



INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

SUBMISSION TO THE COMMISSION OF
INQUIRY INTO SPECIFIC MATTERS RELATING
TO THE CRIME AND CORRUPTION
COMMISSION

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Introduction

This submission is made by the NSW Independent Commission Against Corruption (“ICAC”) to the Commission of Inquiry relating to the Queensland Crime and Corruption Commission.

The terms of reference for the Inquiry are set out at Appendix 1 of this submission.

This submission addresses the Commission of Inquiry’s request for the following information:

- any use of seconded police officers in investigations conducted by the ICAC and in the processes connected with decisions to commence prosecutions arising from those investigations;
- issues arising from any use of seconded police officers and how those issues are managed by the ICAC;
- the expertise, qualifications and training required by the ICAC for persons involved in the ICAC’s investigations and decisions to commence prosecutions arising out of those investigations (including the required expertise, qualifications and training in areas of law other than criminal law that may affect investigations and decisions to prosecute, such as administrative law, public law, employment law and public sector corporate governance);
- any relevant law, policies, procedures and practices affecting decisions to commence prosecutions arising out of ICAC investigations;
- any relevant law, policies, procedures and practices affecting any referral of matters by the ICAC to the Office of the Director of Public Prosecutions (NSW), including details about the types of matters that are referred; the form of the referrals; when matters are referred and why referrals are not made at an earlier stage (if known);
- practices regarding interaction between the ICAC and the Office of the Director of Public Prosecutions (NSW), including:
 - practices in respect of advice given (either formally or informally) by the Office of the Director of Public Prosecutions (NSW) before and after the commencement of criminal prosecutions; and
 - practices concerning how evidence obtained by use of coercive powers is managed given the legal principles regulating the use of that evidence (such as those identified in *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, and *Lee v The Queen* (2014) 253 CLR 455); and
- any steps that the ICAC can take, and any steps that it has taken, in the course of investigations or hearings to minimise inappropriate impacts on affected parties (for example, steps taken to mitigate adverse mental health outcomes suffered by witnesses by reason of their involvement in such investigations or hearings);
- any body or bodies established by law that provide independent oversight of the activities of the ICAC (such as bodies equivalent to the Parliamentary Crime and Corruption Committee, the Parliamentary Crime and Corruption Commissioner and the Public Interest Monitor

established by the *Crime and Corruption Act 2001 Act 2001* (Qld)), and the effectiveness of any such body or bodies.

Before responding to the specific matters identified by the Commission of Inquiry, a brief overview of the ICAC is set out in Part 1 of the submission.

Part 2 of the submission sets out the ICAC's response with respect to the use of seconded police officers and the expertise and training of ICAC officers involved in investigations.

Part 3 of the submission sets out information concerning relevant laws, policies, procedures and practices relating to prosecution matters.

Part 4 of the submission sets out information concerning how the ICAC seeks to minimise adverse impacts on affected persons caused by its investigations.

Part 5 of the submission identifies the various bodies that provide independent oversight of the ICAC's activities.

Part 1: Overview of the ICAC

The ICAC was established in 1988 by the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") and commenced operations in 1989.

The ICAC's mandate under s 2A of the ICAC Act is to investigate, expose and prevent corruption involving or affecting public authorities and public officials and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community. The ICAC also investigates conduct that may involve certain specified criminal offences that the NSW Electoral Commission refers to the ICAC for investigation under s 13A of the ICAC Act.

Corrupt conduct is defined in s 7, s 8 and s 9 of the ICAC Act.

Section 12 of the ICAC Act provides that, in exercising its functions, the ICAC shall regard the protection of the public interest and the prevention of breaches of public trust as its "paramount concerns".

Section 12A of the ICAC Act stipulates that, in exercising its functions, the ICAC is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

The ICAC may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.¹ An investigation may be in the nature of a preliminary investigation.²

Only a very small percentage of matters received by the ICAC are made the subject of an investigation.

The ICAC has various powers under the ICAC Act and other legislation to enable it to conduct its investigations both efficiently and effectively. These include power to:

- obtain a statement of information from a public authority or public official (s 21 of the ICAC Act)
- obtain documents or other things by serving a written notice (s 22 of the ICAC Act)
- enter and inspect public premises to inspect documents and other things and take copies of any document (s 23 of the ICAC Act)
- conduct a compulsory examination (private hearing) (s 30 of the ICAC Act)
- conduct a public inquiry (s 31 of the ICAC Act)
- apply for the issue of a search warrant (s 40 of the ICAC Act)
- prepare a report in relation to any matter that has been or is the subject of an investigation (s 74 of the ICAC Act)
- apply for a warrant to use a surveillance device (*Surveillance Devices Act 2007*)
- obtain approval for the conduct of an operation that would otherwise be unlawful (*Law Enforcement (Controlled Operations) Act 1997*)
- obtain authorisation for ICAC officers or others to use a false identity (*Law Enforcement and National Security (Assumed Identities) Act 2010*)

¹ Section 20 of the ICAC Act.

² Section 20A of the ICAC Act.

- apply for a telecommunications interception warrant and a stored communications warrant and obtain access to existing and prospective telecommunications data (*Telecommunications (Interception and Access) Act 1979*).

The ICAC is an investigative body that can make findings of fact and can make findings of corrupt conduct against public officials and others who engage in serious corrupt conduct. Not every investigation will produce findings of corrupt conduct or even adverse factual findings. The purpose of an investigation is to determine the truth or otherwise of the allegations under investigation. As such, an investigation may find that there was no corrupt or improper conduct.

Since the commencement of its work in 1989, the ICAC has conducted numerous investigations and undertaken significant corruption prevention work to strengthen NSW public administration against corruption.

The ICAC does not institute or conduct criminal proceedings. The decision on whether or not to commence criminal proceedings as a result of an ICAC investigation is a matter for the NSW Director of Public Prosecutions (DPP). In NSW the DPP conducts any prosecutions arising from ICAC investigations. If the ICAC has obtained admissible evidence of the commission of a criminal offence in another State, the Commonwealth or a Territory, then the ICAC will furnish such evidence to the Attorney General or to the appropriate authority of the jurisdiction concerned.

Part 2: Use of seconded police officers

This Part of the submission addresses the following matters:

- any use of seconded police officers in investigations conducted by the ICAC and in the processes connected with decisions to commence prosecutions arising from those investigations;
- issues arising from any use of seconded police officers and how those issues are managed by the ICAC; and
- the expertise, qualifications and training required by the ICAC for persons involved in the ICAC's investigations and decisions to commence prosecutions arising out of those investigations (including the required expertise, qualifications and training in areas of law other than criminal law that may affect investigations and decisions to prosecute, such as administrative law, public law, employment law and public sector corporate governance).

