

**Submission
No 4**

**REPUTATIONAL IMPACT ON AN INDIVIDUAL BEING ADVERSELY
NAMED IN THE ICAC'S INVESTIGATIONS**

Organisation: Speaker of the NSW Legislative Assembly

Date Received: 23 June 2020

Submission to the Joint Committee on the Independent Commission Against Corruption (ICAC)'s Inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations

The Hon Jonathan O'Dea MP
Speaker of the NSW Legislative Assembly
23 June 2020

Introduction

In my first speech as Speaker-elect on 7 May 2019, I addressed the impact on a person's reputation when they are adversely named by the Independent Commission Against Corruption (ICAC):

“Following the previous Parliament passing reforms to better focus the efforts of the Independent Commission Against Corruption [ICAC] on serious misconduct allegations, we now need a mechanism to address allegations of a more minor nature. But there is also scope to revisit the issue of how to better reflect the exoneration of parliamentarians and others following a referral to ICAC.”¹

In this submission, I will highlight some shortcomings of the current system and assess the merits of introducing an exoneration protocol or 'statement of findings'.

Case Study: Mike Gallacher

The shortcomings of ICAC's current approach to adversely naming individuals are shown in the lives of people whose reputations have been irrevocably damaged with profound consequences. One of the most notorious examples in recent years is the ICAC Operation Spicer report and its impact on Mike Gallacher.

On 1 May 2014, the Hon. Michael Gallacher MLC was a respected Minister for the Police and Emergency Services, the Central Coast and Industrial Relations, Leader of the Government in the Legislative Council and Vice-President of the Executive Council.

The next day, ICAC heard allegations that Mr Gallacher helped to disguise property developer donations to the Liberal Party, thereby evading electoral funding laws. By the day's end, Mr Gallacher was forced to resign from his ministerial positions and surrender his parliamentary Liberal Party membership.² Despite falling into disrepute and being subject to public trial by media, Mr Gallacher later commented that Ivan Milat received better treatment than him, because he was not allowed to respond to ICAC allegations for 3 months, whereas Milat could address his charges the next day.³

Awaiting ICAC's investigation results, Mr Gallacher spent 3 long years largely isolated on the crossbench, then resigned from Parliament in 2017 to move into the private sector.⁴ Reflecting on the experience, the public service veteran, who served as a police officer for 16 years and

¹ NSW Legislative Assembly Hansard, 'Speaker of the Legislative Assembly Election', *NSW Parliament*, 7 May 2019. Accessed at: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-105122/link/32>.

² ABC News, 'ICAC: NSW Police Minister Mike Gallacher resigns over corruption watchdog probe', 3 May 2014. Accessed at: <https://www.abc.net.au/news/2014-05-02/police-minister-mike-gallagher-resigns-over-icac-probe/5425726?nw=0>.

³ Sharri Markson, 'Milat was 'treated better than me'', *The Australian*, 21 December 2015. Accessed at: <https://www.theaustralian.com.au/national-affairs/state-politics/ivan-milat-was-treated-better-than-me-says-mike-gallacher/story-e6frgczx-1227684993166>.

⁴ Sean Nicholls & Georgina Mitchell, 'Former NSW police minister Mike Gallacher resigns from parliament', *Sydney Morning Herald*. Accessed at: <https://www.smh.com.au/national/nsw/former-nsw-police-minister-mike-gallacher-resigns-from-parliament-20170406-gvffi8.html>.

spent 21 years as a parliamentarian, described the period as “five years of personal hell”.⁵ His name was only cleared of wrongdoing in late 2019, after a parliamentary inquiry revealed that the Inspector of the ICAC, Bruce McClintock SC wrote Mr Gallacher a letter in August 2018 characterising his treatment as wrong and unfair, and expressing sympathy for his experience.

It is clear from Mike Gallacher, as well as the examples of many others who have needlessly suffered awaiting the outcomes of an ICAC investigation, that there are serious shortcomings in ICAC’s approach to providing subsequent information about those who have been adversely named in its investigations.

While other cases may not be as stark, there are numerous other politicians who have been adversely named in ICAC reports yet never been charged or had their status clarified some years later.

Potential Solution: Statement of Findings Obligation

A proper process is needed to deal with certain circumstances where individuals have suffered reputational impact from being adversely named in ICAC’s investigations.

