



THE LAW SOCIETY
OF NEW SOUTH WALES

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19 July 2022

The Hon L Williams MP
Chair, Committee for the Independent Commission Against Corruption

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

Dear Ms Williams,

Review of aspects of the *Independent Commission Against Corruption Act 1988*

Thank you for the opportunity to make a submission to the Committee for the Independent Commission Against Corruption (**Committee**), on its Review of aspects of the *Independent Commission Against Corruption Act 1988*. The Law Society's Public Law Committee contributed to this submission.

General Comments

The Independent Commission Against Corruption (**ICAC**) plays a critical role in our democracy by safeguarding the integrity and credibility of our public institutions. The Law Society's view is that, overall, the ICAC is performing well, particularly following the 2016 amendments to the *Independent Commission Against Corruption Act 1988*.

We consider the Terms of Reference generally reflect the key areas for review.

1. The time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions

We understand the ICAC's internal time standards are often not met. The experience of our members is consistent with the finding in the Committee's Report on "Reputational impact on an individual being adversely named in the ICAC's investigations" (**Report**) that "the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years".¹ We agree that such delays can damage the reputation of persons under investigation, and undermine confidence in the ICAC and in the accountability of government.

Our preliminary view is that introducing statutory timeframes for handing down decisions may not assist in this context. Questions for consideration include the consequences flowing from a breach for the participants in the investigation and for the ICAC, the remedies available to those adversely affected, and the enforceability of those remedies.

¹ Committee of the Independent Commission Against Corruption, "Reputational impact on an individual being adversely named in the ICAC's investigations", Report 4/57 (November 2021), Finding 9.

We note that the former Chief Commissioner reported that the length of an investigation depends on two factors: complexity and resources.²

The complexity of an investigation may be difficult to control. The more insidious forms of corruption can be hidden in complex transactions, requiring considerable work to identify and analyse. Additionally, the ICAC must balance minimising delay with procedural fairness, by ensuring that persons of interest have a proper opportunity to prepare for hearings and to assemble the material relevant to the investigation. If new evidence comes to light in the course of an investigation, the need for fairness may require the ICAC to pause the hearing and take a new line of investigation, adding further complexity and often delay.

Regarding resources, overall the ICAC appears to be under-resourced. We understand the budgets for investigations are often overspent.

We appreciate the difficulties in resource planning, given the unpredictability of the ICAC's work from year to year. Urgent investigations can arise unexpectedly, and, as noted above, participants must be afforded procedural fairness if new evidence comes to light.

We welcome the Government's recent announcement that the ICAC will receive an increase in funding in the 2022-23 Budget and that the ICAC, unlike other NSW agencies, will no longer have efficiency dividends imposed upon it. A flexible resourcing model would allow for variation in the amount directed to different ICAC functions as required, particularly during periods of increased referrals that result in urgent investigations. In such circumstances, a flexible funding model would also enable existing investigations to continue and/or conclude within a reasonable timeframe.

In prolonged investigations, resources should also be directed to improving communications about progress to the persons involved, and, in the case of public hearings, to the public.

Finally, further funding is required for the ICAC's critical educative role, so that the ICAC can continue to better support public authorities to develop policies and processes that reduce the risk of corrupt conduct occurring. Proactive and preventative initiatives should continue to be a key focus of the Commission, particularly as the nature of corrupt conduct is continually changing and evolving. For instance, the public service is becoming more reliant on the use of technology and public/private partnerships to deliver services, both of which provide new opportunities for corruption to occur.

2. The existing mechanism of judicial review

The rules and procedures for the existing mechanism of judicial review are well-established. The Law Society considers there is little value in proposing other mechanisms for judicial review of the ICAC unless the Parliament was minded to adopt a whole of government approach along the lines of the *Administrative Decisions (Judicial Review) Act* (Cth). However, while the ICAC's procedural decisions may be susceptible to review, the general impact of such changes may be limited in the case of the ICAC, so long as it is acting within the scope of its power. This is because it is broadly an investigative body rather than a decision making one. Its findings and recommendations do not directly impact the interests of persons who are the subject of its investigations, even if they are a precursor to other actions, such as a prosecution, which may have such an effect.

The Law Society also does not support the development of a merits review process. In our view, this would be unfair to participants in an investigation, in that it would tend to raise an assumption that not bringing review proceedings constituted an acceptance of the ICAC's

² Ibid at [3.45].

findings. Given that many participants may lack the means to bring an action in merits review, the process would favour the better resourced participants by providing an additional avenue to challenge an unfavourable finding. By turning an inquisitorial process into an adversarial one, a merits review process would also impose cost burdens on all witnesses involved in the original inquiry, even if they agreed with the ICAC's findings and were not responsible for initiating the review. Again, to import a merits review process would also be to misconstrue the ICAC investigation as a trial rather than as the first investigation which may lead to other processes.

We would also not support conferral of a merits review power on the Inspector of ICAC, which in our view, would conflate the Inspector's functions with those of the ICAC. It would also provide a further avenue for forum-shopping on the part of well-resourced participants.

3. The role and powers of the Inspector of the ICAC

The Law Society considers the powers of the Inspector are generally adequate and not in need of expansion.

However, there is a need to address current resourcing constraints, which limit the Inspector's capacity to conduct audits to identify where the ICAC could be performing more effectively or whether there have been breaches of legislation that would otherwise not have been identified. Both the levels and quality of staffing within the Inspector's office are important to the execution of its functions.

Thank you for the opportunity to provide a submission. Questions at first instance may be directed to Sue Hunt at 9926 0218 or sue.hunt@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanne van der Plaats', written in a cursive style.

Joanne van der Plaats
President