The ICAC may arrange for the secondment of staff from any NSW Government department or agency.

Section 101B of the ICAC Act provides that an ICAC investigator who is a seconded police officer has and may exercise all the functions (including powers, immunities, liabilities and responsibilities) that a police officer of the rank of constable duly appointed under the *Police Act 1990* has and may exercise under any NSW law.

The ICAC has not engaged seconded NSW Police officers since 2008. As such, there are no current issues arising from the use of seconded police officers.

Those ICAC officers principally engaged in ICAC investigations are ICAC investigators, lawyers and corruption prevention (CP) officers. ICAC investigators and lawyers are involved in preparing briefs of evidence for submission to the DPP.

Investigators are required to have significant experience investigating alleged serious offences and/or public sector misconduct. They are required to have a good knowledge of the criminal law, the rules of evidence and criminal procedures, an understanding of the ICAC Act, the machinery of government and public sector organisational systems. They must have well-developed planning and organisational abilities, problem solving and analytical skills, be able to write well and communicate effectively with people of diverse background, occupation, and seniority, both internal and external to the Commission.

Senior Investigators must have significant experience and/or formal qualifications investigating alleged serious offences, including fraud and/or public sector misconduct. They must also have supervisory experience in an investigative environment.

Lawyers are required to have a law degree and either be admitted or be eligible for admission as a barrister or solicitor of the Supreme Court of NSW. Legal knowledge and experience, particularly in criminal law and administrative law and a sound knowledge of the rules of evidence, procedural fairness and the ICAC Act are also required. Skills required are high level analytical, organisational and oral and written communication skills.

CP officers are required to have:

- relevant tertiary qualifications in management, public administration, organisational development, law, or a related discipline. Experience in management, research, speaking, education and business organisational analysis
- a good knowledge and understanding of the machinery of government, legislative and policy processes
- developed and capable planning and organisational abilities, research, problem solving and analytical skills, and the ability to write well and communicate effectively with people of diverse background, occupation and seniority, both internal and external to the Commission.

Part 3: Relevant laws, policies, procedures and practices relating to commencement of prosecutions

This part of the submission addresses the following matters:

- any relevant law, policies, procedures and practices affecting decisions to commence prosecutions arising out of ICAC investigations;
- any relevant law, policies, procedures and practices affecting any referral of matters by the ICAC to the Office of the Director of Public Prosecutions (NSW), including details about the types of matters that are referred; the form of the referrals; when matters are referred and why referrals are not made at an earlier stage (if known); and
- practices regarding interaction between the ICAC and the Office of the Director of Public Prosecutions (NSW), including:
 - practices in respect of advice given (either formally or informally) by the Office of the Director of Public Prosecutions (NSW) before and after the commencement of criminal prosecutions; and
 - practices concerning how evidence obtained by use of coercive powers is managed given the legal principles regulating the use of that evidence (such as those identified in *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, and *Lee v The Queen* (2014) 253 CLR 455).

Section 14 of the ICAC Act provides that one of the ICAC's functions is "to gather and assemble, during or after the discontinuance or completion of its investigations, evidence that may be admissible in the prosecution of a person for a criminal offence against a law of the State in connection with corrupt conduct and to furnish such evidence to the Director of Public Prosecutions". The ICAC may also, during or after the discontinuance or completion of its investigations, furnish other evidence obtained in the course of its investigations (being evidence that may be admissible in the prosecution of a person for a criminal offence against a law of another State, the Commonwealth or a Territory) to the Attorney General or to the appropriate authority of the jurisdiction concerned.

Briefs of evidence are usually furnished to the DPP after the ICAC has completed an investigation and its s 74 report on the investigation has been made public.

Section 74 of the ICAC Act provides that the ICAC may prepare reports in relation to any matter that has been or is the subject of an investigation. The ICAC is required to prepare such reports in relation to any matter referred to the ICAC by both Houses of Parliament and in relation to matters where the ICAC has conducted a public inquiry. All such reports are to be furnished to the Presiding Officer of each House of Parliament. Reports are invariably made public by a Presiding Officer upon being furnished.

Section 74A(2) of the ICAC Act requires the ICAC to include in such a report a statement in respect to each "affected" person as to whether or not in all the circumstances the ICAC is of the opinion that

consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence.

An “affected” person is a person described as such in the reference made by both Houses of Parliament or against whom, in the ICAC’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.

As with other investigative commissions, the ICAC is not bound by the rules or practice of evidence.³ The privilege against self-incrimination does not apply in ICAC hearings and witnesses can be compelled to answer questions. If, however, a witness gives evidence under objection⁴ their evidence cannot generally be used against them in criminal proceedings (the exception is for the purposes of an offence under the ICAC Act). Thus, it is often the case that the evidence available to the ICAC upon which it makes its findings will differ from the admissible evidence available to be used in any subsequent criminal proceedings.

The ICAC has a Memorandum of Understanding (“MOU”) with the Office of the Director of Public Prosecutions (“the ODPP”). The MOU sets out, in general terms, the responsibilities of the ICAC and ODPP.

Under the MOU, ICAC officers are responsible for preparing briefs of admissible evidence which are provided to the ODPP.

Generally, compelled evidence taken by the Commission is given under objection and therefore will not be admissible in subsequent criminal proceedings. Such evidence is not included in the briefs of evidence provided to the ODPP. The exception is where the evidence relates to an offence under the ICAC Act, such as an offence of giving false and misleading evidence.⁵ In these circumstances, where the compelled evidence is relevant to the offence, it will be included in the brief of evidence relating to the particular ICAC Act offence.

In *Macdonald & Maitland v R* [2016] NSWCCA 306, the NSW Court of Criminal Appeal considered a situation where transcripts of an ICAC public inquiry were accessed from the ICAC’s website and read by junior counsel for the Crown and an ODPP solicitor with carriage of a prosecution matter arising from that inquiry. The Court held that the ICAC Act by necessary intendment abrogates the accusatorial principle, at least in the circumstances of public examinations occurring before the examinee is charged and substitutes for it the statutory protections contained in sections 18⁶ and 112⁷ of the ICAC Act (if the ICAC determines it is in the public interest to make such a direction). The Court held that in that circumstance it is open to the ICAC to make the transcript of a public examination available to the ODPP.

The briefs of evidence are usually provided after the investigation has concluded and the s 74 report has been made public. Where there is a s 74 report, the briefs of evidence are for the offences identified in the s 74A(2) statements in that report. ICAC investigators, in consultation with an ICAC lawyer assigned to the matter, prepare the briefs of evidence. These are reviewed by the relevant ICAC lawyer before being provided to the ODPP.

