Officer System**

**October 2023**

### **Scope to investigate corrupt conduct**

1. The Independent Commission Against Corruption (“the Commission”) is required, as far as practicable, to direct its attention to serious and systemic corrupt conduct.<sup>1</sup> In addition, conduct by a Member of Parliament cannot be corrupt unless it could constitute or involve a criminal offence or a substantial breach of an applicable code of conduct, or brings the integrity of the office concerned, or of Parliament, into serious disrepute (and also constitutes a breach of law).<sup>2</sup>
2. The resolutions passed by both Houses of Parliament outline the following function for the Independent Complaints Officer (“ICO”).

*The Independent Complaints Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:*

*(i) misuse of allowances and entitlements;*

*(ii) other less serious **misconduct matters falling short of corrupt conduct**; [Emphasis added] and*

*(iii) minor breaches of the pecuniary interests disclosure scheme.<sup>3</sup>*

3. The Commission notes that the misuse of allowances and entitlements could amount to corrupt conduct. Consequently, clauses (i) and (ii) above are potentially in conflict.

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<sup>1</sup> Section 12A *Independent Commission Against Corruption Act 1988* (ICAC Act)

<sup>2</sup> Section 9(1) and (4) ICAC Act.

<sup>3</sup> Legislative Assembly, Votes and Proceedings No. 132, 29 March 2022, p. 1645. Legislative Council, Minutes of Proceedings No. 114, 22 March 2022, p. 3040.

4. The *Independent Complaints Officer Protocols* (“the ICO Protocols”) tabled in both Houses, which outline the current ICO procedures and the types of complaints that the ICO can consider, refer to “*low level minor misconduct matters*” and to “*alleged breaches of the Members’ Code of Conduct including misuse of allowances and entitlements, less serious misconduct matters falling short of corrupt conduct and minor breaches of the pecuniary interest disclosure scheme that involves potential corrupt conduct*”.<sup>4</sup>
5. Pursuant to s 53 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”)<sup>5</sup>, the Commission may refer a matter to “any person or body considered by the Commission to be appropriate in the circumstances”. Before making a referral, the Commission must consult with the relevant party and consider its views. The ICO Protocols reflect the Commission’s referral powers but at present, there is little point in referring matters if the ICO cannot investigate minor corrupt conduct. In addition, the Commission has power to require “any person or body” to submit a report (to the Commission) in relation to the referral (see s 54 of the ICAC Act). Consequently, the Commission could compel the ICO to report on action taken in response to a referral but again, there would be limited value in using this power given the ICO’s current remit.
6. In practice, most matters reported to the Commission that involve reasonable suspicions of corrupt conduct<sup>6</sup> are dealt with by the relevant public authority. The Commission takes into account the responsibility and role of other public authorities and public officials in the prevention of corrupt conduct.<sup>7</sup> Usually, less than 1% of matters received are made the subject of a Commission investigation.<sup>8</sup>
7. As it stands, there is a jurisdictional gap between matters for the Commission to investigate, which focus on serious and systemic corrupt conduct<sup>9</sup> and matters that the ICO can investigate, which involve less serious misconduct matters falling short of corrupt conduct. This gap should be closed by giving the ICO remit to investigate matters that could constitute corrupt conduct. This would place the ICO in the same situation as any other investigator working in or for a NSW public authority.
8. The Commission would continue to investigate the more serious or systemic matters involving MPs and their staff but with an expanded remit, the ICO would tackle a range of potentially corrupt conduct that could include alleged breaches of

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<sup>4</sup> Legislative Assembly and Legislative Council, Tabled Papers, 17 November 2022, *Independent Complaints Officer Protocols*, dated November 2022.

<sup>5</sup> Please note that there is a typographical error in the ICO Protocol, as it refers to ICAC Act 1998 rather than 1988.

<sup>6</sup> Section 11 ICAC Act

<sup>7</sup> section 12A ICAC Act

<sup>8</sup> NSW ICAC, *Annual Report 2021-2022*, p. 29.

<sup>9</sup> For details and the range of factors that Commission takes into account in determining whether conduct could amount to “serious corrupt conduct” pursuant to section 74BA of the ICAC Act, see NSW ICAC, *Annotated Code of Conduct for Members*, April 2023, Appendix 1.

applicable codes of conduct and the disclosure requirements of the Constitution (Disclosures by Members) Regulation 1983.

9. Ideally, this proposed expansion of the ICO's remit would involve the creation of satisfactory liaison and referral arrangements with the Commission.<sup>10</sup>

### **Submission 1**

The remit of the ICO ought to be expanded to allow investigation of matters that could constitute corrupt conduct.

