



Office of the Inspector of the
Independent Commission Against Corruption

Annual Report for the period ending 30 June 2021

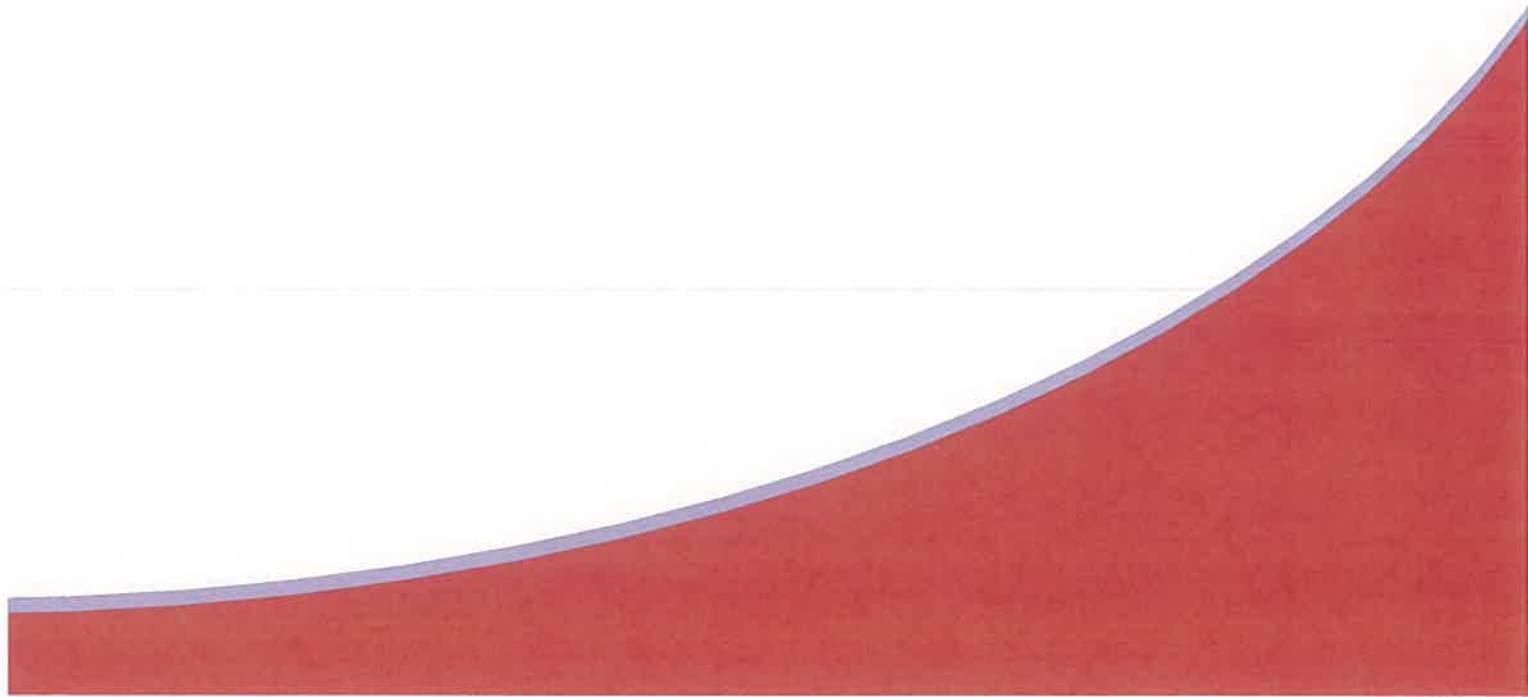


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PART 1: THE INSPECTOR'S ROLE AND FUNCTIONS

1.1 FOREWORD AND OBSERVATIONS

I am pleased to present this Annual Report pursuant to section 77B of the *Independent Commission Against Corruption Act 1988* (NSW) ("ICAC Act") and recommend that it be made public forthwith pursuant to section 78(1A) of the ICAC Act. This Report relates to the year ended 30 June 2021. It is my fourth and final Annual Report as the Inspector of the Independent Commission Against Corruption ("ICAC" or "Commission").

As has consistently been the case during my term as Inspector, most of the complaints received by my Office did not enliven my jurisdiction pursuant to section 57B(1)(b) of the ICAC Act. That is, there was no basis for determining that ICAC or an officer of ICAC engaged in "abuse of power, impropriety or other forms of misconduct" or "maladministration". In some circumstances it was necessary to obtain a response from the Commission in relation to the matters raised by the complainant. For all of those matters I was satisfied with the responses provided by the Commission. In fact, in most of those cases the Commission itself had had extensive dealings with the complainant and the complainant was usually dissatisfied with the Commission's decision not to investigate their complaint.

As the Inspector I do not have the power to deal with decisions by the Commission unless the making of the decision involves conduct of the type referred to in section 57B of the ICAC Act. Table 1 below in part 5.4 provides a summary of the complaints that were received by my Office during the reporting period and a short explanation as to how they were dealt with.

During the reporting period my Office received 21 complaints. All but two were dealt with by letter or email to the complainant explaining my Office's determination of their complaint. The two complaints not dealt with by letter or email were the subject of Special Reports to Parliament. Both concerned the Commission's Operation Keppel. In determining those complaints, I did not make any findings of misconduct or maladministration against the Commission or its officers. However, that should

not be construed as something that diminishes the seriousness of the matters or the significance of their consequences. They have undoubtedly caused reputational damage to the Commission and given rise to public questioning of its credibility.

The first matter reported on concerned a complaint made on behalf of the Hon Gladys Berejiklian MP about ICAC's erroneous publication of a transcript from a private examination that contained personal information about the then Premier. A summary of the report is provided in 5.5. The summary is followed by a report on the Commission's implementation of procedures that were revised in response to the incident and an update about my ongoing consideration of the issue of the Commission's risk management and information handling practices (which the matter brought into sharp focus).

The second matter that was the subject of a report concerned the Commission's handling of a telephone call between Mr Daryl Maguire and the former Consul-General of Japan in Sydney which was intercepted under the *Telecommunications (Interception and Access) Act 1979* (Cth) ("TIA Act"). It came to my attention during the reporting period, but I did not furnish my report to Parliament until 27 August 2021. The information that I provide herein about that report is limited because it would be more appropriately placed in the 2021-2022 Annual Report. Although, what deserves special mention here, is that the matter serves as an important reminder that the Commission does not discharge its functions in a vacuum and collaboration with other government agencies can enhance the effectiveness and appropriateness of its procedures relating to the legality and propriety of its activities.