Recent recommendations from ICAC Inspector David Levine and Acting Inspector John Nicholson SC indicate an exoneration protocol could remedy the potentially devastating impacts of being adversely named. In this definition of an exoneration protocol, a person against whom the finding was made can make a Supreme Court application to expunge the ICAC records or have the findings set aside, if there is no criminal conviction arising from the same or similar facts that warranted ICAC’s finding of corrupt conduct.

I note that in the 2016 *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Special Reports* and further correspondence in 2017, the Parliamentary Committee on the ICAC recommended against a proposed exoneration protocol, due to the differences in procedures between ICAC and criminal courts (including standards of proof, rules of evidence and corrupt conduct findings).⁶

I agree with the Committee’s position that being acquitted of a criminal offence is not the same as being exonerated from a corrupt conduct finding. Due to the differing burdens of proof, it is possible to have acted corruptly without committing a crime under the law of NSW. The phrase ‘exoneration protocol’ also has connotations that the person is innocent or pardoned of any misconduct, which may not truly represent the facts and potentially mislead the public. Therefore, I believe an exoneration protocol is not an adequate method of fairly dealing with the impact of adversely naming some individuals in ICAC investigations.

Rather, I recommend that a positive obligation on ICAC be introduced whereby ICAC must make clarifying statements on their website at regular intervals as to the latest status of any person who is adversely named by ICAC investigations.

After a certain period of time has elapsed from the person’s naming, ICAC might be required to provide a final status update on the allegations concerning the person. If they have not been found guilty of any offence at law and/or complicit in any corrupt conduct, the ICAC should publish a statement that reflects this. If they have been prosecuted and found guilty under criminal law and/or found to have engaged in corrupt conduct, this should also be stated on the ICAC’s website.

⁵ Terry Collins, ‘Allegations of corruption found to be unwarranted’, *Coast Community News*, 1 November 2019. Accessed at: <https://coastcommunitynews.com.au/central-coast/news/2019/11/allegations-of-corruption-found-to-be-unwarranted/>.

⁶ Joint Committee on the Independent Committee Against Corruption, ‘2016-17 Review of the Independent Commission Against Corruption: Consideration of the Inspector's Special Reports’, *NSW Parliament*, 18 October 2018. Accessed at: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2485>.

This 'statement of findings' obligation would address the 'limbo' situation of a person who is named but not found guilty of any offence or charged with corrupt conduct and/or criminal activity until several years later. Such a person might find it difficult to explain the situation to a potential employer, employee, friends or even family.

I believe this positive obligation should apply retrospectively to cover cases of past reputational impact to people named in ICAC investigations. This would ensure natural justice is achieved for all those who have been previously investigated by ICAC, as well as those who will come under scrutiny in future.

A 'statement of findings' proposal has been previously suggested to ICAC, as noted in the Committee of the ICAC's *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of ICAC*.⁷ During the public hearing of the Joint Committee on the ICAC, the Chief Commissioner of the ICAC, the Hon. Peter Hall QC, indicated that he was open to considering the proposal as a remedy for addressing reputational impact.⁸

He qualified this by noting that some affected people prefer to not have an additional statement published on the ICAC website, and so publication would be subject to the affected person's permission.

Stephen Rushton SC, Commissioner of the ICAC, also added that it is now a requirement for the report to include the substance of the affected person's submissions as to why a finding should not be made, if the affected person asks ICAC to do so. This allows members of the public and media who read ICAC reports to judge any potential findings against affected persons for themselves. However, he also acknowledged that many affected persons have not wished to implement this practice.

Conclusion/Recommendation

In summary, I recommend that ICAC be required to regularly publish updated statements of findings on its website regarding persons adversely named in ICAC investigations. This might continue to include reference to each person adversely named for at least a reasonable period after their case status was finalised and would potentially be subject to their consent.

The process would promote procedural fairness, transparency and limit unfair damage to an affected person's reputation as a result of ICAC investigations.

⁷ Joint Committee on the Independent Committee Against Corruption, *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of ICAC*, *NSW Parliament*, 20 November 2019. Accessed at: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2548>.

⁸ Joint Committee on the Independent Committee Against Corruption, 'Public Hearing Transcript Report on Proceedings Before Committee on the Independent Committee Against Corruption: Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of ICAC', *NSW Parliament*, 21 October 2019. Accessed at: <https://www.parliament.nsw.gov.au/ladocs/transcripts/2212/Committee%20on%20the%20ICAC%20-%20Public%20Hearing%20-%20Transcript%20-%20Monday%2021%20October%202019.pdf#page=11>.