³ Section 17(1) of the ICAC Act.

⁴ See s 37 and s 38 ICAC Act.

⁵ Section 87 of the ICAC Act.

⁶ This section provides that the ICAC may commence, continue, discontinue or complete an investigation or furnish a report despite any court proceedings.

⁷ This section allows the ICAC to make non-publication directs with respect to evidence.

The purpose of the case lawyer review is to ensure the brief is complete, accurate and meets all requisite evidentiary and disclosure requirements. The case lawyer also prepares a cover letter addressing the following:

- each of the proof elements for the identified offence(s)
- any known or expected difficulties of proof
- which witnesses have indicated that they are willing to give evidence, and particulars of the manner in which this willingness was conveyed to the ICAC
- which witnesses have indicated that they are not willing to give evidence and particulars of the manner in which this unwillingness was conveyed to the ICAC
- the significance of the documents included in the brief
- if there is any particular urgency, and in the case of matters in which summary charges are considered appropriate, the last date on which proceedings can be instituted.

The MOU provides that the ODPP will provide advice to the ICAC as to whether criminal charges are available on the evidence that has been provided by the ICAC. There is provision for the ODPP to raise “requisitions” identifying any additional evidence or other material required before the ODPP can provide final advice. The ICAC is responsible for obtaining any such additional evidence or other material and providing it to the ODPP.

Once the ODPP has finalised its review of the evidence provided by the ICAC, it provides advice to the ICAC. That advice will either be that there is insufficient evidence to prosecute particular offences or that there is sufficient evidence to prosecute nominated offences. The offences nominated by the ODPP may differ from those identified by the ICAC.

The MOU provides that if, after consideration of the advice received from the ODPP, the ICAC is of a different view to that taken by the ODPP, the ICAC will consult with the ODPP. The ODPP will advise the ICAC whether or not it agrees with the ICAC’s view. Where the ODPP does not agree with the ICAC’s view, the ODPP’s advice effectively prevails. This is because, although ICAC officers may commence prosecution proceedings (see below), under s 9 of the *Director of Public Prosecutions Act 1986*, the DPP may take over any prosecution or proceeding in respect of an offence instituted by any person other than the DPP and discontinue the prosecution. The ICAC has never instituted criminal proceedings without the agreement and advice of the ODPP.

In NSW criminal proceedings are generally commenced by the issue and filing of a Court Attendance Notice (“CAN”). In providing advice to the ICAC on what criminal proceedings should be commenced, the ODPP also provides appropriate wording for the CANs. The ICAC prepares the CANs in accordance with this advice and serves the CANs.

Under the Criminal Procedure Act 1986, a “public officer” may issue a CAN and be named in the CAN as the prosecutor. An ICAC officer is a “public officer” for the purposes of that Act. Under the MOU, however, the ODPP Solicitor for Public Prosecutions is named in all CANs as the prosecutor. No ICAC officer is named as the prosecutor.

All prosecution proceedings are conducted by the ODPP.

Part 4: Minimisation of impacts

This Part of the submissions addresses how the ICAC manages adverse impacts on persons involved in its investigations.

The ICAC acknowledges that its investigations, particularly where they involve a public inquiry and/or a public report, can adversely impact on the mental health and/or reputation of those involved in the investigation.

Managing impacts on mental health

Any person who is involved in an ICAC investigation who is unwell or is under any physical or mental impediment that may affect their involvement in the ICAC's investigation or may be exacerbated by their involvement in the ICAC's investigation is encouraged to inform the ICAC so that the ICAC can assess and manage any risk to their health and safety.

The ICAC uses a risk-based approach to managing the welfare of those involved in its investigations. This is reflected in a specific procedure for managing risks to the health and safety of external parties involved in its investigations. The purpose of the procedure is to ensure such risks are identified and dealt with appropriately so that, where practical, they are eliminated or minimised.

The procedure provides that if any ICAC officer becomes aware that a person involved in an ICAC investigation is unwell, suffers from any physical or mental illness, or other condition that may affect their involvement in the ICAC's investigation or is receiving medical treatment, the ICAC officer will, as soon as practicable, make a comprehensive report on the matter to the senior ICAC officer responsible for the investigation.

The senior ICAC officer responsible for an investigation is required to ensure that any identified risks are recorded in the ICAC's case management system. The risks recorded will, where relevant, include risks to the health and safety of persons involved in the investigation.

In considering any risks to the health and safety of such persons, the senior ICAC officer responsible for the investigation is required to take into account any known evidence that a person suffers from any physical or mental illness, intellectual disability, other condition that may affect their involvement in the investigation or is receiving medical treatment and the way in which they are likely to interact with or respond to the investigation and the exercise of the ICAC's statutory powers.

Under the procedure, all significant risks are to be reported to the Executive Director, Investigation Division. The Executive Director, Investigation Division must report such risks to the Chief Executive Officer who is required to notify the Chief Commissioner.

It is generally the responsibility of the senior ICAC officer in charge of the investigation to manage any identified risks so that the risk of harm is either eliminated or, where that is not practical, minimised. Where the risk is assessed as significant the Chief Executive Officer may, in consultation with the Executive Director, Investigation Division and the Chief Commissioner, determine to assign responsibility for managing the identified risk to another ICAC officer.

Where necessary to gain an understanding of the risk and how it can be effectively managed, the ICAC may seek expert advice from a suitably qualified medical practitioner.

The way in which the Commission addresses the welfare requirements of those involved in its investigations is set out in Table 1 below.

Table 1: Welfare management requirements

Element	Requirement
Training	The ICAC has trained first aid officers. In addition, the ICAC will provide ongoing mental health awareness training for ICAC officers involved in the exercise of the ICAC's powers so they have a general understanding and awareness of relevant mental health issues and how to deal with them.
Notices under ss 21/22/23 ICAC Act	<p>Prior to the exercise of powers under these sections of the ICAC Act, the Chief Investigator responsible for the relevant investigation will check, or arrange to have checked, ICAC intelligence holdings and any other database accessible to the ICAC considered to be potentially relevant for the purpose of identifying whether there is any potential risk to the health and safety of any person who is the subject of the investigation or otherwise a person of interest to the investigation.</p> <p>Where no risk is identified, that fact is to be recorded in the ICAC's case management system.</p> <p>Where a risk is identified, the Chief Investigator is to prepare an operational risk management plan setting out each risk and identifying available means of eliminating or minimising the risk. The operational risk management plan will be provided to the Executive Director, Investigation Division. Where any identified risk is assessed as significant the Executive Director, Investigation Division will inform the Chief Executive Officer and the Chief Commissioner and (if not the Chief Commissioner) the Commissioner responsible for exercising the relevant statutory power. They will be responsible for approving the strategy for dealing with the risk. If the Chief Executive Officer and relevant Commissioner(s) are not available and the matter requires urgent attention the Executive Director, Investigation Division in consultation with the Executive Director, Legal Division where available) will be responsible for approving the strategy and subsequently notifying the Chief Executive Officer and relevant Commissioner(s).</p> <p>The Chief Investigator will ensure that those ICAC officers who will be responsible for exercising the relevant statutory power are cognizant of the risk(s) and the strategy to address the risk(s).</p> <p>The above procedure will not be undertaken where the subject of the investigation or any person of interest to the investigation will not be involved in or have knowledge of the exercise of the relevant power (such as where a notice under s.22 of the ICAC Act is issued to a financial institution for production of records).</p>