The relationship between the Commission and that of my Office continues to function well and, as ever, I appreciate the Chief Commissioner regularly briefing me on matters that effect the work of the Commission. Given I am now approaching the end of my term, I feel confident that I can describe my relations with the Commission as firm but fair, and cooperative but not captured.

In the foreword and observations for last year's report I noted the Commission's budgetary issues and its future funding model as an example of one such matter that

was the subject of briefings from the Commission to my Office. That persisted as a matter of concern to the Commission during 2020-2021.

In previous Annual Reports I have expressed views about the question of funding, and at this juncture there is nothing new that I, as Inspector, can contribute to the discussion. Reports by others on the topic are numerous and voluminous, including those of the Legislative Council's Public Accountability Committee, the Auditor-General, and not least the Commission itself.

I do not see it as part of the Inspector's functions to advocate for any specific model or to provide comment on the level of funding. Bearing that in mind, I note that it is now quite simply time for the necessary consultations to occur between all relevant parties in order to resolve the issues. Ideally, such consultation should occur with appropriate standards of accountability, rigour and transparency while having due regard to the Commission's independence.

1.2 SIGNIFICANT LEGISLATIVE REFORMS AND OTHER LEGAL DEVELOPMENTS

There have been no significant statutory reforms or legal developments during the reporting period.

1.3 ROLE OF THE INSPECTOR

The Inspector's role and functions are prescribed by Part 5A of the ICAC Act. Under section 57A of the ICAC Act the Inspector is appointed by the Governor of NSW. A Committee of the NSW Parliament comprising representatives of all political parties and independent members called "The Committee on the Independent Commission Against Corruption" ("the Committee") is empowered to veto the proposed appointment which is required to be referred to the Committee by the Minister. The Premier and the Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, are jointly responsible for the administration of the ICAC Act. As such, reference to "the Minister", under the ICAC Act, are the Premier of New South Wales and the Special Minister of State.

The principal functions of the Inspector are set out in section 57B(1) of the ICAC Act. These are to:

- Audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
- Deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
- Deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
- Assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

The definition of maladministration is set out under section 57B(4) of the ICAC Act as follows:

action or inaction of a serious nature that is:

- a. Contrary to law, or*
- b. Unreasonable, unjust, oppressive or improperly discriminatory, or*
- c. Based wholly or partly on improper motives.*

Section 57B(2) of the ICAC Act enables the Inspector to exercise the prescribed statutory functions 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 Joint Committee or any public authority or public official.

Section 57B(3) of the ICAC Act provides that the Inspector is not subject to the Commission in any respect.

Under section 77A of the ICAC Act the Inspector may make special reports on any matters affecting the Commission or on any administrative or general policy matter relating to the functions of the Inspector.

Under section 77B of the ICAC Act the Inspector is required to report annually to Parliament. Pursuant to both sections 77A and 77B, reports are to be made to the Presiding Officer of each House of Parliament.

1.4 INSPECTOR'S POWERS UNDER THE ICAC ACT

Section 57C of the ICAC Act establishes the powers of the Inspector. The Inspector may investigate any aspect of the Commission's operations or any conduct of any officers of the Commission.

Section 57D of the ICAC Act empowers the Inspector to make or hold inquiries for the purposes of the Inspector's functions. Under section 57D(2) any inquiry made or held by the Inspector under this section provides the Inspector with the powers, authorities, protections and immunities of a Royal Commissioner as conferred by Division 1 of Part 2 of the *Royal Commission Act 1923 (NSW)*, with the exception of section 13 of that Act. There have been no inquiries held pursuant to section 57D to date by my predecessors or myself.

PART 2: OTHER RELEVANT LEGISLATION

2.1 GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 (GIPA ACT)

The *Government Information (Public Access) Act 2009* (“GIPA Act” or “GIPA”) came into force on 1 July 2010 replacing the *Freedom of Information Act 1989*. Information concerning the Office and the ICAC’s statutory functions are exempt from being released under an access application made under the *GIPA Act*.

Pursuant to Schedule 1(1) of the GIPA Act, an access application made for access to any information relating to the ICAC’s corruption prevention, complaint handling, investigative or reporting functions will not be granted.

Pursuant to Schedule 2(2) of the GIPA Act an access application made for access to any information relating to the auditing, complaint handling, investigative and reporting functions of this Office will not be granted.

Applications for access to information made in respect of the Office’s administrative functions (for example, staffing policies and practices) may be granted. Such applications will be assessed on a case by case basis.

As required under section 20 of the GIPA Act, the Office has an Agency Information Guide. The Guide is available on the Office website: <https://www.oicac.nsw.gov.au//assets/oicac/AGENCY-INFORMATION-GUIDE2.pdf>

The Agency Information Guide includes information about my functions and the structure of the Office and other matters as required by section 20 of the GIPA Act.

Under section 7(3) of the GIPA Act and 8(a) of the Regulation, I advise that I conducted an annual review of this program to release proactively information which is in the public interest. All information which is publicly available appears on the Office website.

In compliance with section 7 of the GIPA Act, I advise that the Office's website content was reviewed to assess what, if any, further information could be proactively released. The Office ensures that my reports that are tabled in the NSW Parliament are made available on its website. Other than those reports and the Annual Reports, there is limited information held by the Office that can be proactively released due to the sensitive and confidential nature of material handled by the Office. However, during the reporting period existing information on the Office website was updated to ensure currency and relevance. It is a process of ongoing review.

In compliance with section 125 of the GIPA Act and clause 8(b) of the Regulation, I advise that there were no access applications made under the GIPA Act to the Office during the reporting period.

In compliance with section 125 of the GIPA Act and clause 8(c) of the Regulation, I advise that there were no access applications received by the Office during the reporting period that the Office refused, either wholly or partly, because the application was for the disclosure of information referred to in Schedule 1 to the Act (Information for which there is conclusive presumption of overriding public interest against disclosure).

In compliance with section 125 of the GIPA Act, and clause 8(d) and Schedule 2 of the Regulation, information about access applications is provided in tables A to I that follow.

