

INQUIRY INTO REVIEW OF INDEPENDENT COMPLAINTS OFFICER SYSTEM (2023)

Organisation: NSW Ombudsman

Date Received: 2 April 2024

2 April 2024

The Hon. Stephen Lawrence MLC
Committee Chair
Legislative Council Privileges Committee

By email: privilege@parliament.nsw.gov.au

Dear Mr Lawrence

Review of the Independent Complaints Officer (ICO) system

Thank you for the invitation to make a submission to the Legislative Council Privileges Committee *Inquiry into the review of the Independent Complaints Officer system*.

I understand the ICO was established by the resolution of each of the Houses of Parliament and is now subject to review by the relevant committees of both Houses.

Last year, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics invited a submission from my office in relation to its *Review of the Independent Complaints Officer system*. The submission dated 27 October 2023 set out:

- The role and functions of my office, including to receive complaints about and investigate NSW public authorities (which includes both agencies and officials). Those functions are subject to Schedule 1 of the *Ombudsman Act 1974* which provides for 'excluded conduct' that cannot be the subject of complaint to, or investigation by the Ombudsman, including the conduct of Parliament, its members and officers. Our view is that there is no practical overlap between the functions of my office and the ICO.
- Our function under section 25A of the *Ombudsman Act* to review the systems of 'public authorities' for handling complaints. We noted that although we could potentially (in theory) review the ICO's complaints-handling system (as the ICO is a 'public authority', albeit one that is excluded from our complaint-handling and investigation functions by Schedule 1), it is unlikely we would conduct a deep-dive review of the ICO for the reasons set out in our submission.
- The potential application of the *Public Interest Disclosure Act 2022* (PID Act) to complaints made to the ICO. We noted that, under what appears to be the current [ICO Protocols](#) (dated November 2022), those who may be expected to complain to the ICO will often be public officials for the purpose of the PID Act. This includes staff employed by Parliament to support the work of members. Under section 11 of the *ICO Protocols*, the ICO was not nominated as a disclosure officer for the purpose of the previous PID legislation (*Public Interest Disclosures Act 1994*). A footnote to that section of the protocol notes that this position may change with the commencement of the new PID Act. Our view is that with the commencement of the new PID Act in October last year, it is important for Parliament to consider whether the ICO is to be a nominated disclosure officer.

A copy of our submission referred to above is enclosed for reference by the Privileges Committee.

Please contact Christie Allan, Executive Strategy Officer at _____ if you have any questions or require any further information about this letter.

Yours sincerely

Paul Miller
NSW Ombudsman

**Submission
No 6**

REVIEW OF THE INDEPENDENT COMPLAINTS OFFICER SYSTEM (2023)

Organisation: NSW Ombudsman

Date Received: 27 October 2023

27 October 2023

Alex Greenwich MP
Committee Chair
Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics

By email: Ethics.Committee@parliament.nsw.gov.au

Dear Mr Greenwich

Review of the Independent Complaints Officer System (2023)

Thank you for contacting us about the review of the Independent Complaints Officer (ICO) system.

No practical overlap between the functions of the Ombudsman and the ICO

My office can receive complaints about and investigate NSW public authorities (which includes both agencies and officials). However, Schedule 1 of the *Ombudsman Act 1974* provides that certain conduct of certain public authorities is 'excluded conduct' and cannot be the subject of complaint to or investigation by, the Ombudsman. Excluded conduct includes the conduct of Parliament and its members and officers.

Accordingly, the types of complaints that are now able to be handled by the ICO (being complaints concerning members of Parliament) are complaints that the Ombudsman is not otherwise able to receive or investigate.

Whether the ICO itself is a public authority about whose conduct complaints could be made to the Ombudsman depends on whether the ICO is considered an 'officer of Parliament' and as such, excluded from the jurisdiction of the Ombudsman as noted above (refer to clause 1, Schedule 1 of Ombudsman Act). As the ICO was established by a resolution of both houses of Parliament, and given its role, our provisional view is that it is likely to be an officer of Parliament for the purpose of Schedule 1, and therefore its conduct cannot be the subject of complaint to or investigation by the Ombudsman.

Ombudsman reviews of complaints-handling systems

Under section 25A of the Ombudsman Act, the Ombudsman may 'review the systems of public authorities for handling complaints'.

This function is not necessarily limited to those public authorities whose conduct may be the subject of a complaint to or investigation by the Ombudsman. That is, the Ombudsman could review the complaints-handling system of a public authority even if the conduct of that public authority is otherwise excluded conduct under Schedule 1 of the Ombudsman Act (such as the ICO or NSW Police Force).

