

Submission  
No 1

## INQUIRY INTO REVIEW OF INDEPENDENT COMPLAINTS OFFICER SYSTEM (2023)

**Organisation:** Independent Complaints Officer

**Date Received:** 27 October 2023

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The Hon Stephen Lawrence MLC  
Chair  
Legislative Council Privileges Committee  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Chair

Thank you for your invitation to make a submission to the Legislative Council Privileges Committee review of the Independent Complaints Officer system (2023).

### **Background**

I was appointed as the inaugural Independent Complaints Officer (ICO) in August 2022 and commenced formally in the role on 1 September 2022. The role was created by resolutions of the Legislative Council on 22 March 2022 and the Legislative Assembly of 29 March 2022 (collectively referred to as “the resolutions”).

The initial task required of the ICO by the resolutions was, within three months of appointment, to develop a protocol to be approved by the Legislative Council Privileges Committee and the Legislative Assembly Parliamentary Privilege and Ethics Committee (referred to as “the Privileges Committees”) and tabled in the relevant House. The protocols were tabled in the Legislative Council and the Legislative Assembly on 17 November 2022. They were also made available on the Parliament of NSW intranet site.

Communications about the appointment of the ICO and the role and functions were developed and distributed to all members of the Parliamentary community in emails and through information on the intranet site. A brief information resource was provided on the Parliament of NSW website [[Independent Complaints Officer \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/independent-complaints-officer)]. I have also liaised with the Department of Parliamentary Services (DPS) team developing communications following the Broderick inquiry and those communications have included information about the ICO.

I participated in a panel session during the orientation for new Members following the election in March 2023 to provide information about the role of the ICO.

As required by the resolutions, quarterly reports have been provided to the Privileges Committees for the periods September – November 2022, December 2022 to February 2023, March to May 2023 and June to August 2023. The reports are tabled in Legislative Assembly and Legislative Council.

### **Overview of matters dealt with by the ICO since 1 September 2022**

A total of 13 individual matters have been raised (as inquiries or complaints) with the ICO in the period 1 September 2022 to 27 October 2023.

### *Matters outside the ICO's jurisdiction*

Seven of these thirteen matters were outside the jurisdiction of the ICO.

In respect of two of these matters the lack of ICO jurisdiction related to the ICO only being able to consider matters arising after the resolutions made in March 2022. As time progresses it is expected fewer matters will fall outside jurisdiction for this reason.

The other reasons for matters being outside the jurisdiction of the ICO were that they did not relate to the conduct of a member of parliament [two matters], that the complainant was not a member of the Parliamentary community [two matters] and that the conduct was during Parliamentary proceedings [one matter].

Where a complaint or inquiry was made in respect of a matter that is outside the jurisdiction of the ICO, I have endeavoured to assist the complainant by the provision of information about alternative options for action, including the possibility that the matter could be raised with the DPS Workplace Support team. So far, no formal referrals to other complaint handling bodies have occurred.

Of the matters outside the jurisdiction of the ICO most related to “bullying, harassment or other unacceptable conduct”. Only one related to alleged misuse of entitlements or allowances (this one was out of jurisdiction as the alleged conduct occurred prior to March 2022.)

### *Complaints within the ICO jurisdiction*

Of the six complaints that were potentially within the ICO jurisdiction:

- One was investigated as far as draft findings but was not progressed as the member involved had received advice that their conduct was covered by parliamentary privilege.
- One had some preliminary inquiries made, and some minor resolution was obtained. However the preliminary inquiries indicated that the main matter at issue had its origins in a dispute of a political nature and was not a matter that the ICO could pursue.
- One was discontinued as the complainant was no longer a member of the parliamentary community following the election in March 2023.
- One was not investigated as the complainant decided to resign from their position and did not wish to pursue the matter.
- One was finalised but was appealed by the member involved to the relevant privileges committee. The committee determined that the conduct involved was covered by parliamentary privilege and not within the jurisdiction of the ICO.
- One matter was ongoing as at 27 October 2023.

All five of the concluded matters related to conduct that was alleged to be “bullying, harassment or other types of inappropriate conduct”.

### **Matters arising in respect of the ICO role**

#### *Communication about the role of the ICO*

Communication about the existence and role of the ICO is continuing. A further email message to all members of the Parliamentary community will be sent in November 2023, reinforcing previous messages and reflecting issues that have arisen in the past 12 months.

Beginning in November 2023, training sessions focusing on creating a respectful, safe and inclusive workplace culture and obligations regarding workplace misconduct are being made available to all staff in leadership roles across Parliament as well as all members of Parliament. I have agreed to participate in the pilot session and provide some information about the role of the ICO by video for use in all the sessions.

There appears to be some ongoing lack of knowledge about the jurisdiction and role of the ICO and this is a matter of ongoing consideration. The Committee may have a view as to any specific messages or methods of communication that should be used to increase understanding of the ICO system.

#### *Interpretation of “not related to conduct in proceedings” and parliamentary privilege*

The resolutions provide that the ICO can consider conduct that is “not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees”. This phrase is similar to the words used in relation to the Parliamentary privilege of freedom of speech. I have interpreted this part of the resolutions as reflecting an intention that the ICO should not consider any conduct that would attract parliamentary privilege immunity.

The Committee may wish to consider whether there should be a direct statement in the resolutions that conduct to which privilege attaches is outside the jurisdiction of the ICO.