Table A: Number of applications by type of applicant and outcome*

	Access granted in full	Access granted in part	Access refused in full	Information not held	Information already available	Refuse to deal with application	Refuse to confirm/deny whether information is held	Application withdrawn
Media	0	0	0	0	0	0	0	0
Members of Parliament	0	0	0	0	0	0	0	0
Private sector business	0	0	0	0	0	0	0	0
Not for profit organisations	0	0	0	0	0	0	0	0

or community groups								
Members of the public (application by legal representative)	0	0	0	0	0	0	0	0
Members of the public (other)	0	0	0	0	0	0	0	0

* More than one decision can be made in respect of a particular access application. If so, a recording must be made in relation to each such decision. This also applies to Table B.

Table B: Number of applications by type of application and outcome

	Access granted in full	Access granted in part	Access refused in full	Information not held	Information already available	Refuse to deal with application	Refuse to confirm/deny whether information is held	Application withdrawn
Personal information applications*	0	0	0	0	0	0	0	0
Access applications (other than personal information applications)	0	0	0	0	0	0	0	0
Access applications that are partly personal information applications and partly other	0	0	0	0	0	0	0	0

* A **personal information application** is an access application for personal information (as defined in clause 4 of Schedule 4 to the Act) about the applicant (the applicant being an individual).

Table C: Invalid applications

Reason for invalidity	No of applications
Application does not comply with formal requirements (section 41 of the Act)	0
Application is for excluded information of the agency (section 43 of the Act)	0
Application contravenes restraint order (section 110 of the Act)	0
Total number of invalid applications received	0
Invalid applications that subsequently became valid applications	0

Table D: Conclusive presumption of overriding public interest against disclosure: matters listed in Schedule 1 to Act

	Number of times consideration used*
Overriding secrecy laws	0
Cabinet information	0
Executive Council information	0
Contempt	0
Legal professional privilege	0
Excluded information	0
Documents affecting law enforcement and public safety	0
Transport safety	0
Adoption	0
Care and protection of children	0
Ministerial code of conduct	0
Aboriginal and environmental heritage	0
Information about complaints to Judicial Commission	0
Information about authorised transactions under <i>Electricity Network Assets (Authorised Transactions) Act 2015</i>	0
Information about authorised transaction under <i>Land and Property Information NSW (Authorised Transaction) Act 2016</i>	0

* More than one public interest consideration may apply in relation to a particular access application and, if so, each such consideration is to be recorded (but only once per application). This also applies in relation to Table E.

Table E: Other public interest considerations against disclosure: matters listed in table to section 14 of Act

	Number of occasions when application not successful
Responsible and effective government	0
Law enforcement and security	0
Individual rights, judicial processes and natural justice	0
Business interests of agencies and other persons	0
Environment, culture, economy and general matters	0
Secrecy provisions	0
Exempt documents under interstate Freedom of Information legislation	0

Table F: Timeliness

	Number of applications
Decided within the statutory timeframe (20 days plus any extensions)	0
Decided after 35 days (by agreement with applicant)	0
Not decided within time (deemed refusal)	0
Total	0

Table G: Number of applications reviewed under Part 5 of the Act (by type of review and outcome)

	Decision varied	Decision upheld	Total
Internal review	0	0	0
Review by Information Commissioner*	0	0	0
Internal review following recommendation under section 93 of Act	0	0	0
Review by NCAT	0	0	0
Total	0	0	0

* The Information Commissioner does not have the authority to vary decisions, but can make recommendations to the original decision-maker. The data in this case indicates that a recommendation to vary or uphold the original decision has been made by the Information Commissioner.

Table H: Applications for review under Part 5 of the Act (by type of applicant)

	Number of applications for review
Applications by access applicants	0
Applications by persons to whom information the subject of access application relates (see section 54 of the Act)	0

Table I: Applications transferred to other agencies under Division 2 of Part 4 of the Act (by type of transfer)

	Number of applications transferred
Agency-initiated transfers	0
Applicant-initiated transfers	0

2.2 THE PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT)

The Public Interest Disclosures Act 1994 (“the PID Act”) provides for public servants and other public officials to report serious wrongdoing in public sector agencies on a confidential basis. Under the PID Act complaints or allegations made by public servants and public officials are called disclosures. The PID Act provides for public

servants and public officials making disclosures to be protected against actual or potential reprisals.

The Inspector is an investigating authority pursuant to s4(1)(g) of the PID Act. To be protected by the PID Act a disclosure by a public official to the ICAC Inspector must:

- (a) be made in accordance with the *Independent Commission Against Corruption Act 1988*, and
- (b) be a disclosure that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the Commission, an officer of the Commission or an officer of the ICAC Inspector¹.

To ensure that the Office complies with section 6D(1) of the PID Act which provides that each public authority must have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures, the Office has available on its website its policy and procedure for dealing with PIDs which is available on the Office website at: <https://www.oicac.nsw.gov.au/protected-disclosures/>

During the reporting period, staff were reminded of the contents of the policy and the protections under this Act for a person who makes a public interest disclosure, and for the need to comply with that policy and the obligations set out in the PID Act.

The following information, relevant to the current reporting period, is provided pursuant to section 31 of the PID Act and clause 4 of the *Public Interest Disclosures Regulation 2011*:

¹ Section 12C(1) *Public Interest Disclosures Act 1994*

- a) The number of public officials who have made a public interest disclosure to the Inspector – 0
- b) The number of public interest disclosures received by the Inspector – 0
- c) The number of public interest disclosures received by the Inspector relating to each of the following:
 - i. corrupt conduct only– 0
 - ii. maladministration and/or corruption– 0
 - iii. serious and substantial waste of public money or local government money (as appropriate)– 0
 - iv. government information contraventions- 0
 - v. local government pecuniary interest contraventions- 0
- d) The number of public interest disclosures finalised – 0

2.3 TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) ACT 1979 (CTH) (TIA ACT)

The Inspector is included as an “*eligible authority*” for the purposes of the *TIA Act*. In accordance with reporting requirements under section 96(1) of the *TIA Act*, the Minister for Home Affairs was advised by the Inspector that there was nil usage of the relevant provisions of the *TIA Act* during the reporting period.

PART 3: THE OFFICE OF THE INSPECTOR OF ICAC – ADMINISTRATION

3.1 PREMISES

The Office of the Inspector of ICAC shares premises with the Office of the Inspector of the Law Enforcement Conduct Commission (OILECC).