### **Referring matters to the Commission**

10. Section 11 of the ICAC Act requires the principal officer of a public authority to "report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct". However, neither the Legislative Assembly, the Legislative Council nor the Parliament itself is defined as a "public authority" for the purposes of the ICAC Act and as such, the s 11 reporting requirement does not apply.
11. Furthermore, pursuant to the resolutions of both Houses and the ICO Protocols, the ICO is not required to notify the Commission of matters that potentially involve corrupt conduct.<sup>11</sup>
12. However, the ICO Protocols provide the ICO with a discretion to notify the Commission of a matter as an "*exceptional circumstance*" and with regard to a matter that is "*notably serious or substantial*" and if "*there would be a strong public interest in the ICAC being informed*".<sup>12</sup>
13. The ICO Protocols state that where a matter could involve corrupt conduct, the ICO will suggest that the complainant should raise the matter with the Commission. While a complainant in this situation may follow the suggested course of action, if the complainant is anonymous or unwilling to contact the Commission, the complaint may never be actioned.
14. While the Commission respects the right of Parliament to determine its own operating procedures, the absence of a mandatory reporting mechanism means that the Parliament's overall controls are less robust than typical NSW public sector agencies. Some options for consideration include:

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<sup>10</sup> Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer, Report 1/57*, July 2021, p. 22, para. 2.14.

<sup>11</sup> Legislative Assembly, Votes and Proceedings No. 132, 29 March 2022, p. 1647. Legislative Council, Minutes of Proceedings No. 114, 22 March 2022, p. 3042. Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para 15 and para 23.5.

<sup>12</sup> Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para. 15.3

- inserting a mandatory reporting requirement into the ICO Protocols (akin to a s 11 requirement)
  - giving the ICO an unfettered discretion to report matters to the Commission. That is, removing the “exceptional circumstance”, “notably serious or substantial” and “strong public interest” limitations.
  - developing a memorandum of understanding that better articulates the types of matter the ICO can or should refer to the Commission.
  - improving education among members and staff about the importance of reporting suspected corrupt conduct, including to the Commission.
15. Paragraph 11.1 of the ICO Protocols refers to the *Public Interest Disclosures Act 1994* but a relevant footnote points to the new legislation (now the *Public Interest Disclosures Act 2022*). In addition to updating the legislative reference, steps should be taken to ensure the ICO Protocols are consistent with the law.

## **Submission 2**

That the Committee consider the options for improving the reporting of suspected corrupt conduct to the Commission.

## **Standing for complainants**

16. The ICO can only receive complaints from a limited number of persons, including current members of the NSW Parliament and staff.<sup>13</sup> Former staff can only complain to the ICO for up to 21 days following the end of their employment (except in relation to their rights under any other legislation such as the *Work Health and Safety Act 2011* or the *Anti-Discrimination Act 1977*).<sup>14</sup>
17. Recently departed staff may be on holidays, in a new job or looking for a new job. Less often, they may be contemplating an unfair dismissal application following the end of their employment. This means that former staff may not have had time to consider whether they also have concerns that ought to be reported to the ICO before expiry of the 21 day time period.
18. The Commission is aware of a matter where the limited standing for complainants was likely an impediment for the ICO receiving this complaint.<sup>15</sup>

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<sup>13</sup> Legislative Assembly and Legislative Council, Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para. 6.

<sup>14</sup> Ibid, para. 6.6.

<sup>15</sup> Referenced by the ICO in her *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 March 2023 to 31 May 2023*. See Tabled Papers, Legislative Assembly, 20 June 2023.

19. A system with such a tight timeframe for former staff to raise concerns, yet being able to receive complaints from anonymous sources, indicates a degree of incongruity.
20. A range of people other than members of Parliament, staff and the Commission could have information that warrants investigation by the ICO. This could include family members and business associates of members/staff, members/staff of other parliaments, party members and officials, unions and business associations and political donors. The ICO will be in a difficult position if they cannot take action in response to compelling information about misconduct by a member, simply because it comes from an impermissible class of complainant.
21. The Commission notes that the ICO can receive complaints from anonymous sources even though the ICO is unlikely to be able to confirm the standing of an anonymous source.<sup>16</sup> It is possible that person who is an impermissible class of complainant will decide to lodge an anonymous complaint as a means of having their matter assessed and investigated. This also places the ICO in a difficult decision because it would require a judgement call to be made, with incomplete information, about jurisdiction. In addition, while it is considered better practice to permit anonymous complaints, it is preferable if an investigator is able to communicate with the complainant.
22. The current limitations of the standing of complainants could be an impediment for the ICO to receive and consider complaints. The three quarterly reports from the ICO tabled in the Legislative Assembly indicate that the ICO has not received a large number of complaints to date.<sup>17</sup>

### **Submission 3**

NSW Parliament should consider expanding the classes of person/organisation that can make a complaint to the ICO and the time limits in which former staff can submit complaints.

### **Time periods for conduct**

23. Pursuant to the ICO Protocols, the ICO may only receive complaints relating to matters arising after 22 March 2022 in relation to members of the Legislative Council or 29 March 2022 in relation to members of the Legislative Assembly

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<sup>16</sup> Ibid, para. 5.3 and para 20.

