

INQUIRY INTO REVIEW OF INDEPENDENT COMPLAINTS OFFICER SYSTEM (2023)

Organisation: Parliament of New South Wales Advisory Group on Bullying,
Sexual Harassment and Serious Misconduct

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ADVISORY GROUP ON BULLYING, SEXUAL HARASSMENT AND SERIOUS MISCONDUCT

Executive Summary

The Parliament of New South Wales Advisory Group on Bullying, Sexual Harassment and Serious Misconduct ('PAG') appreciates the opportunity to provide this submission to the Privileges Committee's Review of the Independent Complaints Officer System ('ICO Review').

The PAG was initially constituted on 14 May 2021 prior to the *Independent Review into bullying, harassment and sexual misconduct at the Parliament of NSW* (the 'Broderick Review'), and has worked since that time to inquire into, investigate and make recommendations about the systemic issues affecting the risk of bullying, sexual harassment, and serious misconduct in NSW parliamentary workplaces. During the Broderick Review, the PAG proactively worked with Elizabeth Broderick AO and her team to ensure the review's findings and recommendations appropriately reflected the experiences of workers in and visitors to the NSW Parliamentary precinct. The PAG was recently reconstituted on 18 March 2024 and consists of 16 members (including the independent chair) representing the constituencies of members of Parliament from both chambers, parliamentary staff, members' staff, and ministerial staff, convened by an independent chair. A large part of the PAG's current work is overseeing and advising on the implementation of the Broderick Review recommendations. The PAG's new terms of reference state that "The PAG are advocates, advisors and facilitators for respectful and safe parliamentary workplaces".

Employers within the Parliament of NSW – including members of Parliament - have an important statutory obligation under the *Work Health and Safety Act 2011* (NSW) to ensure the health and safety of workers by eliminating or minimising risks of workplace hazards, including those arising from bullying, sexual harassment, and serious misconduct.¹ In December 2022, a new positive duty was also imposed on employers to eliminate workplace sex discrimination, harassment and victimisation.² An accessible, objective, fair, transparent, and trusted complaints process is an essential control measure to such misconduct.³ Given the confronting findings of the Broderick Review, it is critically important that NSW Parliament has robust and reliable mechanisms to address complaints made about interpersonal misconduct. The Independent Complaints Officer ('ICO') provides one such mechanism to address complaints made about bullying, harassment and other types of inappropriate behaviour by current members of the Parliament of NSW.

This submission aims to provide additional information based on the experience of the PAG's membership, informed by the views of each member's constituency, to assist and support the Privileges Committee to make findings and recommendations for the present ICO Review. The PAG makes seven recommendations to the Privileges Committee regarding the jurisdiction of the ICO, the level of visibility and awareness of the ICO in the parliamentary community, appeal pathways of ICO decisions, and further processes we believe are necessary to gain an adequate

¹ *Work Health and Safety Act 2011* (NSW) s 19.

² Respect@Work 'New positive duty on employers to prevent workplace sexual harassment, sex discrimination and victimisation' <<https://www.respectatwork.gov.au/new-positive-duty-employers-prevent-workplace-sexual-harassment-sex-discrimination-and-victimisation>>.

³ SafeWork, *Guide for Preventing and Responding to Workplace Bullying* (2016, Code of Practice) pp 14-15.



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understanding of how the ICO is perceived in the NSW parliamentary community and what further reforms are necessary to guarantee the success of the role. Due to the nature of the work of the PAG, we have only focussed on the aspects of the ICO role that relate to complaints about bullying, harassment, and other types of inappropriate behaviour.

