

**Submission  
No 9**

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

**Organisation:** Clerk of the Parliaments

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LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

D24/018554

22 April 2024

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

Dear Mr Lawrence,

I refer to your email message, dated 20 February 2024, inviting me to make a submission to the review of the Independent Complaints Officer system (2023) being undertaken by the Privileges Committee, and specifically to address any of the matters highlighted in the Committee's Issues Paper for this inquiry on which I can make a contribution.

As requested, I have sought to address those matters from the Issues Paper on which I think I can make a contribution. I do, however, wish to place those brief comments in a broader context and so begin with some background information and general observations on the first 18 months or so of the operation of the Independent Complaints Officer (ICO) system.

## **Background**

### Establishment of the Independent Complaints Officer system

Noting that there are a number of Members of the Privileges Committee who are new to the Committee in the 58th Parliament, it may be helpful to firstly provide some background information about the rationale for, and very long journey to eventually arrive at, the establishment of the ICO system. I therefore attach extracts from the following reports of the Privileges Committee:

- Report 70, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, June 2014 and
- Report 83, *Proposal for a Compliance Officer for NSW Parliament*, May 2021.

The June 2014 report outlines the interest of the Privileges Committee in an ICO-like system since as early as 1996, and the Committee's renewed interest in this matter in 2003/4, 2005, and 2010. This report goes on to express support for an ICO-like system in NSW (the appointment of a Commissioner for Standards), for the following reasons:

- To provide a mechanism for the investigation of less serious allegations of misconduct against Members, given the limited capacity of the ICAC, and the focus of the ICAC on large-scale corruption.
- To allow allegations against Members to be investigated and dealt with more speedily than through ICAC processes.
- To allow more ready resolution of less serious allegations of misconduct against Members, including through mechanisms such as 'rectification' and 'reimbursement'.
- To increase the transparency of Parliament's handling of complaints against Members, with appropriate information on investigations made public.
- To provide an independent mechanism for assessing possible misconduct by Members, removing concerns that direct investigation by specially appointed committees would be politicised.
- To ensure that matters in which issues of parliamentary privilege were raised could be appropriately investigated.

The May 2021 report takes up matters from the time of the 2014 report, then outlines developments in 2016 through to the 2020 proposal for the appointment of a Compliance Officer. It should be noted that, up until 2020, the proposed scope of responsibilities for an ICO-like system was confined to misuse of entitlements, inadequate disclosure of interests and minor Code of Conduct breaches. Following representations from 23 Members across both Houses and all major political parties in 2020 in favour of the development of a mechanism to handle complaints about bullying or inappropriate behaviour by Members, the then Presiding Officers requested that the Clerks and the Chief Executive of the Department of Parliamentary Services prepare a jointly agreed proposal for the establishment of a position of “compliance officer” covering all of those matters. Both the Legislative Council Privileges Committee and the Legislative Assembly Privilege and Ethics Committee subsequently recommended the appointment of an Independent Complaints Officer, with the relevant resolutions to this effect passing the two Houses in early 2022 and the first ICO being appointed in August 2022.

#### Volume and type of complaints received

At page two of the Committee's Issues Paper there is discussion of the ICO's comment that a low number of complaints (about bullying and harassment) have been received in light of the 2022 Broderick report. As noted in the Issues Paper, it may be that the Broderick report, and the existence of the ICO, have themselves had a deterrent effect on the sorts of behaviour which would otherwise have resulted in more complaints. It should also be noted that the data in the Broderick report is based on the experience of Members and staff over the five year period prior to the publication of that report, so it should not be expected that the same volume of complaints would have been forthcoming over the shorter 18 month period since the appointment of the ICO.

It is also noted that there have been almost no complaints received by the ICO about the misuse of entitlements or inadequate disclosure of interests. In this regard, perhaps the focus of the parliamentary community on issues of bullying and harassment since the Broderick report has meant the ICO's critically important role in dealing with complaints about misuse of entitlements is not as well understood as it should be.

The ICO notes that a number of complaints received have been outside the ICO's jurisdiction. In that regard, I would draw Members' attention to the extremely long gestation of this system and the fact that the prescriptive content of the resolution establishing the ICO, including limitations on jurisdiction, reflects the direct and specific intentions of Members during the 2021 consideration of the current model. Perhaps some of those restrictions on the jurisdiction of the ICO will be loosened in time as

the system matures, particularly if Members themselves become critical of the restrictions imposed on the ICO's jurisdiction?

Finally, having reviewed the ICO's reports to date, media reporting about the ICO, and the matters raised at The Legislature's budget estimates hearing on 4 March 2024, I would like to make a suggestion to the Committee.

Media reports (which of course may or may not be accurate) suggest the Legislative Assembly Privileges and Ethics Committee navigated a somewhat creative path in dealing with an appeal challenging a finding of the ICO about a Member of the Legislative Assembly. It would appear from the recent budget estimates hearing that the ICO has similarly sought to navigate a somewhat tortured path in responding to a recent complaint.

The common element is that both matters involved complaints made by a Member against another Member alleging bullying or harassment. Both involved conduct which, if found to have amounted to bullying and harassment, would most likely have been found to have been at the less serious end of the scale of such matters.

Given the opportunities that Members have to raise such matters in their respective Houses, and the inherently politically contested nature of any such matters between Members, the Committee may wish to give some consideration as to whether the threshold for a complaint by a member about the conduct of another Member requires any additional step or requirement. A staffer or other participant in the parliamentary workplace will not have the opportunity to use parliamentary proceedings to pursue their complaint. A Member, able to use the forums of the House, is in a different position and perhaps the ICO's investigations protocol should take this into account?