The contact details for the Office are:

Postal address: GPO Box 5341, Sydney, NSW, 2001
Telephone: (02) 9228 3023
E-mail: oiicac_executive@oiicac.nsw.gov.au

3.2 STAFF

The Inspector shares two staff with the Inspector of the LECC, a Principal Legal Advisor and a Business Coordinator.

3.3 BUDGET AND FINANCE

The Office of the Inspector is a cost centre within the NSW Department of Premier and Cabinet (DPC).

The Office's budgeted expenditure for the period from 1 July 2020 to 30 June 2021 was \$518,383. The Office's actual expenditure for that period was \$618,188, which compares with a total expenditure of \$587,044 in the previous financial year.

The Inspector is paid a daily rate of \$4600 being the Attorney General's rate paid to Senior Counsel at the time of the Inspector's appointment on 1 July 2017, with an annual cap of \$350,000.

PART 4: LIAISON AND COMMUNICATION

4.1 LIAISON WITH THE ICAC

The Memorandum of Understanding (MOU) between the Chief Commissioner and me, which sets out the arrangements for liaison between the Commission and my Office concerning referral of matters, access to information and points of contact between both agencies, has been operating effectively. Overall, during the reporting period the Commission has responded adequately to my requests for information.

While handling the complaint made on behalf of the Hon Gladys Berejiklian MP (a summary of which is provided in part 5.5 below) there was cause for me to outline to the Chief Commissioner my view that provisions in the ICAC Act give the Inspector unfettered access to all Commission records, whether or not they are subject to a non-publication direction under section 112 of the ICAC Act.² It is my expectation that the Commission is forthright in its responses to requests for information from my Office.

As indicated in part 5.4 below, the Commission, in accordance with the MOU, notified my Office of misconduct or possible misconduct by Commission officers during the reporting period.

During the reporting period I met with the ICAC Chief Commissioner and Commissioners on a number of occasions to discuss matters relevant to the exercise of my functions.

In addition, informal and regular liaison occurs frequently between staff of the Office and staff of the Commission for the purpose of requesting and obtaining documents from ICAC to assist me in exercising my functions.

² The details of this exchange are provided in paragraphs 25 – 28 in my “Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 determining a complaint by Mr Arthur Moses SC on behalf of the Hon Gladys Berejiklian MP against the Commission 2021/02”. That report is available on the OIICAC website at: <https://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/Operation-Keppel-report-and-submissions-27-November-2020.pdf>

4.2 MEETINGS/CONFERENCES UNDERTAKEN BY THE INSPECTOR

Conferences/meetings with external agencies:

Date	With Whom	Where	Purpose
18 September 2020	Parliamentary Committee on the ICAC	Parliament House	Public hearing for the Committee's inquiry into reputational impact on an individual being adversely named in the ICAC's investigations
6 November 2020	National meeting of Inspectors, Reviewers and Parliamentary Commissioners	Virtual meeting attended at 365Workspace	Meeting to discuss matters of mutual interest
2 December 2020	Parliamentary Committee on the ICAC	Parliament House	Closed session discussion about the Inspector's work
14 May 2021	Parliamentary Committee on the ICAC	Parliament House	Public hearing for the Committee's review of the Inspector's 2019-2020 Annual Report
20 May 2021	National meeting of Inspectors, Reviewers and Parliamentary Commissioners	Office of the Commonwealth Ombudsman, Canberra	Meeting to discuss matters of mutual interest

4.3 WEBSITE

The Office manages its own website. The content of which was reviewed and updated during the reporting period. The website address is www.oiiac.nsw.gov.au.

The website is regularly updated and contains access to reports that have been prepared by the Office, including Annual Reports and Special Reports which have

been tabled in Parliament. The website also contains information for members of the public about my powers and functions and information about how to contact the Office.

PART 5: THE INSPECTOR'S STATUTORY FUNCTIONS

5.1 AUDITING THE OPERATIONS OF THE ICAC [Sections 57B(1)(a) and 57B(1)(d)]

The ICAC is invested with compulsory powers to seek and obtain information under sections 21, 22, 23 and 35 of the ICAC Act. In addition, there is the power to apply for and execute search warrants under Division 4 of part 4 of the ICAC Act and Division 4 part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPR Act"). ICAC may also conduct controlled operations pursuant to the *Law Enforcement (Controlled Operations) Act 1997*. It is further empowered to apply for and execute surveillance device warrants pursuant to the *Surveillance Devices Act 2004* (Cth) and the *Surveillance Devices Act 2007* (NSW). Such warrants may authorise, among other things, the use of listening devices, data surveillance devices, optical surveillance devices and tracking surveillance devices. It may also apply for telecommunications interception and other warrants under the TIA Act.

My Office is routinely provided with an audit schedule in respect of the Commission's use of its statutory powers under the ICAC Act. That document is useful in enabling the Office to discharge its various statutory functions, in particular section 57B(1)(a) and (d) of the ICAC Act, in its auditing and oversight of the operations of the Commission. Furthermore, it provides the Office with an overview of certain aspects of the Commission's activities during any given period of time.

The monthly audit schedule includes the following information:

- Number of preliminary investigations commenced and completed pursuant to section 20A
- Notices issued pursuant to section 21 and the investigation it relates to
- Notices issued pursuant to section 22 and the investigation it relates to
- Notices issued pursuant to section 23 and the investigation it relates to
- Injunctions granted by the Supreme Court pursuant to section 27 and the investigation it relates to

- Number of compulsory examinations conducted pursuant to section 30 and the investigation they relate to
- Number of public inquiries conducted pursuant to section 31 and the investigation they relate to
- Number of summons issued by a Commissioner pursuant to section 35 and the investigation they relate to
- Number of search warrants issued pursuant to section 40 and the investigations they relate to
- Number of reports prepared pursuant to section 74.

The Commission also provides the Office with investigation and executive management reports and other quarterly reports, all of which have been helpful in assisting me to carry out my audit function.

During the reporting period the Principal Legal Advisor in my Office watched segments of the Commission's public inquiries via the live stream made available on its website. That was in aid of my continual monitoring of the Commission's procedures and protocols in respect of counsel assisting in the conduct of public inquiries and to observe the Commission's treatment of witnesses during its public inquiries.

