

Integrity issues relating to the state election

As the March 2023 state election approaches, I am writing to all current members of Parliament and registered political parties to remind them about a number of important matters.

“Weaponisation” of the ICAC

At times in the past, individuals have “weaponised” the Commission by levelling public allegations of corruption against their political opponents. This is sometimes accompanied by public statements that the matter has been referred to the Commission, or backgrounding a journalist about the referral.

Even in circumstances where there is a reasonable basis for such allegations, making them in public is often intended to inflict political damage. When made during an election campaign, there is usually insufficient time to properly assess, let alone investigate the allegation, leaving a cloud that cannot be removed by polling day. In addition, when allegations are made in public, evidence may be destroyed and some of the Commission’s investigative opportunities may be jeopardised.

If any member, their staff or a party official holds a genuine suspicion of corrupt conduct, it should be reported to the Commission in the usual manner.

The Commission’s practice is to refrain from confirming or denying the existence of any allegation or investigation. However, if it becomes apparent that the Commission’s functions are being weaponised, I may determine that it is in the public interest to clarify the status of our involvement in a matter.

Post-election obligations

Some members will not be contesting the state election and others may not be successful in their campaign for re-election. Similarly, some members’ staff may no longer have positions after the election.

Those who are transitioning out of public office should be aware of a number of important obligations.

First, as is the case with any other person, members and their staff are entitled to canvass opportunities for future employment. However, in doing so they must not:

- while still in office, provide any sort of improper favourable treatment to a prospective employer
- misuse confidential information obtained while in office
- conceal any relevant conflict of interest

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- endeavour to improperly monetise their existing office or misuse the authority associated with their office.

Such conduct could be a breach of a relevant code of conduct or the law, which may in turn amount to corrupt conduct. A relevant example is set out in the Commission's 2016 report into its investigation known as Operation Spicer.

Secondly, upon leaving office, some members and staff take on roles that involve interacting with government. This can include positions in a public sector agency, in government relations, lobbying or consulting, or in the media. While there is no harm in maintaining contact with former colleagues, it is important that former members and staff do not seek to take improper advantage of these relationships.

Equally, sitting members should exercise care if approached by a former colleague seeking favourable treatment which may create a conflict of interest for the sitting member, or the appearance of partiality.

Pork barrelling

In August 2022, the Commission released its *Report on investigation into pork barrelling in NSW*. This report sets out circumstances where a pork barrelling scheme could involve corrupt conduct. This includes conduct such as:

- influencing a public servant to assess the merit of a grant proposal in a dishonest or partial way
- conducting a merits-based scheme to dishonestly favour political and private advantage over merit
- exercising a power contrary to the purpose for which it was given.

Promises made during an election campaign can lead to allegations of pork barrelling. The Commission's report deals with the election campaigns in these terms:

Those aspiring for political office should be free to inform the electorate about how they plan to exercise executive power if elected. This is usually achieved by announcing policies and making election promises. In a democratic system, candidates for office should have broad scope to campaign, including by proposing new laws, disagreeing with bureaucratic or expert advice and proposing to confer benefits on some parts of the electorate but not others. As noted ... running for office and forming government involves making compromises. In practice, many of these compromises will necessarily involve a degree of departure from the notion of technical merit. Such departures are to be accepted, provided that relevant public interest factors are considered and given effect.

However, ... executive decision-makers cannot expend public money on implementing a policy unless the expenditure is within the scope of a power that is conferred by law.

...

In general, non-statutory executive decision-making is required to be exercised to achieve a particular public good or an objective that serves the public interest.

I urge all members, candidates and parties to bear this in mind during the election campaign.

Political donations

In a 2022 report on its investigation known as Operation Aero, the Commission examined allegations of unlawful political donations.

The report illustrates the importance of compliance with campaign donation laws. The Operation Aero investigation was the result of a referral from the NSW Electoral Commission made under s 13A of the ICAC Act. Such referrals allow the Commission to use its powers to investigate possible criminal offences under the *Electoral Funding Act 2018*, the *Electoral Act 2017* or the *Lobbying of Government Officials Act 2011*.

The NSW Electoral Commission also investigates and enforces contraventions of electoral funding laws and provides guidance material on its website (www.elections.nsw.gov.au) to assist election participants to meet their obligations.

Next steps

As noted in the Commission's recently issued 2021-22 annual report, during my term as Chief Commissioner, I intend to emphasise the importance of education for members of Parliament. Among other things, I will be encouraging the privileges and ethics committees of the Parliament to enhance their efforts to educate members. Hopefully, this will provide assistance so that those elected to office have a better understanding of their obligations.

Should you have any questions about the matters raised in this letter, please contact the Commission at icac@icac.nsw.gov.au. If requested, I would be happy to arrange pre-election briefings for members and parties.

Yours sincerely

The Hon John Hatzistergos AM
Chief Commissioner

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