Summary of Recommendations

1. Consistent with their colleagues who work for Legislative Council ministers, staff who work for members of the Legislative Assembly in their capacity as ministers should be able to make complaints to the ICO about any member of the Parliament.
2. Allow former staff to be able to lodge a complaint with the ICO within 2 years following the end of their employment consistent with other complaints made to the ICO under the protocol.
3. Clarify that the ICO cannot consider complaints about conduct that would attract parliamentary privilege immunity.
4. Create opportunities for members of the Parliament of NSW, members' staff, parliamentary staff, and ministerial staff to have regular, direct, and live contact with the ICO with the objective of developing familiarity with the person holding the role and enhancing attendees' confidence in and understanding of:
 - a. The jurisdiction and role of the ICO.
 - b. The impartiality of the ICO.
 - c. How complaints will be dealt with when received, including principles of how the process will be objective, fair, and transparent.
 - d. The safety of the process, including whether it is trauma informed.
 - e. Support mechanisms that will be available to complainants and those who are the subject of a complaint.
 - f. How information about the complaint will be shared and to whom.
 - g. Possible actions or recommendations the ICO might use to address misconduct.
 - h. How recommendations from the ICO are considered and addressed.
 - i. Appeal pathways.
5. Create an appeal pathway for all determinations made by the ICO, including whether to investigate a complaint, whether the complainant has standing, whether the complaint falls within the ICO's jurisdiction, the findings, conclusions and recommendations of the investigation, and any other similar determination. All complainants and all those who are the subject of a complaint should have standing to appeal any determination that is relevant to their matter. In lieu of an alternative, one option to consider is that the relevant Privileges Committee, or a sub-committee of the relevant Privileges Committee, should be responsible for confidentially receiving and considering such appeals. The appeals process should involve considering whether the appeal ought to be heard, reviewing the ICO's determination on its merits, and re-making the subject determination.
6. That the Privileges Committee recommend to the Parliamentary Executive Group ('PEG') that they conduct a comprehensive consultation with all those who have standing to



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make a complaint under the ICO protocol as to the level of awareness of and confidence in the ICO role, functions, and process to properly and safely address complaints about of bullying, harassment and inappropriate conduct by members of the Parliament of NSW. The findings of this consultation should be provided by the PEG back to the relevant Privileges Committee to enable them to make further recommendations regarding the ICO role as necessary.

7. That the findings of the consultation described in Recommendation 6 are utilised to fully implement recommendations 5.3 and 5.4 of *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces* (Report, 2022).



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Jurisdiction of the ICO

The ICO can hear complaints about current members (including ministers) of the Parliament of NSW.⁴ Complaints may be received from current members of the NSW Parliament, staff working for members of the NSW Parliament in their capacity as members, staff who work for the parliamentary departments,⁵ and ministerial staff who work for Members of the Legislative Council in their capacity as Ministers.⁶

There is no current complaint pathway for ministerial staff working for Legislative Assembly ministers to address misconduct against them by a member of the NSW Parliament who is not a minister. Such ministerial staff regularly interact with members of Parliament who are not ministers as part of their ordinary duties. It is possible that such staff would experience misconduct during such interactions, and it is important that these staff members can make a complaint about such misconduct.

Recommendation 1

Consistent with their colleagues who work for Legislative Council ministers, allow staff who work for members of the Legislative Assembly in their capacity as ministers to make complaints to the ICO about any member of the Parliament.

Under the current ICO protocol, former staff members may only lodge a complaint with the ICO within 21 days following the end of their employment.⁷ Part five of the Broderick Review's recommendations centre on a safe reporting environment that is human-centric and trauma-informed, with these ambitions extending to the ICO's processes.⁸ Amongst myriad other benefits, trauma-informed processes are designed to avoid re-traumatising the complainant and help to increase the quality of information collected during an investigation.⁹ It is common that complainants who have experienced trauma may need additional time to come to terms with the events that may be the subject of a complaint, or to develop enough confidence and trust in a process to pursue a complaint.¹⁰

The PAG suggests that the current timeframe limitation of 21 days is not adequately trauma-informed and may retraumatise complainants who do not feel ready and/or able pursue a complaint until after that timeframe. The PAG is of a view that this limitation would particularly

⁴ Independent Complaints Officer Protocols (November 2022) 4.1.

⁵ Ibid 6.1-6.2.

⁶ Ibid 6.3.

⁷ Ibid 6.6.