#### Parliamentary privilege

The Committee's Issues Paper discusses some questions which have arisen over the last 18 months about the restriction on the ICO's jurisdiction from dealing with matters related to the conduct of proceedings of the Legislative Council or Legislative Assembly or of their committees, and the process by which the ICO determines whether a matter the subject of a complaint falls within that definition.

As noted above, the current restriction on the ICO from dealing with matters related to proceedings in Parliament, along with other jurisdictional restrictions, is a direct result of the very specific intentions of the Members of the two Houses' respective Privileges Committees when the current system was considered in detail in 2021. The restriction on dealing with matters related to proceedings in Parliament does impinge on one of the purposes of establishing an ICO-like system as articulated by the Committee in 2014 and listed above, namely: "To ensure that matters in which issues of parliamentary privilege were raised could be appropriately investigated." Nevertheless, the current restriction was deliberately put in place following the respective 2021 Privileges Committee inquiries. It is therefore probably too early for the restriction to be reconsidered at this point in time. Perhaps in due course, as the system matures, this restriction may be reconsidered.

As outlined in the Issues Paper, this leaves questions around how the ICO is to make a determination as to whether or not a matter involves proceedings in Parliament. The Issues Paper makes a number of suggestions to assist the ICO.

One of those suggestions is for the ICO to be able to consult with the relevant Clerk. Whilst this would ensure the ICO has access to a ready source of reliable advice, I am uncomfortable with the suggestion. It may be that a Member who has either made a complaint or is the subject of a complaint will have

sought, or may in due course seek, the advice of the Clerk on the matter. It would put the Clerk in an invidious position to also be advising the ICO on their jurisdiction over the matter.

The Issues Paper also suggests that the current Ethics Adviser, being a former Clerk of the Parliaments, could be an alternate source of ready and reliable advice on these issues. The current Ethics Adviser would be an authoritative source of such advice. However, it would be important for the Committee to explore with the Ethics Adviser whether he envisaged any potential conflicts of interest (i.e. a Member either making a complaint or the subject of a complaint may seek the advice of the Ethics Adviser on the matter) before recommending this course of action.

My suggestion would be that the ICO identify another former Clerk or former Clerks from whom she could seek advice on these issues from time to time. Section 5 (i) of the resolution establishing the position of Independent Complaints Officer provides that the ICO is able to obtain expert assistance. I would be happy to provide the ICO with details of former Clerks from whom she could seek such expert assistance from time to time. This arrangement would then ideally be formalised in writing between the ICO and the former Clerk or Clerks who would be available to assist.

### Appeal rights of complainants

The Issues Paper asks whether the limited appeal right in the current ICO system for Members only (and not also for complainants) strikes the correct balance.

Whilst there will no doubt be circumstances where complainants are dissatisfied by the outcome of their complaint, the current limited appeal right was intentionally established. It reflects the fact that only a Member the subject of a complaint is in jeopardy of having an adverse finding made public (if they do not take the corrective action recommended by the ICO) or being subject to some form of sanction. It is my understanding that this limited right of appeal (limited to Members the subject of a draft report which contains adverse findings about their conduct) has been in place from the establishment of both the UK and ACT models which have directly informed the ICO system. I therefore recommend no change to the current appeal provisions in the ICO system.

### Training

The Issues Paper notes the relevant recommendations in the Broderick report in relation to training for Members and staff, and notes that the Presiding Officers and parliamentary administration have introduced a training program entitled RISE (Respectful, Inclusive, Safe and Effective) aimed at addressing bullying, sexual harassment and sexual misconduct in the workplace.

Whilst the feedback from participants in the training program has been very positive, to date there has been a very disappointing participation rate amongst Members.

The assistance of the Privileges Committee and its Members, as leaders in the Parliament, in strongly encouraging all of your colleagues to participate in this training would be greatly appreciated.

Even for those Members who are not convinced of the robustness of the Broderick report and its findings, the responsibilities of each Member as the employer of their staff and some of their relatively new legal obligations as employers, should be of sufficient concern to persuade all Members of the benefits of completing such training. The legal obligations to which I am referring are the obligations under the Work Health and Safety Amendment Regulation 2022 to manage psychosocial risks in the workplace. A copy of the regulation is attached for the information of Members of the Committee.

This Regulation is now part of the law of NSW and applies directly to all Members as employers of their staff.

### Standards for Codes of Conduct

Finally, I would like to draw to the Committee's attention a recent publication from the Commonwealth Parliamentary Association: *Standards for Codes of Conduct for Members of Parliament and the Parliamentary Workplaces: Minimum standards, additional resources and supporting structures*. This is an up-to-date set of benchmarks for use by Parliaments throughout the Commonwealth and draws on best practice across all regions. I particularly draw attention to the information on the following themes:

- Theme 4: Commitment to a safe and respectful workplace (pp 18-22),
- Theme 6: Complaints, independent investigations and procedural fairness (pp 28-32), and
- Theme 7: Rectifications and sanctions (pp 34-37).

The content of the *Standards for Codes of Conduct* suggest that the Parliament's ICO system is broadly consistent with developments in other Commonwealth Parliaments and benchmarks for best practice. On the other hand, the contents of theme 4 suggests that the NSW Parliament may have some more work to do if it wishes to catch up to other Commonwealth Parliaments in relation to standards demonstrating a commitment to a safe and respectful workplace.

Please do not hesitate to contact me if you require any additional information in relation to any of the matters outlined in this submission.

Yours sincerely

**David Blunt AM**  
Clerk of the Parliaments