Search warrants – s.40 ICAC Act	<p>The Chief Investigator responsible for the relevant investigation will prepare a Risk Management Plan for the execution of any search warrant in relation to the investigation. The Risk Management Plan will include, where known, any risk to the physical and mental health of the persons likely to be present at the execution of the warrant and a management strategy to deal with those risks.</p> <p>The Operational Risk Management Plan will be provided to the Executive Director, Investigation Division. Where any identified risk is assessed as significant the Executive Director, Investigation Division will inform the Chief Executive Officer and the Chief Commissioner and (if not the Chief Commissioner) the Commissioner responsible for overseeing the investigation. They will be responsible for approving the strategy for dealing with the risk. If the Chief Executive Officer and relevant Commissioner(s) are not available and the matter requires urgent attention the Executive Director, Investigation Division in consultation with the Executive Director, Legal Division where available) will be responsible for approving the strategy and subsequently notifying the Chief Executive Officer and relevant Commissioner(s).</p> <p>The Chief Investigator will ensure that those ICAC officers who will be responsible for executing the search warrant are cognizant of the risk(s) and the strategy to address the risk(s).</p> <p>If, during the execution of a search warrant, an ICAC officer becomes aware that there may be a risk to the physical or mental health of any person affected by the execution of the search warrant, the officer will immediately notify the relevant Chief Investigator or, if the Chief Investigator is not available, the Executive Director, Investigation Division. The Chief Investigator (or Executive Director Investigation Division) will identify and implement such action as is appropriate to eliminate or minimise any such risk.</p>
Controlled Operations	<p>The <i>Law Enforcement (Controlled Operations) Act 1997</i> provides that the ICAC may undertake certain authorised activity that, but for the authorisation, would be unlawful. Such activity may include ICAC officers and civilian participants. Any application for authorisation to conduct a controlled operation must include a plan of the proposed operation (which, under the <i>Law Enforcement (Controlled Operations) Act 1997</i> is to be approved by the Chief Commissioner or other Commissioner authorising the controlled operation).</p> <p>In preparing the operation plan, the Chief Investigator responsible for the relevant investigation will identify any potential risk to the health and safety of any persons to be involved in the proposed operation and include strategies for eliminating or reducing such risks. The Chief Investigator will ensure that those ICAC officers involved in the controlled operation are cognizant of any identified risk(s) and the strategy to address the risk(s).</p>
Summoning a person to attend at a compulsory	<p>The Chief Investigator responsible for the relevant investigation will check, or arrange to have checked, ICAC intelligence holdings and any other database accessible to the ICAC considered to be potentially relevant for the purpose of</p>

<p>examination – s.30 ICAC Act</p>	<p>identifying whether there is any potential risk to the health and safety of the proposed witness.</p> <p>Where no risk is identified, that fact will be recorded in the ICAC's case management system.</p> <p>Where a risk is identified, the Chief Investigator will prepare an Operational Risk Management Plan setting out each risk and identifying available means of eliminating or minimising the risk.</p> <p>The Operational Risk Management Plan will be provided to the Executive Director, Investigation Division and Executive Director, Legal Division. Where any identified risk is assessed as significant the Executive Director, Investigation Division will inform the Chief Executive Officer and the Chief Commissioner and (if not the Chief Commissioner) the Commissioner presiding at the compulsory examination. They will be responsible for approving the strategy for dealing with the risk. If the Chief Executive Officer and relevant Commissioner(s) are not available and the matter requires urgent attention the Executive Director, Investigation Division (in consultation with the Executive Director, Legal Division where available) will be responsible for approving the strategy and subsequently notifying the Chief Executive Officer and relevant Commissioner(s).</p> <p>The Chief Investigator will ensure that those ICAC officers who will be responsible for serving the summons and for the conduct of the compulsory examination (including any external legal practitioner engaged as counsel assisting) are cognizant of the risk(s) and the strategy to address the risk(s).</p> <p>If, during or after service of a summons, an ICAC officer becomes aware that there may be a previously unidentified risk to the physical or mental health of the recipient of the summons (or the risk is greater than previously identified), the officer will immediately notify the relevant Chief Investigator or, if the Chief Investigator is not available, the Executive Director, Investigation Division. The Chief Investigator (or Executive Director, Investigation Division) will identify and implement such action as is appropriate to eliminate or minimise any such risk.</p>
<p>Summoning a person to attend at a public inquiry – s.31 ICAC Act</p>	<p>The Chief Investigator responsible for the relevant investigation will prepare a Hearing Risk Management Plan for the public inquiry. It will identify any potential risk to the health and safety of those involved in the public inquiry and include strategies for eliminating or minimising such risks.</p> <p>The Hearing Risk Management Plan will be provided to the Executive Director, Investigation Division and Executive Director, Legal Division. Where any identified risk is assessed as significant the Executive Director, Investigation Division will inform the Chief Executive Officer and the Chief Commissioner and (if not the Chief Commissioner) the Commissioner presiding at the public inquiry. They will be responsible for approving the strategy for dealing with the risk. If the Chief Executive Officer and relevant Commissioner(s) are not available and the matter requires urgent attention the Executive Director, Investigation Division (in consultation with the Executive Director, Legal Division where available) will be responsible for approving the strategy and</p>