<sup>17</sup> Tabled Papers, Legislative Assembly, 20 June 2023, *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 September 2022 to 30 November 2022*; *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 December 2022 to 28 February 2023*; *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 March 2023 to 31 May 2023*.

(when the relevant resolutions were passed). Further, a complaint must be lodged within two years of the alleged events occurring (exceptions apply).<sup>18</sup>

24. It is possible that a complainant could present the ICO with information about wrongdoing that does not meet these requirements. It is not uncommon for significant periods of time to elapse between an incident of misconduct and the relevant complaint. This can happen if the matter is initially lodged with a different complaint-handler or if it takes time for the complainant to identify the relevant evidence or summon the will to come forward. It is also the case that an investigation into conduct can identify relevant evidence and witnesses.
25. As noted above, the three quarterly reports from the ICO tabled in the Legislative Assembly indicate that the ICO has not received a large number of complaints to date.<sup>19</sup> The Commission sees no harm in broadening the existing time periods that apply to complaints.

#### **Submission 4**

NSW Parliament should consider revising the existing time periods applying to complaints made to the ICO.

#### **Assistance with investigations**

26. The ICO Protocols provide for the engagement of a person or persons to assist with investigations, especially in respect of matters that raise significant issues. Persons appointed to assist the ICO will have the same powers as the ICO, including to request information and conduct investigations.<sup>20</sup>
27. Pursuant to s 16 of the ICAC Act, the Commission may co-operate with other agencies, or other persons and bodies as appropriate. This provides a legislative basis for co-operation between the Commission and the ICO in relation to investigations.

#### **Submission 5**

The ICO Protocols could be amended to reflect s 16 of the ICAC Act and the possibility of co-operation on investigations.

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<sup>18</sup> Legislative Assembly and Legislative Council, Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para. 6.

<sup>19</sup> Tabled Papers, Legislative Assembly, 20 June 2023, *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 September 2022 to 30 November 2022*; *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 December 2022 to 28 February 2023*; *Report of the Independent Complaints Officer of the NSW Parliament to the Legislative Council Privileges Committee and Legislative Assembly Parliamentary Privileges and Ethics Committee, for the period of 1 March 2023 to 31 May 2023*.

<sup>20</sup> Legislative Assembly and Legislative Council, Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para. 26.

## Monitoring by the ICO

28. The ICO Protocols include a provision for the ICO to monitor the operation of the Code of Conduct for Members, the Constitution (Disclosure by Members) Regulation 1983 and the members' entitlement system.<sup>21</sup>
29. The Commission's 2022 report, *Investigation into the conduct of the local member for Drummoyne* (Operation Witney), outlined a range of systemic weaknesses relating to the conflicts of interest requirements of the Code of Conduct for Members.<sup>22</sup>
30. Pursuant to clause 16 of the Constitution (Disclosure by Members) Regulation 1983, Members, may, at their discretion, disclose any direct or indirect benefit, advantage, or liability, whether pecuniary or not, which the Member considers might appear to raise a conflict between their private interests and their public duty.
31. Pursuant to clause 7 of the Code, Members "*must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest*", including "*in any communications with Ministers, Members, public officials or public office holders*".
32. However, there are no mechanisms in place to collate conflict of interest disclosures made by Members pursuant to clause 7 of the Code of Conduct for Members, as there is no current register of conflicts of interest. Any disclosures made pursuant to Clause 16 of the Constitution (Disclosure by Members) Regulation 1983 of (concerning benefits, advantages or liabilities), are only discretionary. Hence, the current pecuniary interest disclosures for Members do not necessarily capture conflicts of interest that must be disclosed pursuant to clause 7 of the Code of Conduct for Members.
33. On the other hand, pursuant to the *NSW Ministerial Code of Conduct*, there exists a centralised Ministerial Register of Interests, which includes disclosures of conflicts of interests.<sup>23</sup>
34. The Commission previously has made recommendations to address these weaknesses and is cognisant that there is another inquiry currently considering these recommendations.<sup>24</sup> Consequently, no further submission is made here.

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<sup>21</sup> Legislative Assembly and Legislative Council, Tabled Papers, 17 November 2022, Independent Complaints Officer Protocols, dated November 2022, para. 12.3.

<sup>22</sup> NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, July 2022, p. 175ff.

<sup>23</sup> Independent Commission Against Corruption Regulation 2017, Appendix, clause 11 of the NSW Ministerial Code of Conduct; and clause 11 of the Schedule to the NSW Ministerial Code of Conduct

<sup>24</sup> Standing Committee on Parliamentary Privilege and Ethics inquiry into "Recommendations of the ICAC arising out of Operation Keppel and Operation Witney", <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3008>, accessed 18 October 2023.