

Independent Complaints Officer Protocols (November 2022)

Part 1 Preliminary

1. Protocol

This protocol outlines the procedures to be used by the Independent Complaints Officer appointed in accordance with the resolution of the Legislative Council of 22 March 2022 and the resolution of the Legislative Assembly of 29 March 2022¹.

The Legislative Assembly and Legislative Council have established the position of Independent Complaints Officer (ICO) to expeditiously and confidentially deal with low level minor misconduct matters.

The ICO is an independent, non-partisan officer appointed by the Presiding Officers.

The current ICO is Ms Rose Webb. The ICO can be contacted on ico@ico.parliament.nsw.gov.au or on 0437 914 525.

2. Terms used in this Protocol

“**ICAC**” means the NSW Independent Commission Against Corruption

“**ICAC Act**” means the *Independent Commission Against Corruption Act 1988 (NSW)*

“**ICO**” means the Independent Complaints Officer

“**Member**” means a member of either house of the Parliament of NSW

“**Members’ Code**” means the Code of Conduct for Members as adopted by the Legislative Council and the Legislative Assembly

“**Ministers Code**” means the NSW Ministerial Code of Conduct

“**Parliament**” means the Parliament of NSW

“**Pecuniary Interests Disclosure Scheme**” means the requirements for interests to be disclosed under the *Constitution (Disclosures by Members) Regulation 1983*

“**Presiding Officers**” means the President of the Legislative Council and the Speaker of the Legislative Assembly

“**Privileges Committee**” means in relation to the Legislative Council, the Privileges Committee and in relation to the Legislative Assembly, the Parliamentary Privileges and Ethics Committee

¹ *Legislative Council Minutes of Proceedings, 22 March 2022, item 40 pages 3039-3025; Votes and Proceedings of the NSW Legislative Assembly, 29 March 2022, item 15, pages 1633-1639.*

Part 2 Lodging a complaint

3. What types of complaints can the ICO consider?

3.1 The ICO can consider complaints about 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. The ICO can also consider complaints in relation to bullying, harassment and other types of inappropriate behaviour.

3.2 The ICO cannot consider complaints:

- (a) that relate to the proceedings of the Legislative Council or Legislative Assembly or their committees, or
- (b) about conduct that is solely a breach of the Ministerial Code of Conduct.

4. Who can you complain about?

4.1 Complaints may only be made about current members (including Ministers) of the Parliament of NSW.

5. Form of complaint

5.1 A complaint may be made to the ICO formally or informally. It is not necessary to have evidence to an admissible standard, or complete details of a matter, to make a complaint to the ICO.

5.2 A complaint can be made by email (at ico@icoparliament.nsw.gov.au) or by phone (0437 914 525).

5.3 Complaints may be made anonymously, but it should be noted that the ability of the ICO to investigate and resolve a matter may be considerably limited if a complaint is anonymous. (See further below at paragraph 20 as to how anonymous complaints will be handled.)

6 Who can complain to the ICO?

6.1 Complaints may be received from:

- (a) current members of the NSW Parliament
- (b) staff who work for members of the NSW Parliament in their capacity as members (eg electorate office staff, advisers, researchers, assistants)
- (c) staff who work for the parliamentary departments.

6.2 Categories 6.1(b) and 6.1(c) include current contractors or subcontractors, current volunteers, current trainees and current interns.

6.3 Under the resolution of the Legislative Council, staff who work for Members of the Legislative Council in their capacity as Ministers can make a complaint to the ICO (about any member of the Parliament).

6.4 Staff who work for Ministers can also utilise the Respectful Workplaces Policy published by the Department of Premier and Cabinet ([Respectful-Workplace-Policy-May-2022-v2.pdf](https://www.nsw.gov.au/Respectful-Workplace-Policy-May-2022-v2.pdf) ([nsw.gov.au](https://www.nsw.gov.au))).

6.5 A member may “complain” about their own conduct if they wish to self-report and have a matter considered by the ICO.

6.6 Former staff may lodge a complaint with the ICO up to 21 days following the end of their employment. (This limitation does not affect a person’s rights under any other legislation such as the *Work Health and Safety Act 2011* or the *Anti-Discrimination Act 1977*).

7. Complaints from other sources

7.1 The ICO has no power to conduct own motion complaints.

7.2 Under section 53 of the *ICAC Act 1998* the ICAC may refer a matter for investigation or other action to any person or body it considers appropriate. Under agreement between the ICO and the ICAC, the ICAC will generally refer a matter to the ICO for information (not for investigation). The ICO will then follow the procedures outlined below to independently determine whether the matter should be investigated by the ICO.