During the reporting period I also corresponded with the Commission about the timeliness of its reports after the conclusion of its public inquiries. I sought explanations for delays affecting the finalisation of a number of inquiries, including Operations Aero, Dasha, Ember and Skyline. I also requested estimated timeframes for the completion of reports in those matters. Satisfactorily detailed responses were provided.

It is pleasing to report that the Commission has completed Operations Dasha and Eclipse. The Commission has indicated that it will continue keep me informed of its progress in finalising Operations Aero and Skyline.

From late June 2021 through to the time of writing this report, the conduct and timeliness of the Commission's investigations have been impacted by the NSW

Public Health Orders that were implemented to manage an outbreak of the Covid-19 Delta variant. Operations that were at the stage of public inquiry which were particularly disrupted included Operations Keppel, Paragon and Witney. The Commission appropriately responded to the situation by seeking expert health advice to inform changes to the manner in which it conducts its compulsory examinations and public inquiries.

In September 2021 the Chief Commissioner provided me with copies of its newly established protocols for the conduct of compulsory examinations and public inquiries via audio-visual link (AVL) technology. That same month the Commission resumed its compulsory examinations and public inquiries under the protocols. Over the remaining months in the 2021 calendar year, it will be possible to assess the operation of the protocols and any flow on effects for the timeliness of Commission investigations. Timeliness in general is a matter of ongoing interest that I will continue to monitor.

5.2 FORMAL AUDITS CONDUCTED IN THE PERIOD 1 JULY 2020 TO 30 JUNE 2021

During the reporting period, on 27 October 2020, I furnished to Parliament a “Report of an audit of applications for and execution of search warrants by the Independent Commission Against Corruption for 2018-19”.

The audit assessed whether, in applying for and executing search warrants during 2018-2019, the Commission did so in accordance with the ICAC Act and the LEPR Act, as well as its own policies, procedures and operating manuals. It considered the Commission’s compliance with the law, but also whether its conduct and that of its officers in following the letter of the law amounted to effective, appropriate and proper use of its legal powers. Consideration was also given to the effectiveness and appropriateness of the procedures of the Commission as they relate to the legality or propriety of its activities. I concluded that the Commission had complied with the relevant law and its own procedures concerning applications for and execution of search warrants. I also concluded that it was appropriate to apply for and execute the search warrant in each case (in light of the information then available). Further, I found that there was no evidence of abuse of power,

impropriety, other forms of misconduct, maladministration (including unreasonable invasions of privacy) or of any action or inaction of a serious nature that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives on the part of the Commission or officers of the Commission.

5.3 COMPLAINTS [Sections 57B(1)(b) and 57B(1)(c)]

The Inspector is authorised to deal with complaints of abuse of power, impropriety, maladministration and other forms of misconduct only on the part of the ICAC or its officers or former officers.

Maladministration is defined as action or inaction of a serious nature that is contrary to law or unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives.

There is no power for the Inspector to deal with complaints against other bodies. Furthermore, there is no power for the Inspector to compel the ICAC to investigate or not to investigate a particular complaint nor is there power to tell the ICAC how an investigation should be conducted.

A substantial proportion of complaints to my Office involve matters in which ICAC declined to investigate or make a finding of corruption. In effect the complainant seeks to appeal against the decision of the ICAC. When assessing such complaints, the Inspector's objective is to determine whether there was any evidence of ICAC engaging in the type of misconduct prohibited by the ICAC Act. Consequently, when considering such complaints, the focus must be on whether the conduct of ICAC amounts to misconduct or maladministration of the type described above. In the course of looking at this focus, the conduct of those against whom complaints to the ICAC were initially made is considered, but only in the context of whether there was evidence of corruption on which the ICAC could have taken more action than it did and, if it could, whether its failure to do so amounts to such misconduct or maladministration.

Each complaint received is assessed and a decision is made as to whether it is out of jurisdiction or whether there is any substance to the complaint and, whether it warrants investigation.

5.4 PERIOD 1 JULY 2020 TO 30 JUNE 2021: NEW MATTERS AND OUTSTANDING COMPLAINTS FROM PREVIOUS REPORTING PERIODS

My Office dealt with a total of 24 complaints in the reporting period. A breakdown of the complaints that were dealt with is as follows:

- Of the 21 complaints received by the Inspectorate in the reporting period, 17 were completed and 3 complaints remained outstanding at the end of the period. However, of those two have since been completed. It is only one aspect of the one matter that remains outstanding which is unresolved. In the circumstances of that particular matter, it is very difficult to predict when it will be completed.
- Of the 21 complaints that were received during the current period, 2 of those complaints were either referred or notified to the Office pursuant to the MOU between the Inspector and the Chief Commissioner of ICAC. Those matters are identified in Table 1 below.
- During the current reporting period the Office finalised 3 complaints that were received during the previous reporting period (2019-20).

In most cases that I do not submit a Special Report to Parliament, I write to the complainant advising them that their complaint has been dismissed and that I will not be taking any further action in relation to it. In any case that I do uphold a complaint about ICAC I will submit a Special Report to Parliament.

A summary of the details of all the complaints received in the reporting period is provided below in Table 1. To protect the identity of the complainants the description of the complaints is only provided in general terms.

During the reporting period I received correspondence and other communication from 6 individuals who purported to be complainants. For various reasons I

determined that the matters raised by those individuals should not be treated as complaints. A summary of the details of all such matters is provided below in Table 2.

Table 1

Complainant	Nature of Complaint	Inspector's determination of complaint
C01 2021	Complaint about various Queensland government agencies.	Complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C02 2021	Complaint that ICAC did not investigate the individual's complaints about a number of bodies.	The Inspector determined that the conduct of ICAC did not amount to an "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) and (c) of the ICAC Act. Complainant was advised that no further action will be taken by the Inspector.
C03 2021	Complaint that ICAC did not investigate the complainant's complaints about the courts and the NSW Police Force.	The Inspector determined that the conduct of ICAC did not amount to an "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) and (c) of the ICAC Act. Complainant was advised that no further action will be taken by the Inspector and a complaint should be made to the Law Enforcement Conduct Commission.
C04 2021	Referral from ICAC under the MoU about a complaint that alleged two Commission officers stole from the complainant.	Correspondence containing the original complaint and information about ICAC's handling of it were provided to the Inspector. Inspector determined that appropriate action had been taken by ICAC. No further action was taken by the Inspector.
C05 2021	Complainant sought a review of their complaint to ICAC.	Complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C07 2021	Complaint about ICAC's handling of workplace issues affecting a particular staff member.	Complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C09 2021	Complaint about the publication of a transcript of evidence given in private during	Complaint was determined by way of Special Report 2021/02: https://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/Operation-Keppel-