⁸ Elizabeth Broderick & Co., *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces* (Report, 2022) ('Broderick Report').

⁹ Australian Human Rights Commission, *Person-centred and Trauma-informed Approaches to Safe and Respectful Workplaces* (Factsheet, August 2023)

<https://humanrights.gov.au/sites/default/files/factsheet_-_person-centred_and_trauma-informed_approaches_to_safe_and_respectful_workplaces_0.pdf>

¹⁰ See additional discussion in Queensland Centre For Domestic + Family Research, *Trauma-informed Responses to Sexual Assault* (Research to Practice Paper, 20 May 2020).



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unfairly affect members' staff who may have lost their employment after being subjected to misconduct and attempting to address it via less formal avenues than a complaint to the ICO.

The PAG is concerned that due of this limited timeframe, the NSW Parliament will not receive the benefit of complainant testimony to identify and address misconduct by members of the Parliament of NSW. While it is understood this timeframe may have been selected so that it is consistent with unfair dismissal claims, the PAG does not see this as a comparable process as the staff member could not reasonably seek reinstatement through such a complaint. The PAG observes that potential complainants as defined by the *Independent Complaints Officer Protocols (November 2022)* are able to lodge a complaint within two years of the alleged incident.

Recommendation 2

Allow former staff to be able to lodge a complaint with the ICO within 2 years following the end of their employment consistent with other complaints made to the ICO under the protocol.

The ICO's jurisdiction is defined to not extend to complaints 'that relate to the proceedings of the Legislative Council or Legislative Assembly or their committees'. The Legislative Council Privileges Committee issues paper asked whether this should be more clearly expressed to refer explicitly to conduct that would attract parliamentary privilege immunity. The PAG agrees that this would provide more clarity.

Both chambers of the Parliament of NSW have important work to do in implementing the recommendations of the Broderick Review to define and enforce better standards of conduct in the chamber and during committee hearings. Although the standards of conduct set and met by MPs and MLCs in the chambers and committee hearings have a substantial impact on the broader culture of the Parliamentary precinct, reform must be actively pursued and implemented by the chambers themselves to be adequately effective.

It is appropriate that the ICO is provided with greater clarity as to their jurisdiction not extending to conduct that would ordinarily attract the parliamentary privilege immunity so that there are no incidents of the ICO making ultra vires determinations, which could undermine the role.

Recommendation 3

Clarify that the ICO cannot consider complaints about conduct that would attract parliamentary privilege immunity.

Visibility and awareness of the ICO

It has been identified that the ICO has received a low number of complaints compared to the high incidence of misconduct suggested by the Broderick Review. The PAG cautions against the committee making any finding that the low number of complaints to the ICO indicates any reduction in the level of misconduct compared to the findings of the Broderick Review. Indeed, the PAG has received anecdotal feedback to suggest that potential complainants are refraining from using the ICO to make a complaint at this time.



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The PAG recognises that given the creation of the ICO prior to the release of the Broderick Review, the design of the ICO and the initial implementation process did not benefit from its findings and recommendations. As a result, members of the PAG have received significant feedback from their constituencies that there is a low level of awareness of and trust in the ICO role, its processes, and what positive or negative outcomes may follow on from a complaint. The feedback is consistent with evidence provided to the Broderick Review regarding the non-reporting of workplace incidents.¹¹ The PAG remains concerned that, in the absence of qualitative evidence to the contrary, many of these reasons could continue to be relevant today resulting in the reluctance of complainants to utilise the ICO.

SafeWork's *Guide for Preventing and Responding to Workplace Bullying* provides useful information about designing responses to workplace bullying behaviours, including complaints processes. In summary, it provides that to successfully operate in a workplace, complaints processes should be known to be objective, transparent, consistent, timely and effective. Workers should be able to trust that they will not be subjected to victimisation or further harm as a result of making a complaint.¹² It appears to the PAG that there has been very little, if any, direct contact between the ICO and members of the Parliamentary community. While the PAG is aware that information about the ICO has been included in the new members' and staff induction, and that a video by the ICO about their role has been included in the recent RISE training, the PAG believes that these efforts should be substantially expanded to adequately generate trust and awareness in the role and processes. By way of example, the PAG suggests that the ICO develop a regular and proactive outreach program which include online and face to face interactions.