	<p>subsequently notifying the Chief Executive Officer and relevant Commissioner(s).</p> <p>The Chief Investigator will ensure that those ICAC officers who will be responsible for serving the summons and for the conduct of the public inquiry (including counsel assisting) are cognizant of the risk(s) and the strategy to address the risk(s).</p> <p>If, during or after service of a summons, an ICAC officer becomes aware that there may be a previously unidentified risk to the physical or mental health of the recipient of the summons (or the risk is greater than previously identified), the officer will immediately notify the relevant Chief Investigator or, if not available, the Executive Director, Investigation Division. The Chief Investigator (or Executive Director, Investigation Division) will identify and implement such action as is appropriate to eliminate or minimise any such risk.</p>
Conduct of a compulsory examination and public inquiry	<p>Prior to the commencement of a compulsory examination or a witness giving evidence in a public inquiry, where any potential risk to the health or safety of a witness has been previously identified, the ICAC lawyer with carriage of the matter may enquire of the witness (or their legal representative if legally represented) whether they have any physical or mental condition that may affect their welfare. In the event advice of such a condition is provided, the ICAC lawyer will notify Counsel Assisting the Commission (if any) and the presiding Commissioner with a view to determining what, if any, action needs to be taken with respect to that witness.</p> <p>Where a witness required to attend a compulsory examination or public inquiry advises an ICAC officer that they consider they may be unfit to attend and give evidence, the ICAC may require the person to provide a report from a suitably qualified medical practitioner setting out the person's current condition and how that impacts on the person's ability to attend and give evidence. The person must nevertheless attend the ICAC in response to the summons unless released from doing so by the presiding Commissioner.</p> <p>The danger of physical risk to those attending hearings is minimised through:</p> <ul style="list-style-type: none"> • having special constables on duty to maintain security; • not allowing entry to the ICAC's offices or hearing rooms by banned persons; • limiting and controlling access to public and private areas of the ICAC's offices; • electronic screening of persons wishing to enter the hearing room; • electronic monitoring of the hearing room; • not permitting glassware to be used in the hearing room; and • provision for response to a critical incident (which includes an incident involving imminent or actual serious injury to a person). <p>Where a potential risk to the health and safety of any person required to attend at a compulsory examination or public inquiry is identified, the ICAC may:</p> <ul style="list-style-type: none"> • regulate the hearing so as to reduce the risk; • adjourn the hearing where appropriate;

	<ul style="list-style-type: none"> • obtain a medical report from a suitably qualified medical practitioner; • take evidence from a suitably qualified medical practitioner; • make suppression orders under s.112 of the ICAC Act; • make arrangements under s.50 of the ICAC Act (see below); • arrange for an ICAC first aid officer to be present; • appoint an ICAC contact officer to liaise with the person; • arrange for an appropriately qualified medical practitioner or counsellor to be present. <p>Where a person is unwell or attempts self-harm, immediate medical assistance will be sought, including in all cases of attempted self-harm the calling of an ambulance. Police will also be notified of any attempt at self-harm.</p>
Welfare services	<p>The ICAC's Employee Assistance Program ("EAP") is available to persons whose health and safety may be at risk arising from an ICAC investigation.</p> <p>If the person is a NSW public sector employee then the person may be able to seek confidential counselling through their agency's EAP and should be so advised.</p> <p>If the person is employed in the private sector or is unemployed it may be appropriate to recommend the person visit the NSW Mental Health Commission website at: www.nswmentalhealthcommission.com.au.</p> <p>Persons can also be advised to contact:</p> <ul style="list-style-type: none"> • Lifeline on 13 11 14 • Suicide Call Back Service 1300659 467 • Mental Health Line 1800 011 511 • Beyond Blue 1300 224 636 • Headspace (for people aged 12-25) 1800 650 890. <p>The ICAC has available trained first aid officers and may appoint an ICAC contact officer to liaise with a person.</p> <p>If an ICAC officer believes that a registered health practitioner or welfare support service should be notified of a health or safety risk to a person involved in an investigation, the officer will report that concern to the Chief Investigator responsible for the investigation. If the Chief Investigator determines to make such a notification, the Chief Investigator will seek to obtain the prior permission of the person for such notification and for the provision of their personal welfare details.</p>
Monitoring welfare	<p>ICAC officers exercising an ICAC statutory power will, at the time the power is being exercised, consider the welfare of those subject to the exercise of the relevant power with a view to identifying and dealing with any risks.</p> <p>Once the power has been exercised, the ICAC officers involved in the exercise of the power will consider whether any relevant welfare support services should be notified with respect to any person the subject of the exercise of the</p>

	power. If it is considered that welfare support services should be notified the relevant ICAC officer will notify his/her Executive Director.
Medical incident management and response	Where ICAC officers become aware that a person affected by the exercise of statutory powers requires medical attention from a qualified medical professional, the senior Commission officer will make arrangements for the person to be offered such attention. The need for such services will be reported to the Chief Executive Officer.
Section 112 restrictions on publication of evidence	Section 112(3) of the ICAC Act provides that it is not a contravention of a direction given under s.112 to publish any evidence, contents of a document or information to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person who has given or may be about to give evidence at a compulsory examination or public inquiry.

Section 50 of the ICAC Act provides that, if the safety of a person (or the safety of any other person, including family members) may be prejudiced or the person may be subject to intimidation or harassment because the person assisted the ICAC, the ICAC may make arrangements to:

- protect the person's safety; or
- protect the person from intimidation or harassment.

Such arrangements may involve directing the Commissioner of Police to:

- provide protection;
- provide personnel or facilities or both to assist in providing protection; or
- otherwise assist in providing protection.

The ICAC may also make an order to protect a person's safety or to protect a person from intimidation or harassment. It is a criminal offence for anyone to contravene such an order.

Under s 93 of the ICAC Act, it is a criminal offence for any person who uses, causes, inflicts or procures, or threatens to use, cause, inflict or procure, any violence, punishment, damage, loss or disadvantage to any person for or on account of the person:

- assisting the ICAC; or
- giving evidence to the ICAC.

Managing impacts on reputation

The ICAC manages reputational impact in a number of ways.

Where an investigation has been concluded without the need for a public inquiry and either the fact of the investigation is known publicly or the person against whom allegations have been made is aware of the ICAC's investigation (for example, as the result of being interviewed by ICAC officers or giving evidence at a compulsory examination), it is ICAC policy to consider how the subject of the investigation should be advised of the outcome of the investigation. This may take the form of a letter advising the person that the ICAC has concluded its investigation. There is no restriction preventing

the person receiving such a letter from publishing the contents of the letter should he or she wish to do so to address any reputational impact arising from the fact that they had been the subject of an investigation.

The question of reputational impact usually arises in circumstances where the ICAC conducts a public inquiry and/or produces an investigation report under s 74 of the ICAC Act. While the ICAC must make a report under s 74 of the ICAC Act where it has conducted a public inquiry,⁸ it can also make such a report in the absence of a public inquiry.

Managing reputational impact is part of the overall management of public inquiries.

Under the ICAC Act, the risk of undue prejudice to a person's reputation is one of the factors the ICAC must take into account in determining whether to conduct a public inquiry. It is not the sole consideration and must be balanced with other public interest considerations.