	Operation Keppel which revealed information concerning the Hon Gladys Berejiklian MP.	report-and-submissions-27-November-2020.pdf
C11 2021	Complaint about a workers compensation matter, icare NSW and the State Insurance Regulatory Authority.	The Inspector sought clarification from the complainant about whether they were making a complaint about ICAC. The complainant's response clarified that they were complaining that ICAC did not investigate their allegations about the workers compensation and insurance matters. The Inspector determined that the complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C12 2021	Complaint alleged that ICAC disclosed a confidential interview with the complainant during the Operation Keppel public inquiry.	The Inspector sought particulars about this matter from ICAC. However, the Inspector ultimately determined that the conduct of ICAC did not amount to "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) & (c). The complainant was advised that no further action will be taken by the Inspector.
C13 2021	Allegation that ICAC intercepted and published a telephone call during Operation Keppel in breach of the <i>Vienna Convention on Consular Relations 1963</i> .	Matter was determined by way of Special Report 2021/03: https://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/Report-concerning-circumstances-surrounding-the-Independent-Commission-Against-Corruptions-use-of-certain-telephone-intercept-material-during-Operation-Keppel-2021-03.pdf
C14 2021	Complaint about defamatory statements made about the complainant.	The complainant was advised of the Inspector's jurisdiction and asked to clarify their complaint, including whether it concerned the conduct of ICAC. The complainant did not provide clarification and they were advised that no further action will be taken by the Inspector.
C15 2021	Complaint that ICAC did not investigate the complainant's complaints about the Department of	The Inspector determined that the conduct of ICAC did not amount to an "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) and (c) of the ICAC Act. Complainant was

	Communities and Justice.	advised that no further action will be taken by the Inspector.
C16 2021	Referral from ICAC under the MoU about a complaint that alleged a Commission officer did not act appropriately and demonstrated negligent judgement when processing a complaint.	Correspondence containing the original complaint and information about ICAC's handling of it were provided to the Inspector. Inspector determined that appropriate action had been taken by ICAC. No further action was taken by the Inspector.
C18 2021	Complaint that Australian citizens located overseas are unable to return to Australia due to the Covid-19 pandemic.	Complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C19 2021	Complaint that ICAC did not offer the complainant "whistle-blower protection", wrongly decided their complaint and had been "infiltrated by ASIO".	The Inspector determined that the conduct of ICAC did not amount to an "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) and (c) of the ICAC Act. Complainant was advised that no further action will be taken by the Inspector.
C20 2021	Complaint about the Northern Territory ICAC.	The complaint was referred to the Inspector of the Northern Territory ICAC.
C21 2021	A verbal complaint about a Supreme Court matter and the Office of the Legal Services Commissioner, which also claimed that ICAC did not respond to correspondence.	A review of the Office's files revealed that the complainant's matter had previously been dealt with by Inspector Harvey Cooper AM in 2013. The complainant was asked to provide details of their complaint about ICAC and supporting material in writing. The Inspector determined that no further action will be taken until such time as the complainant provides the information requested in writing.
C22 2021	Complainant sought confirmation of the Office's email address and stated that they wished to complain about ICAC.	The Office contacted the complainant to confirm its email address. Complainant did not provide any particulars in relation to the complaint. Inspector determined that no further action will be taken until such time as

		further information is provided by the complainant.
C23 2021	Information provided by a Member of Parliament (MP) on behalf of a constituent that alleged the constituent's appearance at a public inquiry led to his bank closing his accounts.	The Inspector advised the MP that the actions of a bank would generally not enliven the Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act. Further particulars were sought concerning any possible provision of information by ICAC to the bank, and clarification was sought about whether the matter was a complaint. No response was received.
C24 2021	Complainant sought a review of their complaint to ICAC.	Complaint did not enliven Inspector's jurisdiction pursuant to s57B(1)(b) and (c) of the ICAC Act and complainant was advised that no further action will be taken by the Inspector.
C27 2021	Complaint that, among other things, ICAC failed to address their specific complaints.	The Inspector determined that the conduct of ICAC did not amount to an "abuse of power, impropriety or other forms of misconduct" or "maladministration" pursuant to s57B(1)(b) & (c) and the complainant was advised that no further action will be taken by the Inspector.

Table 2

Matter	Nature of matter	Inspector's determination of matter
C06 2021	Correspondent sought responses from ICAC and the Inspector to a number of procedural questions, and requested the Inspector to consider that a failure by ICAC to respond to the questions is a matter to be dealt with by way of complaint.	Inspector declined to accept the matter as a complaint and advised the complainant of that decision.
C08 2021	Correspondent expressed views about, among other things, ICAC's publication of a transcript of evidence	Inspector declined to accept the matter as a complaint.

	that was given in private during Operation Keppel that contained information about the Hon Gladys Berejikian MP.	
C10 2021	Correspondent expressed views about, among other things, ICAC's publication of a transcript of evidence that was given in private during Operation Keppel that contained information about the Hon Gladys Berejikian MP.	Inspector declined to accept the matter as a complaint.
C17 2021	Correspondent provided personal information about their health and inability to return to Australia due to the Covid-19 pandemic. Correspondent requested the Inspector to "save" their email.	Inspector declined to accept the matter as a complaint.
C25 2021	Correspondent made unsupported and vague claims about a large number of government agencies including ICAC.	Inspector declined to accept the matter as a complaint until such a time as the correspondent provides a particular complaint about ICAC.
C26 2021	Correspondent emailed ICAC outlining issues of complaint about its decision making, and simply copied the Inspector into that email.	Inspector determined not to respond to the correspondent unless they directed a complaint to him.

5.5 SUMMARY OF SPECIAL REPORTS SUBMITTED TO PARLIAMENT PURSUANT TO SECTIONS 57B(5) AND 77A OF THE ICAC ACT

Below are summaries of the two Special Reports that were furnished to Parliament during the reporting period. The reports can be found on the OIICAC website at the following location: <https://www.oiiac.nsw.gov.au/reports/>

Both of the reports concerned matters that gave rise to issues which I felt required continuing work, beyond the event of tabling the reports. The summaries below identify those issues and are followed by updates about subsequent developments, as well as what work is to be done during the 2021-2022 reporting period.