7.3 Regardless of whether the complaint comes from the ICAC or through another source it will be necessary for the original “complainant” to be one of the persons listed in 6.1 above before the ICO can take action on the complaint.

8. Time periods for complaints

8.1 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 (when the relevant resolutions were passed).

8.2 A complaint must be lodged within two years of the alleged events occurring unless it would not be fair to a complainant or the member who is the subject of the complaint.

8.3 As noted above at 6.6, former staff members may complain only within 21 days of ceasing employment. Pursuant to the resolutions, this arrangement does not apply to members. Former members cannot complain to the ICO.

9. Confidentiality by the ICO on receipt of complaint

9.1 The ICO will not disclose the fact that a complaint has been lodged except as necessary to enable the complaint to be assessed and if applicable, investigated.

10. Confidentiality by complainants and others about complaint being lodged

10.1 Complainants and others who are not members of Parliament who lodge a complaint or who are aware that a complaint has been lodged are required to keep the fact of the complaint having been lodged confidential.

10.2 There is an expectation that, except in extraordinary circumstances, members will maintain confidentiality about complaints having been lodged. Nothing about this expectation affects parliamentary privilege and in particular the parliamentary privilege of freedom of speech.

10.3 Publication of the fact that a complaint has been lodged may lead to an adverse inference about the seriousness of the complainant in wishing to have a matter investigated.

11. Complaint that is also a Public Interest Disclosure matter

11.1 The ICO is not a disclosure officer for the purposes of the *Public Interest Disclosure Act 1994*². However it is possible that a complaint made to the ICO is also a public interest disclosure, for example because the complainant has previously made a public interest disclosure to a disclosure officer in respect of the same matter. In these circumstances the protections provided under the Public Interest Disclosure Act will continue to protect the person making the complaint.

12. The ICO deals with complaints, not the provision of advice on specific matters

12.1 The ICO may not give advice about the Members' Code of Conduct and related matters. This is to eliminate the possibility of a conflict should the ICO later be asked to investigate a complaint related to a matter on which advice has been provided.

12.2 Should the ICO be asked for advice the ICO will suggest alternative sources of advice such as the Presiding Officers, the Clerks the Department of Parliamentary Services, or the Parliamentary Ethics Adviser.

12.3 The ICO will monitor the operation of the Code of Conduct for Members, the *Constitution (Disclosure by Members) Regulation 1983* and the members' entitlement system and may provide advice about reform to the relevant Privileges Committee as requested.

Part 3 Initial Assessment of Complaints

13. Assistance for complainants

13.1 The ICO may identify that in addition to wishing to lodge a complaint with the ICO the complainant is seeking support to deal with the impact of an incident on their working or home life. The ICO cannot provide counselling or guidance but will assist in finding other sources for support. This will include ensuring that the complainant is aware of the EAP services offered by the NSW

² This position may change with the new public interest disclosure legislation due to commence in mid-2023

Parliament or if the complainant does not wish to use that service, finding an alternative source of support.

14. Determining that complaint can be dealt with by the ICO

14.1 On receipt of a complaint the ICO will first determine that it falls within the matters that the ICO can deal with pursuant to the resolutions of the Legislative Council and Legislative Assembly.

14.2 If the complaint cannot be dealt with by the ICO the ICO will inform the complainant within three working days and assist the complainant with identifying an alternative course of action.

14.3 At this assessment stage the ICO will not disclose the fact of the complaint having been made to any other person.

15. Complaint that alleges corrupt conduct

15.1 If the ICO determines that a complaint may potentially involve corrupt conduct the ICO cannot deal with the complaint and will instead suggest to the complainant that the matter should be raised with the Independent Commission Against Corruption (ICAC).

15.2 “Corrupt conduct” is defined in detail in section 8 and section 9 of the ICAC Act ([Independent Commission Against Corruption Act 1988 No 35 - NSW Legislation](#)). Section 9 of the ICAC Act provides specifically that conduct does not amount to corrupt conduct in the case of a Minister or member unless it amounts to a substantial breach of a relevant code of conduct

15.3 Under the resolutions the ICO may notify the ICAC of a complaint. As a general rule the ICO will not inform the ICAC of the existence of the complaint, whether or not the complainant decides to raise the matter with the ICAC. However, if the complaint is notably serious or substantial and there would seem to be a strong public interest in the ICAC being informed of a complaint the ICO would consider notifying the ICAC as an exceptional circumstance. The ICO would tell the complainant that it has done so. The ICO cannot be compelled to refer a complaint to the ICAC.