¹¹ See Broderick Report (n 8) pg 64, 'Figure 27: Reasons for not reporting bullying (%)'.

¹² SafeWork, *Guide for Preventing and Responding to Workplace Bullying* (2016, Code of Practice) pp 14-15.



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Recommendation 4

Create opportunities for members of the Parliament of NSW, members' staff, parliamentary staff, and ministerial staff to have regular, direct, and live contact with the ICO with the objective of developing familiarity with the person holding the role and enhancing attendees' confidence in and understanding of:

- a. The jurisdiction and role of the ICO.
- b. The impartiality of the ICO.
- c. How complaints will be dealt with when received, including principles of how the process will be objective, fair, and transparent.
- d. The safety of the process, including whether it is trauma informed.
- e. Support mechanisms that will be available to complainants and those who are the subject of a complaint.
- f. How information about the complaint will be shared and to whom.
- g. Possible actions or recommendations the ICO might use to address misconduct.
- h. How recommendations from the ICO are considered and addressed.
- i. Appeal pathways.

Although outside the remit of this review, the PAG also recognises that members' staff may be less likely to make a complaint to the ICO, particularly about their employing member, due to the job insecurity they experience. Currently, members' staff are unable to enjoy or enforce any workplace rights under the *Industrial Relations Act 1996* (NSW) due to being excluded from its protections by s 26 of the *Members of Parliament Staff Act 2013* (NSW) ('*MoPS Act*').

Section 26 of the *MoPS Act* effectively prevents members' staff from bringing an action for unfair dismissal if they were to be terminated as a result of making a complaint to the ICO. There also appears to be no capacity for members' staff to be redeployed or placed on paid leave for the duration of an investigation or following the substantiation of a complaint due to the arrangements under the *MoPS Act*. This means that from a practical perspective, it is very unlikely that most members' staff would feel supported to make a complaint, particularly about their employing member, while also expecting to remain in employment. This would serve as a significant disincentive for staff to utilise this complaints mechanism. The PAG will continue to work with relevant stakeholders on addressing these important issues.

Appeal Pathways

The Independent Complaints Officer Protocols do not provide any appeal pathways for complainants and a very limited appeal pathway for those who are the subject of a complaint. The only exception is where a member has failed to accept the ICO's recommended rectification or corrective action or declines to take the action. When involving misconduct, with the complainant's consent, the ICO presents a confidential investigatory report to the relevant Privileges Committee reporting the findings of the investigation and recommendation as to the action that should be taken including sanctions, if any, that should be imposed by the House.¹³ It

¹³ Independent Complaints Officer Protocols (November 2022) 31.1.



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is only at this point that a member who is the subject of a complaint is able to seek an appeal of the ICO's determinations.

The PAG is concerned that the lack of any appeals pathway for most actions and determinations of the ICO constitutes a serious breach of procedural fairness principles for both complainants and those who are the subject of a complaint. This is an unusual situation for a complaint pathway of this kind, which would ordinarily present all parties with an opportunity to seek internal review of a determination prior to seeking external review from a body such as a court or tribunal. In this instance, it is unclear which external body, if any, would have the jurisdiction to review the determinations of the ICO – particularly for complainants who are excluded from accessing the Industrial Relations Commission.

The determinations made by the ICO, including whether to investigate a complaint, whether the complainant has standing, whether the complaint falls within the ICO's jurisdiction, the findings, conclusions and recommendations of the investigation, and any other similar determination, should each be subject to an appeal process initiated by either the complainant or person who is the subject of the complaint.

The PAG is concerned that no individual can get these decisions right 100% of the time and without adequate pathways to remediate errors, there is a significant risk that valid complaints will be inadvertently dismissed, and that members who are the subject of complaints will be unfairly subjected to inappropriate findings. At this stage, the PAG is agnostic as to who should carry out the appeal process. One consideration is the establishment of an independent review process, involving personnel outside the Parliamentary workplace. In lieu of a clear alternative, suggests the relevant Privileges Committee – or a sub-committee - should confidentially receive and consider such appeals.