Section 31(2) of the ICAC Act sets out the factors the ICAC must take into account in determining whether or not it is in the public interest to conduct a public inquiry. These are:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct
- (b) the seriousness of the allegation or complaint being investigated
- (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding a public inquiry)
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The ICAC's Operations Manual, which outlines the procedure for the conduct of public inquiries, provides that considerations to be taken into account by the ICAC in applying the criteria in s 31 of the ICAC Act include:

- a) whether public exposure would be likely to:
 - educate the public about serious corruption or systemic failures and issues
 - encourage others to come forward with information relevant to the investigation
 - encourage public agencies to engage in reform and/or establish public understanding of why change is necessary
- b) the seriousness and nature of the conduct alleged, for example:
 - whether the conduct involves a criminal offence or offences
 - the seniority or standing of the public official/s involved
 - the level of sophistication, organisation and planning
 - the number of persons involved and whether the alleged conduct is systemic
- c) whether the allegations are already in the public domain and the public inquiry would:
 - provide a transparent mechanism for public officials and others to be publicly accountable for their actions
 - enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account
- d) the desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

⁸ Section 74(3) of the ICAC Act.

The requirements of the ICAC Act and the ICAC's Operations Manual ensure that potential damage to reputation is one of the matters considered by the Commission in determining whether to conduct a public inquiry as opposed to taking other action.

The ICAC also protects against unnecessary reputational damage by only commencing a public inquiry where there is probative evidence to suggest corrupt conduct has occurred or is occurring or, in the case of a referral by the Electoral Commission under s 13A of the ICAC Act, where probative evidence has been obtained of a possible criminal offence to which that section applies. The ICAC's usual practice is to gather evidence, including by conducting compulsory examinations with relevant witnesses and affected persons, before considering whether to conduct a public inquiry. This assists the ICAC to assess the evidence and to address the matters set out in s 31(2) of the ICAC Act.

While a public inquiry is to be held in public,⁹ the ICAC may decide to hold part of the inquiry in private if it considers this to be in the public interest.¹⁰ Part of the inquiry might be heard in private where, for example, a witness raises new and untested allegations against another person. It would arguably be in the public interest for that evidence to be heard in private both to protect the reputation of the person who was the subject of the new allegations and to enable the ICAC to investigate the allegations without that investigation being possibly prejudiced by public disclosure of the allegation(s).

The ICAC may also make non-publication directions under s 112 of the ICAC Act. Section 112(1) provides that the ICAC may direct that:

- (a) any evidence given before it, or
- (b) the contents of any document, or a description of any thing, produced to the ICAC or seized under a search warrant issued under this Act, or
- (c) any information that might enable a person who has given or may be about to give evidence before the ICAC to be identified or located, or
- (d) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry, or
- (e) any written submissions received by the ICAC (including, but not limited to, submissions made by Counsel Assisting the ICAC),

shall not be published or shall not be published except in such manner, and to such persons, as the ICAC specifies.

The ICAC is not to give a direction under s 112 unless satisfied that the direction is necessary or desirable in the public interest.¹¹

Where it is in the public interest to do so, a s 112 direction can be made in a public inquiry to prevent the publication of evidence (whether oral or documentary) or any information that might identify a witness where such publication might cause reputational harm.

A person giving evidence at a public inquiry or a person who is substantially and directly interested in any subject matter of a public inquiry may be authorised to be represented by an Australian legal practitioner at the public inquiry or a specified part of the public inquiry.¹² Section 33(2) of the ICAC

⁹ Section 31(8) of the ICAC Act.

¹⁰ Section 31(9) of the ICAC Act.

¹¹ Section 112(1A) of the ICAC Act.

¹² Section 33(1) of the ICAC Act.

Act requires the ICAC to give a reasonable opportunity for a person giving evidence at the public inquiry to be legally represented. An Australian legal practitioner authorised to appear at a public inquiry may, with the leave of the ICAC, examine or cross-examine any witness on any matter that the ICAC considers relevant.

A person's legal representative may play an important role in the public inquiry. This includes by assisting to mitigate against any adverse reputational impact upon that person. This may be done in a number of ways. These include examination of the witness to elucidate exculpatory evidence, cross-examination of witnesses whose evidence is adverse to the person for the purpose of obtaining exculpatory evidence and/or assessing credibility, and identifying additional relevant evidence that should be considered by the ICAC. An unrepresented witness, of course, may also, where relevant, cross-examine other witnesses and identify additional relevant evidence.

In conducting its public inquiries, the Commission must also observe and comply with the principles of natural justice.¹³

Reputation is guarded by the requirement that adverse findings are subject to the duty to afford procedural fairness. A principal procedural fairness requirement is that bodies such as the ICAC cannot lawfully make a finding adverse to the interests of a person without first giving the person an opportunity to make submissions against the making of such a finding – see *Annetts v McCann* (1990) 170 CLR 596 at 600-601.

At the conclusion of the taking of evidence in a public inquiry, it is the invariable procedure for Counsel Assisting the ICAC to make written submissions setting out what findings and recommendations it is contended by Counsel Assisting are available on the evidence before the ICAC to be made by the ICAC. Relevant parties have the opportunity to make submissions in response. Submissions are made the subject of a non-publication direction under s 112 of the ICAC Act. A principal reason for making such a direction is to protect persons from attracting publicity of adverse findings contended by Counsel Assisting but that might not ultimately be made by the Commission.

Information concerning recommendations made by the Commission that consideration be given to the taking of criminal, disciplinary or dismissal action is published on the Commission's website under each relevant investigation. The information includes the recommendation(s) made by the Commission, when briefs of evidence were provided to the relevant authority, and the outcomes of any consideration, including the result of any proceedings instituted as a result of the Commission's recommendations. So, for example, where the DPP decides not to commence criminal proceedings or a person is acquitted or convicted of an offence arising from a Commission investigation, including as a result of an appeal, that outcome is published on the Commission's website. That information is also published in the Commission's annual reports.

The Parliamentary Committee on the ICAC (see Part 5 of this submission) recently completed its inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations. The Committee's November 2021 report on its inquiry is accessible from the NSW Parliament website. The findings made in the report include the following:

Finding 1

¹³ It is well established that, where a statute, such as the ICAC Act, confers power on an official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless expressly excluded – see *Annetts v McCann* (1990) 170 CLR 596 at 598 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576.

The nature of reputational impact is varied and includes economic, business, social and psychological effects.

Finding 5

There is currently a broad range of safeguards in place to minimise reputational impact on individuals being adversely named in the ICAC's investigations.