15.4 The ICO will not provide any material or information that has come into their possession through the lodging of the complaint to the ICAC unless compelled to do so (see further paragraph 34.1 below).

16. Complaints that relate to the conduct of the Legislative Council or Legislative Assembly or their committees

16.1 Under the resolutions, the ICO cannot receive or investigate complaints related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees. This includes conduct during parliamentary sittings, committee hearings and the deliberations of committees. Should such a complaint be made to the ICO the complainant will be referred to the relevant authorities such as the Presiding Officers, the Clerks or the Committee Chairs.

17. Complaints about bullying, harassment and inappropriate behaviour – relationship with other legislation

17.1 Particularly for complaints about bullying and harassment and other inappropriate behaviour there is a possibility that the alleged conduct may be a breach of specific legislative provisions (such as the *Work Health and Safety Act 2011* or the *Anti-Discrimination Act 1977*) or may be a criminal offence. The ICO may still consider and, if appropriate, investigate the matter.

17.2 The ICO may discuss with the complainant whether they have made, or may wish to make, a complaint to other relevant bodies charged with the administration of relevant legislation. However there will be no obligation on the complainant to make such a complaint to another authority. The ICO will not disclose any information to another authority without the specific consent of the complainant.

17.3 In particular, the ICO will not share information about the content or identity of specific matters with the Department of Parliamentary Services WHS team, SafeWork NSW, the NSW Anti-Discrimination Commission, the Police or any other person or agency without the express consent of the complainant unless the ICO is subject to a compulsory legal process (such as a Notice to Produce Documents or a subpoena) or a compulsory legal requirement to report.

Part 4 Preliminary Inquiries

18. Commencement of matter

18.1 On receipt of a complaint and having determined that it is a matter the ICO can deal with, the ICO will assign the matter a complaint number and open a file in their confidential complaints database.

19 . Discussion with complainant

19.1 Before determining whether to commence an investigation the ICO will undertake preliminary inquiries into the matter. This may include an initial discussion with the complainant (in person, by phone or video meeting, or, if preferred via email) to obtain some further details and context about the matter.

19.2 This discussion will also canvass with the complainant what outcome they are looking for from the matter, and the next steps in the investigation. This will include ensuring that the complainant understands that it may be necessary to identify them to others as the source of a complaint and to consider what steps can be taken to protect their interests.

19.3 For example, the ICO may discuss with the complainant which possible witnesses they would feel comfortable knowing the details of the complaint, and which might cause them more concern. It might also be discussed whether the complainant requests that the ICO not disclose some particularly sensitive parts of the complaint during the course of the investigation.

20. Anonymous complaints

20.1 As noted above in paragraph 5.3, a complaint may be made anonymously, and will be recorded in the complaints database. A preliminary inquiry will be undertaken but given there will be no ability to obtain further information or context from a complainant, the complaint may not be able to be proceeded with further.

20.2 There are circumstances where an anonymous complaint may be pursued. For example, where the complaint is extremely detailed and able to be corroborated by objective evidence or where the complaint is consistent with other complaints that have been made on a non-anonymised basis.

20.3 The maker of an anonymous complaint should be alive to the possibility that during the course of preliminary inquiries or an investigation their identity as the maker of the complaint may be become evident to others. While the ICO may not be able to identify who they are, other witnesses who know about the context may be able to deduce who has complained.

21. Discussions with other possible witnesses

21.1 As part of the preliminary inquiry process, the ICO may also confidentially discuss the matter with other potential witnesses and, depending on the circumstances, the member whose conduct is the subject of the complaint. The extent of the preliminary inquiries will depend on the nature of the matter and will be informed by the discussion with the complainant.

22. Decision not to investigate after preliminary inquiry phase

22.1 After preliminary inquiries the ICO may decide not to investigate a matter including for the following reasons:

- (a) it has become apparent during the preliminary inquiries that the matter is not within the jurisdiction of the ICO
- (b) it has been identified that the matter is being dealt with in another forum and it would be duplicative or counter-productive for the ICO to also carry out an investigation
- (c) the preliminary inquiries indicate that the complaint is without substance and / or is purely vexatious in nature
- (d) the preliminary inquiries indicate that there is no information available to determine whether the conduct complained of has occurred and that such information or evidence will not become available by further investigation
- (e) The matter has previously been investigated and no additional information has been provided

22.2 The ICO will advise the complainant (and any other person who has been made aware of the complaint during the course of the preliminary inquiry process) of this decision. If appropriate, the complainant will be assisted with finding an alternative route to address their concerns.