However, even if the Ombudsman could (in theory) decide at some time in the future to conduct a review of the ICO's complaints-handling system, as a matter of discretion, it is unlikely that the Ombudsman would exercise this function to conduct a deep-dive review in respect of a public authority whose conduct is otherwise wholly excluded from the Ombudsman's jurisdiction. Reasons for this

include practicality (the Ombudsman would likely not have, or be able to obtain, all of the information necessary for such a review), resourcing (it is appropriate for the Ombudsman to focus limited resourcing on those public authorities generally within its oversight), and avoidance of duplication (those public authorities whose conduct is excluded from the Ombudsman's jurisdiction are generally subject to other oversight arrangements – in the ICO's case, oversight by Parliament and its committees, in the case of Police, by the Law Enforcement Conduct Commission, and so on).

It is to be expected then, that the Ombudsman will generally focus any deep-dive complaints-handling system reviews on those public authorities whose conduct is otherwise within the Ombudsman's complaint handling and investigatory jurisdiction. (For example, the Ombudsman is currently undertaking a complaint handling review in relation to the Department of Community and Justice's system for handling complaints about child protection matters affecting Aboriginal families.)

Co-operation between the ICO and the Ombudsman

Following the commencement of the ICO and given the Ombudsman's expertise in complaints-handling and agency complaints-handling systems, I wrote to the inaugural ICO, Ms Webb to offer any support my office might be able to provide in establishing her office and processes, including the receipt and management of public interest disclosures. There are also a range of resources available on our website to all agencies about good complaints-handling practices – see [Effective complaint handling - NSW Ombudsman](#).

Although, for the reasons stated above, there is no overlap between the complaints-handling functions of the ICO and that of my office, it is typical that complaints-handling offices will from time-to-time receive 'misdirected complaints' (that is, complaints that are outside of jurisdiction and that are within the jurisdiction of another complaints-handling office). It is also common that complaints-handling offices will from time to time receive general enquiries seeking assistance in identifying and navigating to the most appropriate office to which to make a particular complaint.

In this context, two of my Deputy Ombudsman (Ms Jacqueline Fredman, Deputy Ombudsman (Complaints & Resolution) and Ms Louise Lazzarino, Deputy Ombudsman (Systems Oversight)), met with Ms Webb shortly after her appointment to discuss our respective roles, functions and processes. It was agreed at that time that our offices would liaise as necessary about any matters that arise that may require referral, should either of us receive a complaint that appeared to be more appropriately dealt with by the other office. To date we have not referred any matters to the ICO, nor have we received a referred complaint. We also obtained assistance from Ms Webb to provide a briefing to my complaints and resolution staff about the role of the ICO, the types of complaints it can handle, and when it may be appropriate to refer a person who has contacted my office to the ICO.

Potential application of the Public Interest Disclosures Act 2022 to complaints made to the ICO

In addition to our complaint handling role, my office also has specific statutory functions overseeing the public interest disclosures (PID) scheme in NSW under the new *Public Interest Disclosures Act 2022* (PID Act) which commenced on 1 October 2023. The PID scheme provides a framework for public officials to report serious wrongdoing in the public sector, and to be protected when they do so.

To be a PID, a report must generally be made to a 'disclosure officer' or to a person's 'manager' (in the case of report to a person's manager, the manager's role is to then ensure that the PID is reported to an appropriate disclosure officer). Disclosure officers therefore play a central role under the PID Act.

Under section 6 of what appears to be the current [Independent Complaints Officer Protocols](#) (dated November 2022), those who may be expected to complain to the ICO will often be public officials for the purpose of the PID Act. This includes staff employed by Parliament to support the work of members.

Under section 11 of the *Independent Complaints Officer Protocols*, the ICO was not nominated as a disclosure officer for the purpose of the previous PID legislation (*Public Interest Disclosures Act 1994*). A footnote to that section of the protocol notes that this position may change with the commencement of the new PID Act.

With the commencement of the new PID Act, it is important for Parliament to consider whether the ICO is to be a nominated disclosure officer.

Ms Louise Lazzarino, Deputy Ombudsman (Systems Oversight) is responsible for the PID functions of my office. Given that the 2022 PID Act has recently commenced, she has contacted Ms Webb to discuss the new PID Act and any advice or assistance we can provide, including the appropriateness of Ms Webb seeking to be nominated as a disclosure officer. This would ensure that any complaints brought to her by public officials are appropriately assessed as PIDs and that those complainants benefit from the protections under the PID Act, including protections against detrimental action being taken against them for having made their complaint. There are also a range of resources available on our website about PIDs – see [The Public Interest Disclosures Act 2022 - NSW Ombudsman](#).

Thank you for the opportunity to contribute to the review. Please contact [REDACTED] at [REDACTED] if you have any questions or require any further information about this letter.

Yours sincerely

Paul Miller
NSW Ombudsman