1. Telecommunications (Interception and Access) Act 1979 (Cth) – Serious Gap in Inspector’s Powers (Special Report 2021/01)

The purpose of this report was to raise with Parliament a longstanding issue concerning the limited powers conferred on the Inspector under the TIA Act. Specifically, the TIA Act limits the purpose for which the Inspector can obtain telecommunications material intercepted by the Commission. The report highlighted deficiencies with the current statutory scheme and advocated for the inclusion of the Inspector as an eligible authority under the TIA Act for the purpose of auditing the Commission’s intercepted material. It was furnished to Parliament on 27 October 2020.

The issue first arose in 2009 when the then Inspector requested from ICAC, “all applications for TI warrants” in order to audit the ICAC’s compliance with the ICAC Act and the *Telecommunications (Interception and Access) (New South Wales) Act 1987* (“the NSW TIA Act”). It arose again during the terms of my predecessors, Mr Harvey Cooper AM, and the Hon David Levine AO RFD QC.

Over a prolonged period the issue has been the subject of advice provided by Commonwealth legal officers and by counsel engaged by the Inspectorate. In short, that advice confirmed that the Inspector may have access to telecommunications intercept material for the purpose of an “investigation” and, thus, for the purposes

of sections 57(1)(b) and 57(1)(c) of the ICAC Act but not for performing an audit under sections 57B(a) and 57B(d).

In the report I presented my view that such a position is anomalous and that I can see no reason why I, along with my predecessors, should not be permitted to access telecommunications intercept material to perform one aspect of my statutory functions but not the other. There is real significance in this, because it means I am unable to perform any effective audit of the warrants obtained by ICAC for telecommunications intercepts, which presumably make up a substantial proportion of the warrants the ICAC obtains. I say “presumably” because for the reasons expressed above, I have no actual information on the point.

As was also indicated in the report, by way of letter dated 18 June 2020, I raised the matter with Dr James Renwick CSC SC, the then Independent National Security Legislation Monitor. In that letter I requested an amendment to the TIA Act to enable the Inspector to have access to material obtained by the ICAC pursuant to that Act.

A copy of the letter to Dr Renwick, together with other correspondence and advice relevant to the matters recounted above, were made available in the report. At the time of furnishing the report the requested amendment had not come to fruition. That remains the position.

Update in relation to Special Report 2021/01:

In December 2020 the Australian Government publicly released the *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community* (the Review) authored by Mr Dennis Richardson. At the same time, the Government’s response to the Review was also released. The Review recommended, among other things, the creation of a single legislative framework under Commonwealth law to regulate the use of electronic surveillance powers including telecommunications interception, covert access to stored communications, computers and telecommunications data, and the use of optical, listening and tracking devices. (At present those powers are primarily, but not only, regulated by the TIA Act and Commonwealth, state and territory surveillance

devices legislation.) The Review led to the establishment of an Electronic Surveillance Reform project managed by the Department of Home Affairs. Its purpose is to draft the new legislative framework.

When I appeared before the ICAC Committee on 14 May 2021, I expressed disappointment about the lack of legislative reform achieved by the Inspectorate to secure the ability to audit the Commission's use of the TIA Act. At that time, it was my understanding that the Electronic Surveillance Reform project was in its infancy and I did not know what opportunities there would be for consultation. Very recently my Office was invited to participate in a preliminary round of consultation for the Reform project. I anticipate that future stages of the consultation process will afford me the opportunity to put forward the case for the amendments that I am seeking once more. It is hoped that whatever shape Electronic Surveillance legislation takes in future, there is provision for the Inspector to audit all aspects of the Commission's use of it.

I also wish to note my appreciation for the interest that the ICAC Committee has shown in this particular issue, which it has documented in findings 6 and 7, and recommendation 4, of its *Report 3/57 – August 2021: Review of the 2019-2020 annual reports of the ICAC and the Inspector of the ICAC*.

2. Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 determining a complaint by Mr Arthur Moses SC on behalf of the Hon Gladys Berejiklian MP against the Commission (Special Report 2021/02)

The report determined a complaint against the Commission made by Mr Arthur Moses SC on behalf of the Hon Gladys Berejiklian MP. It was furnished to Parliament on 27 November 2020.

The complaint concerned the circumstances in which a transcript of evidence given in private at the Commission by Mr Daryl Maguire on 15 October 2020 was erroneously uploaded to the Commission website and, as a result, was accessed by a number of persons contrary to its intended confidentiality. The complaint

suggested that the security of Ms Berejiklian's home was compromised because information about it was disclosed in the transcript. The complaint also raised another issue which I was not, at the time of reporting, able to resolve. Consequently, references to that issue were redacted from the correspondence that was attached to the report.

During my investigation I carefully considered whether the circumstances of the upload and the Commission procedures which enabled it to occur, amounted to "maladministration" within the meaning of section 57B of the ICAC Act. Ultimately, I determined that, the transcript was uploaded to the website as a result of a simple, but regrettable, human error and in those circumstances found that the conduct in question did not constitute maladministration. Nevertheless, I considered that the circumstances revealed a serious administrative failure which had unfair and detrimental consequences for Ms Berejiklian which would not have happened had adequate processes been in place.

As part of my investigation into the matter, I conducted a review of the Commission procedures that were then in existence which related to the uploading of material to the Commission's public and restricted websites. That review was of a preliminary nature and was conducted in the context of the Commission making a commitment to review its internal procedures for uploading material to its website and retraining Commission officers tasked with the responsibility of uploading content to the ICAC website. A concern that I noted in my report, was that while generally the procedures were prescriptive in guiding staff to undertake certain duties, they did not adequately explain the risks involved in mistakenly or incorrectly handling Commission material.

I also held concern about the level of responsibility placed on junior employees who do not have sufficient understanding of the issues involved in a public inquiry but are given the responsibility for the significant role of uploading material to the Commission's website without perhaps having a full appreciation of the contents of the material in question, or the day's events in a particular hearing during which highly sensitive matters may be dealt with as part of the Commission investigation.