22.3 Pursuant to the resolutions, if the matter is not one involving bullying, harassment or inappropriate behaviour, the ICO will briefly report the decision not to investigate to the relevant Privileges Committee. If the matter is one involving bullying, harassment or inappropriate behaviour the matter will only be briefly reported to the relevant Privileges Committee if the complainant consents to such a notification.

Part 5 Investigation of Complaints

23. Investigations will be conducted on a confidential basis

23.1 The ICO will carry out all investigations with a view to maintaining confidentiality so far as is possible without interfering with the efficacy of the investigation.

23.2 Complainants and others who are involved in investigations who are not members of parliament are required to maintain confidentiality concerning investigations.

23.3 There is an expectation that, except in extraordinary circumstances, members will maintain confidentiality about complaints and investigations. However nothing about this expectation affects parliamentary privilege and, in particular, the parliamentary privilege of freedom of speech.

23.4 Publication of the fact that an investigation has commenced may lead to an adverse inference about the seriousness of the complainant in wishing to have a matter investigated.

23.5 The ICO is not required to notify the ICAC (or any other person) when an investigation is commenced.

24. Obtaining information during an investigation

24.1 During the course of an investigation the ICO will obtain relevant information about the matter through a variety of means including meeting with the complainant, members and other witnesses (including other members of the parliamentary community, or where relevant, other members of the general public).

24.2 Any person asked to attend a meeting with the ICO may request that another person attend the meeting with them. That person would be bound by the same confidentiality obligations as the witness.

24.3 A note will be made of all meetings and a confidential copy of the note provided to those present at the meeting. The ICO will not be making a verbatim transcription of meetings.

24.4 The ICO may also obtain information by requesting the production of documents and other records from members and officers of the Parliament. The request will be made in writing, with a description of the documents requested and a date by which they should be provided.

24.5 The ICO may also liaise with the relevant Clerk to obtain access to relevant registers including disclosure of interests to the extent that this information is not publicly available.

24.6 Members, their staff and parliamentary officers are required to reasonably co-operate at all stages with the ICO's investigations including giving a full, truthful and prompt account of the matters giving rise to a complaint.

24.7 The ICO may report to the relevant Privileges Committees any failure to comply with a request for a meeting, or failure to respond to questions during the meeting or to a request for the production of documents and the committee will recommend whether the matter requires any determination by the House.

24.8 See below at paragraphs 33 and 34 about confidentiality and disclosure of information and documents obtained during the course of an investigation.

25. Procedural fairness on draft findings

25.1 Following the conduct of the investigation the ICO will make a draft finding. The draft finding will be provided to the member that is the subject of the complaint on a confidential basis and an opportunity provided to make submissions to the ICO. These submissions will be considered before the ICO makes final findings and any recommendations.

26. Assistance with investigations

26.1 The ICO can engage the service of a person or persons to assist with investigations or perform services for the ICO, and in the conduct of the investigation. This is most likely to occur where a complaint raises significant issues and assistance is needed to complete the investigation in an expedient manner. Depending on the nature of a complaint, expert work health and safety or accounting or financial services may be engaged.

26.2 Any person appointed to assist the ICO will have the same powers as the ICO to request information and conduct investigations. They will be under the same confidentiality obligation as the ICO.

Part 6 Outcomes of Investigations

27. No breach found

27.1 If, after an investigation, the ICO determines that no breach of the Members Code or regulations or other misconduct has occurred, the ICO will write a short report outlining the reasons for that decision. The ICO will notify the complainant, the member complained of and any other person who has assisted in the investigation of the outcome of the investigation.

27.2 No further report will be made identifying the specifics of the investigation. On an unidentified basis, the matter will be counted in the ICO's report of the "number of matters found to be unsustainable" in a quarterly report to the Privileges Committees.

28. Misuse of allowance or entitlement found – recommended action

28.1 Where the ICO finds that there has been a misuse of an allowance or entitlement, the ICO may recommend repayment of the funds misused and may make other recommendations for corrective action, including improvements to the member’s record keeping and administrative requirements.

29. Minor or inadvertent misuse of allowance or entitlement

29.1 If following investigation the ICO concludes that the misuse is minor or inadvertent and that the member has taken the recommended action to rectify the breach no further action will be taken. The ICO will advise the member and the complainant in writing of the finding and note the rectification of the breach.

29.2 A brief report of the investigation and the rectification action taken will be made to the relevant Privileges Committee on a confidential basis.