Some matters that have come to the ICO have raised a question as to whether the conduct was “related to conduct in proceedings of the Legislative Council or Legislative Assembly”. Assuming that the practical effect of finding that conduct is “related to conduct in proceedings” is the same as finding that the conduct attracts parliamentary privilege immunity there may be an issue as to the role of the ICO in interpreting this phrase. Generally the question of whether privilege applies in a matter for the Parliament (through the privileges committees).

It is not clear whether it was intended that the ICO should immediately cease consideration of a matter to refer questions about “conduct in proceedings” (and therefore privilege) to the relevant privileges committee or alternatively whether the ICO should make an initial determination as to whether the exemption for “conduct in proceedings” might apply with parties having an ability to appeal to the relevant committee if they do not agree with the ICO’s interpretation. If the latter course is considered appropriate and the ICO should make a first call on the issue of “conduct in proceedings”, it might be helpful for there to be a clear process by which the ICO can seek advice from an appropriate person to assist with this interpretation.

#### *Interaction with the role of the ICAC*

The resolutions provide that if the ICO has concerns that a matter may potentially involve corrupt conduct, the ICO should cease their investigation and invite the complainant to raise the matter with the Independent Commission Against Corruption (ICAC). The ICO protocols confirm that in determining whether a matter may involve corrupt conduct the definition of corrupt conduct in sections 8 and 9 of the *ICAC Act 1998* will be used.

The ICO may inform the ICAC of the complaint but cannot provide information obtained during the course of a complaint to the ICAC. In the ICO protocols it is noted that as a general rule the ICO will not inform the ICAC of the existence of a complaint. However if the complaint is notably serious or

substantial and there would be a strong public interest, the ICO would consider notifying the ICAC as an exceptional circumstance. The ICO cannot be compelled to refer a complaint to the ICAC.

I have liaised with the ICAC to develop working relationships. Under section 53 of the *ICAC Act 1998* the ICAC may refer a matter for investigation or other action to anybody it considers appropriate. Under agreement between the ICO and the ICAC, the ICAC has indicated that it will generally refer a matter to the ICO for information (not for investigation).

One issue that has been noted in discussions with the ICAC is that potentially the ICAC may wish to refer a matter to the ICO even when it falls within the definition of “corrupt conduct”. This is because the ICAC prioritises its activities by investigating more serious matters and referring other less serious conduct (including conduct that falls within sections 8 and 9) for consideration by the relevant government agency (under section 53). However this could not occur in the case of a referral to the ICO because if the matter may potentially involve corrupt conduct the ICO cannot consider it.

Potentially there could be complaints to the ICO that cannot be considered by the ICO as they come within the definition of “corruption” but they also don’t meet the ICAC’s criteria for further action.

So far only one matter has come to the ICO that might have raised matters under the ICAC Act. In that case the complainant made the complaint simultaneously to the ICAC and the ICO in the same email and it was able to be discussed directly with the ICAC.

#### *Times frames and “expedition”*

The resolutions describe the role of the ICO as dealing with matters “expeditiously” and require members, staff and parliamentary officers to reasonably co-operate with the ICO’s inquiries including giving a full, truthful and “prompt” account of matters.

In light of this I have endeavoured to give reasonable, but not lengthy, timeframes to members from whom information or submissions have been sought, having regard to the complexity of the questions being asked. Extensions of the timeframes have been sought on some occasions. A new schedule has been able to be negotiated with the relevant member and the matter has been able to proceed.

However, I wanted to bring to the Committee’s attention that it was raised on one occasion that the timeframe in which I sought to have a meeting was unreasonable as “in the ordinary course of commencing a resolution dispute process 21 days is the normal time frame”. I indicated to the member involved that I would raise as a general issue whether it was intended that rigid time frames such as 21 days were envisaged for the work of the ICO.

#### *Interpretation of “bullying, harassment and other types of inappropriate conduct”*

The resolutions creating the position of ICO and the ICO protocols do not contain a specific definition of the phrase “bullying, harassment and other types of inappropriate conduct”.

In considering complaints about conduct of this nature I have had regard to general standards of for safe workplaces, community understanding of the conduct expected of Members of Parliament and guidance provided in other documents including:

- The NSW Ministerial Offices Respectful Workplaces Policy (“Respectful Workplaces Policy”)
- The Legislative Council Code of Conduct for Members as amended and a recent report proposing a similar amendment to Legislative Assembly Code of Conduct for Members, and
- The Independent Review into Bullying, Harassment and Sexual Misconduct at the Parliament of NSW (“the Broderick Report”)

I believe that there is no necessity for a specific definition of these terms in the resolutions (or the protocols) given the availability of many other resources such as those outlined above. A bullying, harassment and sexual harassment policy is currently being consulted on by DPS which I will also be able to rely on. Additionally updated guidance on issues such as psychosocial hazards and respect at work is being provided by SafeWork NSW and other regulators.

However, one member who was the subject of a complaint submitted that the lack of a definition in the resolutions meant that a fair hearing on the complaint could not occur as the party complained of could not properly respond to the complaint. It was suggested that only the Parliament could define the type of conduct that was to be considered by the ICO. I did not accept this submission at the time but bring it to the Committee’s attention that the issue was raised.

I would be happy to provide any further information the Committee requires or answer any questions that the Committee may have.

Yours sincerely

[signed]

Rose Webb  
Independent Complaints Officer  
Parliament of NSW