Finding 6

Some reputational impact is unavoidable if the ICAC is to be effective in its work to investigate, expose and prevent corruption.

Finding 8

Many stakeholders agree that the current safeguards for reputational impact are adequate and no changes are necessary.

Part 5: Independent oversight

This Part of the submissions identifies the bodies that provide independent oversight of the ICAC.

The two main external accountability bodies for the ICAC are the Parliamentary Committee on the ICAC and the Inspector of the ICAC.

Parliamentary Committee on the ICAC

The Parliamentary Committee on the ICAC (“the Parliamentary Committee”) is the means by which the ICAC is accountable to the NSW Parliament. It was established by resolution on 6 April 1989 and was re-established on 19 June 2019.

The Parliamentary Committee comprises members of both the Legislative Council and the Legislative Assembly.

The functions of the committee are set out in s 64 of the ICAC Act. They are to:

- monitor and review the exercise by the ICAC and the Inspector of the ICAC of the ICAC’s and Inspector’s functions
- report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the ICAC or the Inspector connected with the exercise of its functions to which, in the opinion of the Parliamentary Committee, the attention of Parliament should be directed
- examine each annual and other report of the ICAC and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report
- examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change that the Parliamentary Committee thinks desirable to the functions, structures and procedures of the ICAC and the Inspector
- enquire into any question in connection with its functions referred to it by both Houses of Parliament, and report to both Houses of Parliament on that question.

The Parliamentary Committee cannot investigate a matter relating to particular conduct, reconsider a decision by the ICAC to investigate, not to investigate or discontinue an investigation, or reconsider any findings, recommendations, determinations or other decisions of the ICAC in relation to a particular investigation or complaint.

The Parliamentary Committee conducts public inquiries and publishes reports on those inquiries. Information with respect to each inquiry and copies of inquiry reports can be accessed through the NSW Parliament website.

The ICAC Inspector

The principal functions of the ICAC Inspector are set out in s 57B of the ICAC Act. They are to:

- audit the operations of the ICAC for the purpose of monitoring compliance with the law of NSW
- deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or ICAC officers
- deal with (by reports and recommendations) conduct amounting to maladministration (including delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or ICAC officers
- assess the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities.

The Inspector has extensive powers. These include the power to:

- investigate any aspect of the ICAC's operations or any conduct of ICAC officers
- require ICAC officers to supply information or produce documents or other things relating to the ICAC's operations or conduct of ICAC officers
- require ICAC officers to attend before the Inspector of the ICAC to answer questions or produce documents or other things relating to the ICAC's operations or the conduct of ICAC officers
- investigate and assess complaints about the ICAC or ICAC officers
- recommend disciplinary action or criminal prosecution against ICAC officers.

The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the minister, in response to a complaint made to the Inspector or in response to a reference by the Committee or any public authority or public official.

A memorandum of understanding, entered into on 2 November 2017, sets out arrangements for liaison between the ICAC and the Inspector concerning referral of matters, access to information and points of contact between the ICAC and the Inspector's office.

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:

- a) any matters affecting the ICAC, including, for example, its operational effectiveness or needs, and
- b) any administrative or general policy matter relating to the functions of the Inspector, and
- c) any other matter relating to the exercise of a function to audit, deal with or assess any matter that the Inspector considers warrants the making, in the public interest, of a special report.

The Inspector is also required to prepare annual reports.

Reports made by the Inspector are made public by a Presiding Officer and are published on the Inspector's website.

Other accountability bodies

The ICAC is also externally accountable for its work through:

- accounting to the NSW Treasury and the Auditor General for the proper expenditure of funds
- inspection by the Inspector of the Law Enforcement Conduct Commission (LECC) of records of telecommunications interceptions, controlled operations and the use of surveillance devices
- inspection by the Commonwealth Ombudsman of records relating to stored communications warrants, preservation notices and access to telecommunications data
- reporting to the NSW Attorney General and the judge who issued the warrant for each surveillance device warrant
- compliance with access to information and privacy laws, with exemption for certain operational matters
- requirements for annual reporting, including those in the ICAC Act.

In some cases, the Commission's actions are reviewable by the NSW Supreme Court to ensure proper exercise of its functions and powers.

Appendix 1: Inquiry terms of reference

Order in Council containing Terms of Reference

Commissions of Inquiry Order (No. 1) 2022

Short title

1. This Order in Council may be cited as the *Commissions of Inquiry Order (No.1) 2022*.

Commencement

2. This Order in Council commences on 7 February 2022.

Appointment of Commission

3. UNDER the provisions of the *Commissions of Inquiry Act 1950*, the Governor in Council hereby appoints the Honourable Gerald Edward (Tony) Fitzgerald AC QC as Chairperson and Commissioner and the Honourable Alan Wilson QC, as Commissioner, from 7 February 2022, to make careful inquiry, in a transparent and independent manner with respect to the following matters:
 - a. noting the findings of Parliamentary Crime and Corruption Committee's (PCCC) Report No. 108, *'Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters'*, the adequacy and appropriateness of the structure of the Crime and Corruption Commission (CCC) in relation to use of seconded police officers, including having regard to:
 - i. the views and recommendations of Tony Fitzgerald QC, as expressed in the report of the 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (the Fitzgerald Inquiry Report) in respect of the establishment of a Criminal Justice Commission (CJC);
 - ii. the structure of other Australian State and Territory integrity bodies, with a particular emphasis on the use of seconded police officers, including the tenure, qualifications and training of such personnel;
 - b. the adequacy and appropriateness of legislation, procedures, practices and processes relating to the charging and prosecution of criminal offences for serious crime and corruption in the context of CCC investigations, including having regard to:
 - i. relevant findings and recommendations of the PCCC Report No. 108, *'Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters'* and other previous relevant reports of the PCCC;
 - ii. the the use and role of seconded police officers and the retention of their powers pursuant to sections 174 and 255 of the *Crime and Corruption Act 2001*;
 - iii. the extraordinary nature of the CCC's powers and functions under the *Crime and Corruption Act 2001* and differences from police powers in the investigation, charging and prosecution of criminal offences, including provisions of the *Police Powers and Responsibilities Act 2000*;
 - iv. the consequences arising from the laying of criminal charges as a result of a CCC investigation, including the provisions under section 175K of the *Local*