30. Other breaches of the Code of Conduct or Regulations or bullying harassment or inappropriate conduct and corrective action taken

30.1 Where the ICO finds that there has been a breach of the Code of Conduct or regulations or a member has engaged in bullying or harassment or inappropriate conduct (other than misuse of an entitlement or allowance) the ICO may recommend corrective action by the member. If the corrective action is taken the ICO will advise the complainant and the member in writing of the finding and the corrective action that has been taken and finalise the complaint.

30.2 Except in the case of bullying, harassment and inappropriate behaviour matters, a brief report of the investigation and the rectification action taken will generally be made to the relevant Privileges Committee on a confidential basis.

30.3 In the case of bullying, harassment and inappropriate behaviour matters, no report will be made to the relevant Privileges Committee unless the complainant consents to the making of the report.

31. Failure to take rectification or corrective action or appeal of findings

31.1 If the member does not accept the ICO’s recommended rectification or corrective action or declines to take the action pending an appeal the ICO will present a confidential investigatory report to the relevant Privileges Committee reporting the findings of the investigation and recommendations as to the action that should be taken including sanctions, if any, that should be imposed by the House.

31.2 However, if the matter involves bullying, harassment or inappropriate conduct an investigatory report will only be made with the complainant’s consent. If consent is not provided the investigation will conclude. The records will be stored confidentially and only used for future related matters with the consent of the complainant.

31.3 Once an investigatory report has been made, the member in question will have the right to lodge an appeal against the ICO's findings, conclusions and recommendations. The relevant Privileges Committee will set the procedures under which appeals will be considered.

31.4 After receiving the investigatory report and, if any, appeal from the member, the relevant Privileges Committee will form its own conclusions as to whether it will accept the findings of the ICO. The Committee may decide to report its conclusions and recommendations, including about sanctions, to the House. The Committee can determine that a report to the House and / or sanctions are not warranted in a particular case, for example where the Committee disagrees with the ICO's findings.

Part 7 Record keeping and regular reporting

32. Record keeping by the ICO

32.1 The ICO will keep records of complaints received, assessments made, investigations conducted and all relevant information received in these activities. The records will be kept in a separate database on a confidential basis that is not accessible by others, including by any staff of the Parliament.

33. Publication of ICO records

33.1 The records of the ICO are considered to be records of the Legislative Council and Legislative Assembly and may be made public only with the prior approval of the ICO and resolution of the relevant House or where a member requests that the records be made public.

33.2 A member of the Legislative Council requesting that the records be made public should present the records to the Clerk, to be tabled in the House at the next sitting. During an extended break in sittings the Privileges Committee is empowered to publish records of the ICO if, on the recommendation of the ICO, expeditious publication is required.

33.3 A member of the Legislative Assembly requesting that the records be made public should table them in the House. During an extended break in sittings a member may table records with the Privileges Committee.

34. Provision of records to other agencies or persons

34.1 Any documents obtained by the ICO during the course of an investigation will not be provided to the ICAC unless under legal compulsion. If a notice under section 22 of the ICAC Act is received the ICO will ensure that procedural fairness is provided to any person who may be affected by the provision of the documents (subject to any obligations of confidentiality). This will include provision of an opportunity to claim parliamentary or any other relevant privilege.

34.2 The ICO will not provide records to any other agency or person unless there is a legal obligation to do so (for example pursuant to a subpoena from a court). Prior to the release of any information under a legal obligation, the ICO will inform any person who may be impacted by the release of the records. The ICO will also consider whether any claim of privilege (for example, parliamentary privilege or public interest immunity) may be made.

34.3 As the documents are considered to be records of the relevant house, the *Government Information (Public Access) Act 2009* does not apply to the ICO's records.

35. Regular Reporting by the ICO

35.1 The ICO will provide quarterly reports to the relevant Privileges Committees to be published in the House that contain general, de-identified information about the matters dealt with under the ICO system including:

- (a) the number and types of complaints received
- (b) the number of matters assessed with no further action being taken, with a brief description of the reasons
- (c) the number of investigations undertaken
- (d) the number of matters resolved by rectification or corrective action and the types of rectification or corrective action undertaken
- (e) the number of matters where rectification or corrective action was proposed where the member failed to take the required action and the matter was reported to the relevant Privileges Committee, and when reported to the Committee and the House
- (f) the results of matters reported to the House.

35.2 The ICO will meet annually with the Privileges Committees.

35.3 A review of the ICO arrangements will occur after 12 months of the establishment of the ICO position in consultation with key stakeholders. Suggestions about the operation of the ICO and these protocols can be provided to ico@ico.nsw.parliament.gov.au at any time.