I stated in paragraph 8 of the Report that “I propose to monitor the Commission’s implementation of the revised procedures and report on that implementation in my annual report for the 2020-2021 year” and in paragraph 36 that “I am considering conducting a formal audit of the procedures separate to my current investigation. I anticipate that audit will consider the procedures referred to [in the report] in addition to other Commission procedures that deal with the handling and security of information.”

Update in relation to Special Report 2021/02:

The Commission’s implementation of the revised procedures:

In my report there were detailed references to an internal investigation report dated 16 October 2020 that was prepared by a senior Commission officer. That report made factual findings about how the transcript came to be uploaded, and the steps taken by the Commission in response. It also made several recommendations, including among other things that:

- specific operations manuals be reviewed to strengthen the security measures around the upload of private transcripts to its restricted and public website, and
- relevant staff are retrained in the appropriate actions and security measures applicable to the uploading of private transcripts.

On 13 November 2020 (which was prior to the furnishing of my report), the Chief Commissioner informed me that the Commission intended to implement all recommendations made in the internal investigation report by 29 January 2021. And further, that a project group had been established to “review the Commission’s relevant procedures and processes and to provide advice and any further recommendations on appropriate risk strategies for implementation.”

In the months following my report, the Commission provided my Office with regular updates about the progress of the review of its procedures. Those updates outlined that the project workgroup submitted an interim report to the Commission’s

Executive Management Group (EMG) on 27 January 2021, and a final report on 12 March 2021. Copies of the reports were sent to my Office, and the Chief Commissioner gave an assurance that measures regarding the process and security around the uploading of private transcripts would be finalised in time for the commencement of the Operation Witney public inquiry on 29 March 2021. That was the Commission's first public inquiry following Operation Keppel.

On 11 June 2021 the Chief Commissioner wrote to me to provide the outcomes from the Commission's project workgroup. In summary, six recommendations were made to the EMG, all of which were accepted.

The first recommendation provided, crucially, for the creation of a permanent full-time paralegal position with the responsibility to upload exhibits, transcripts and witness lists to the public website during public inquiries. The paralegal is to perform those tasks with oversight and assistance from senior legal and communications officers. The Commission engaged a contract paralegal on 22 March 2021. The implementation of that recommendation is somewhat challenging in light of the Commission's budgetary constraints; however, it is committed to supporting the dedicated role.

The second recommendation resulted in the Commission's IT section assuming a stricter level of control over the particular shared network location used by the Commission for the purpose of managing investigation material to be uploaded to the ICAC website. While the third recommendation led to the Commission implementing "an enhanced data auditing capability prior to the end of July 2021."

Recommendation four suggested that the EMG consider changes to Investigation Operations Manual Work Instructions (that were subject to the acceptance of recommendation 1):

- IP03-1I-B Hearing associate duties and responsibilities
- IP03-WI-D Use of the restricted and public websites for Commission hearings
- IP03-WI-E Management of Commission transcripts and hearing recordings

On 2 June 2021 the EMG approved a range of changes to those Operations Manual Work Instructions. In summary, the changes resulted in clearer lines of responsibility for specific tasks in relation to the handling of transcripts and uploading of material to the Commission's website.

Recommendation five was "that the Commission Executive and managers promote the importance of public inquiries through priority resourcing and allocation of duties." I note that this recommendation was made as a consequence of the project group's finding that there was a perception in the Commission that only certain Divisions had responsibilities for delivering public inquiries, and as a consequence those Divisions were subject to a silo effect, resulting in limited support from the organisation as a whole. The EMG supported the recommendation and noted its commitment to ensuring available resources are provided as a priority and duties are allocated.

Recommendation six concerned the public expectation that has developed (particularly among the media) that daily transcripts from public inquiries will be made available on the Commission's website within certain timeframes. The project workgroup recommended that the information on its website about the availability of transcripts during public inquiries be amended to shift expectations away from them being available within specific time frames. Certain changes were made to that information at the commencement of Operation Witney and will be adopted in future inquiries.

Formal audit of the Commission's revised procedures and other Commission procedures that deal with the handling and security of information:

After having completed my report, several separate incidents arose involving the Commission's information handling. Those incidents highlighted that the specific incident dealt with in my report was a relatively small part of a bigger picture. The Commission's information holdings are vast and must be the subject of strong multilayered protections. In my view, that is not something that can be ensured through an audit conducted by my Office with a focus that would be necessarily

limited by the expertise, resources and time that are immediately available.

On 4 June 2021, the Commission notified me of one of the incidents alluded to in the preceding paragraph and indicated that a formal review of the incident was underway. In response, on 10 June 2021, I stated:

On reading your notification, I am reminded of the complaint made to my Office by Mr Arthur Moses SC on behalf of the Hon Gladys Berejiklian in October 2020 about the erroneous upload of a transcript to the Commission's website. Your notification and that complaint both concern the unauthorised (albeit inadvertent) disclosure of sensitive information by way of human error. It is reassuring that the Commission is taking clear steps to improve its processes in response to those two particular matters. However, I am concerned that there may be other areas of the Commission's work in which there are unidentified or unaddressed risks relating to how information is handled.

If the Commission has not already done so, I encourage it to consider whether the currently proposed reviews – or a separate review to be conducted in the near future – should examine the information handling practices in place across the entire Commission.

On the same day, the Commission responded and advised me that it saw merit in the suggestion and that it would take steps to implement a Commission wide examination of its information handling practices, and it will write to me further once it has “settled on the process to be adopted to undertake such an examination”. In the months since the Commission has indicated that it is still settling that process but will continue to keep me informed.

PART 6: CONCLUSION

My term as Inspector will end on 30 June 2022 and it will fall on my successor to complete the Annual Report relevant to my final year in the role. As such I took the present report as an opportunity to reflect. The role of Inspector is one that I have greatly enjoyed performing and will sincerely miss. Upon my departure, I will endeavour, as best I can in the circumstances, to offer guidance to whoever takes over.

In the conclusion to last year's Annual Report, I reflected that "the number of complaints about the Commission received by my Office has remained consistently low since I took Office on 1 July 2017" and anticipated that "this trend will continue under the current regime and the Commission's current practices." I am gratified that the trend did in fact continue for the 2020-2021 reporting period, and I am hopeful that it continues well beyond the expiration of my term and the terms of the current Commissioners.

B. R. McClintock

Bruce McClintock SC

Inspector ICAC

29 October 2021