- Government Act 2009* for a person to be automatically suspended as a councillor when the person is charged with a ‘disqualifying offence’;
- c. the adequacy and appropriateness of section 49 of the *Crime and Corruption Act 2001*, including consideration of:
 - i. relevant findings and recommendations of the Parliamentary Crime and Corruption Committee’s (PCCC) Report No. 108, ‘*Inquiry into the Crime and Corruption Commission’s investigation of former councillors of Logan City Council; and related matters*’ and other previous relevant reports of the PCCC;
 - ii. the evolution of section 49, including the nature and purpose of amendments made in the *Crime and Corruption and Other Legislation Amendment Act 2018*;
 - iii. current and proposed policy, procedure and practice relating to the obtaining of independent advice by the CCC on complex prosecutions;
 - iv. the approach to review by, and the obtaining of advice from, respective Directors of Public Prosecutions in other jurisdictions of charges arising out of investigations by serious crime and corruption integrity bodies;
 - v. the CCC’s interaction with the Director of Public Prosecutions (DPP), including existing information sharing and other processes that facilitate interaction;
 - vi. whether there should be a requirement that the CCC obtain a recommendation from the DPP, or a senior independent legal advisor, before police officers use their discretion to charge serious criminal offences and implications for agencies associated with such a requirement;
1. AND the Commission may carry out its inquiry by calling on relevant agencies, including the CCC, Queensland Police Service and the DPP, academics and individuals and entities considered relevant; and reviewing any other relevant case law, literature, research and data.
 2. AND in receiving evidence or information pursuant to clauses 3 and 4 on a matter that is the subject of a covert investigation, or proceeding, or an investigation or intelligence operation of a law enforcement agency, or may expose a witness to risk of harm, the Commission will receive such evidence in camera and ensure anonymity of the relevant parties.
 3. AND the Commission will ensure that it does not publicly expose details of current or anticipated intelligence collection strategies and investigation methods where such detail is not already in the public domain.
 4. AND the Commission will ensure that it has regard to the need to protect and promote human rights protected under the *Human Rights Act 2019*.
 5. EXCEPT that, while the inquiry may consider processes and procedures in relation to current and past CCC investigations and judicial proceedings arising from CCC related investigations and charges, the inquiry is not to make any findings with respect to the allegations in relation to the conduct of persons the subject of those investigations, charges and judicial proceedings.

Commission to report

6. AND directs that the Commission make faithful report and recommendations on the aforesaid subject matter of inquiry, and transmit the same to the Honourable the Premier and Minister for the Olympics and the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence by 9 August 2022.

Commission to make recommendations

7. IN making recommendations the Commission should consider any recommended legislative, structural, procedural or organisational changes to promote the ability of the CCC to carry out its statutory functions in a way that is efficient, effective, objective, fair and impartial and meets the public interest in ensuring Queensland has an independent crime and corruption body that meets the highest standards of integrity and impartiality and the need to protect and promote human rights, including the rights protected under the *Human Rights Act 2019*.

Application of Act

8. Pursuant to section 4(2) of the *Commissions of Inquiry Act 1950*, it is declared that all of the provisions of the *Commissions of Inquiry Act 1950* shall be applicable for the purposes of this inquiry, except for section 19C – Authority to use listening devices.

Conduct of Inquiry

9. The Commission may receive submissions and hold public and private hearings in such a manner and in such locations as determined by the Commission as appropriate and convenient and in a way that protects and promotes the rights protected under the *Human Rights Act 2018*, subject to the considerations identified in clauses 5 and 6.
10. Whenever the Honourable Gerald Edward (Tony) Fitzgerald AC QC is absent from duty or unable for any other reason to perform the duties of Chairperson, the Chairperson of the inquiry shall be the Honourable Alan Wilson QC.

Endnotes

1. Made by the Governor in Council on 31 January 2022.
2. Notified in the Gazette on 31 January 2022 (PDF, 265Kb)
3. Not required to be laid before the Legislative Assembly.
4. The administering agency is the Department of Justice and Attorney-General.

The Hon Tony Fitzgerald AC QC
Chairperson and Commissioner
Commission of Inquiry into the CC

The Hon Alan Wilson QC
Commissioner
Commission of Inquiry into the CCC

By E-mail: submissions@cccinqury.qld.gov.au

Dear Sirs,

I am writing in response to your letter of 19 April 2022 inviting comment in relation to whether delays have been experienced in NSW as a result of involving the NSW DPP in providing advice about charging and, if so, about any strategies that have been used to address any delays.

As noted in Part 3 of the ICAC's March 2022 submission to the Commission of Inquiry, the ICAC has a Memorandum of Understanding ("MOU") with the NSW Office of the Director of Public Prosecutions ("ODPP") which sets out, in general terms, the responsibilities of the ICAC and ODPP. One purpose of the MOU is to prevent unnecessary delays in obtaining advice on whether or not prosecution action should be commenced.

The MOU provides that, in relation to time-limited summary offences, the ICAC brief will be provided as early as is practicable, and in any event not later than three months before the time will expire. Within eight weeks of the ODPP receiving the brief, the ODPP is to advise the ICAC if criminal charges are available or provide a progress report.

Most offences that are prosecuted following an ICAC investigation are indictable offences.

With respect to indictable offences, the MOU sets out the following timetable:

- Upon receipt of the brief, the ODPP will assign the matter to an appropriately senior ODPP lawyer;
- The ODPP will, within two weeks of receipt of the documentation, advise the ICAC case lawyer of the name and contact details of the ODPP lawyer with carriage of the matter and whether the ODPP has categorised the matter as a "straightforward" matter, a "standard" matter, a "moderate complexity" matter or a "high complexity" matter;
- A conference is to be arranged by the ODPP lawyer as soon as practicable but in any event within three months of receipt of the brief;
- At the conference, a timetable for the answering of requisitions and the furnishing of advice by the ODPP as to whether criminal charges are available is to be agreed, and confirmed in writing by the ODPP lawyer;
- The ODPP is to aim to provide advice to the ICAC as to whether criminal charges are available as quickly as practicable after receipt of the brief, and at least within 6 months for straightforward and standard matters and within 12 months for moderate complexity and high complexity matters.

The MOU defines a "straightforward" matter as one involving one accused with usually one set of charges and few if any legal issues.

A "standard" matter involves more than one set of charges, accused or complainants, established legal principles and a brief of less than three folders.

A "moderate complexity" matter involves multiple co-accused, multiple complainants, complex legal issues, special interest matters, some media interest and a brief of more than three folders.

A "high complexity" matter involves complex or unsettled legal issues, large scale criminal organisation or enterprise, a brief of 10 folders or more, high profile matters and matters involving significant media interest.

The ICAC and ODPP consider the above timelines to be reasonable and appropriate.

Unfortunately, the ODPP has had difficulty in meeting these timelines which has resulted in delays in providing advice to the ICAC. The delays have largely been attributed to resource limitations within the ODPP. [REDACTED]

Yours sincerely,

[REDACTED]
The Hon Peter Hall QC
Chief Commissioner

PH April 2022