Recommendation 5

Create an appeal pathway for all determinations made by the ICO, including whether to investigate a complaint, whether the complainant has standing, whether the complaint falls within the ICO's jurisdiction, the findings, conclusions and recommendations of the investigation, and any other similar determination. All complainants and all those who are the subject of a complaint should have standing to appeal any determination that is relevant to their matter. In lieu of an alternative, one option to consider is that the relevant Privileges Committee, or a sub-committee of the relevant Privileges Committee, should be responsible for confidentially receiving and considering such appeals. The appeals process should involve considering whether the appeal ought to be heard, reviewing the ICO's determination on its merits, and re-making the subject determination.

Further review of the ICO role

While the PAG believes that our recommendations will work to significantly improve the role and processes of the ICO, we are concerned that the findings and recommendations made by the present inquiry will not benefit from the broad views of those with standing to make a complaint under the ICO protocol. The PAG is not aware of any proactive consultation process that has been



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undertaken in the Parliament of NSW to gain an understanding of how the ICO is perceived. Without consultation, it is difficult for the Privileges Committee to comprehensively understand whether the parliamentary community has confidence in the ICO to properly and safely address complaints about of bullying, harassment and inappropriate conduct by members of the Parliament of NSW. It is the view of the PAG that further review is necessary to achieve this.

Recommendation 6

That the Privileges Committee recommend to the Parliamentary Executive Group ('PEG') that they conduct a comprehensive consultation with all those who have standing to make a complaint under the ICO protocol as to the level of awareness of and confidence in the ICO role, functions, and process to properly and safely address complaints about of bullying, harassment and inappropriate conduct by members of the Parliament of NSW. The findings of this consultation should be provided by the PEG back to the relevant Privileges Committee to enable them to make further recommendations regarding the ICO role as necessary.

The findings from such a review should inform the implementation of the processes outlined in the Broderick Review recommendations 5.3 and 5.4:¹⁴

5.3 **Scope and resourcing of the Independent Complaints Officer function**

- *The House Departments should work with PAG to develop strategies to reduce barriers to accessing the Independent Complaints Officer, particularly to ensure political independence and to ensure that the function has access to the resources required to meet its responsibilities; and the Independent Complaints Officer should be enabled to address any impediments in the scope of the resolution.*
- *PEG should review the number and nature of complaints made to the Independent Complaints Officer in the first year, in order to assess whether the function is being accessed for complaints relating to bullying, sexual harassment and sexual assault, and support the Independent Complaints Officer to make any adaptations needed to improve confidence in and access to the Independent Complaints Officer.*
- *The House Departments, in consultation with the PAG and the Independent Complaints Officer, should jointly develop principles and protocols regarding external investigations, including ensuring: that investigators are suitably skilled; use a trauma-informed approach to investigations; and work appropriately with the other support people engaging complainants, respondents and witnesses*
 - *that investigators are politically independent*
 - *that there are transparent expectations regarding timeframes for investigation and reporting*
 - *that there are increased opportunities for the participation of survivors in the investigation (including consulting with survivors about who is to be interviewed and sharing the final report with survivors).*

¹⁴ Broderick Report (n 8) p 81.



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5.4 **Update and expand pathways to reporting**

- *PEG, in consultation with PAG, should redesign reporting pathways, ensuring that people experiencing bullying, sexual harassment or sexual misconduct have access to formal, informal and anonymous reporting options that are human-centric and provide support from the first disclosure. The reporting pathways should emphasise the agency of the individual in choosing the pathway that is most appropriate for them and the value of seeking advice and/or reporting early (that is, seeking advice regarding early intervention options).*

Recommendation 7

That the findings of the consultation described in Recommendation 6 are utilised to fully implement recommendations 5.3 and 5.4 of *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces* (Report, 2022).