

**Submission  
No 6**

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

**Organisation:** NSW Independent Commission Against Corruption

**Date Received:** 14 July 2020

Mrs Tanya Davies MP  
Chair  
Committee on the ICAC  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

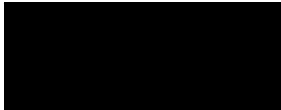
Dear Mrs Davies,

**Inquiry into the reputational impact on an individual being adversely named in an  
ICAC investigation**

I am pleased to provide the Commission's submission with respect to the above inquiry.

Please feel free to contact me should you or the Committee require any further information from the Commission with respect to the submission or the inquiry.

Yours sincerely,



**The Hon Peter Hall QC**  
**Chief Commissioner**  
14 July 2020

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**Sensitive**

I·C·A·C

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INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

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SUBMISSION TO THE COMMITTEE ON THE  
INDEPENDENT COMMISSION AGAINST  
CORRUPTION (ICAC) INQUIRY INTO THE  
REPUTATIONAL IMPACT ON AN INDIVIDUAL  
BEING ADVERSELY NAMED IN AN ICAC  
INVESTIGATION

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July 2020

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# Introduction

This submission is made by the NSW Independent Commission Against Corruption (“the Commission”) for the purposes of the Committee on the Independent Commission Against Corruption (“the ICAC Committee”) inquiry into reputational impact on an individual being adversely named in the Commission’s investigations.

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

In summary, it is the Commission’s submission that:

1. existing safeguards and remedies with respect to reputational impact are both appropriate and adequate
2. no additional safeguards and remedies are needed
3. it is not necessary to develop a specific exoneration protocol to deal with reputational impact.

# Part 1: Overview of the Commission's role and work

The Commission's mandate under s 2A of the *Independent Commission Against Corruption Act 1988* ("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 Commission also investigates conduct that may involve certain specified criminal offences that the NSW Electoral Commission refers to the Commission 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 Commission 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 Commission 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 Commission 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.<sup>1</sup> An investigation may be in the nature of a preliminary investigation.<sup>2</sup>

The Commission 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 (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 Commission officers or others to use a false identity (*Law Enforcement and National Security (Assumed Identities) Act 2010*)

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<sup>1</sup> Section 20 of the ICAC Act.

<sup>2</sup> 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* (Commonwealth)).

In 2018–19, being the last full reporting period before the impact of the COVID-19 pandemic, the Commission received and managed 2,743 matters, including 1,220 complaints made under s 10 of the ICAC Act and 789 reports of suspected corrupt conduct made under s 11 of the ICAC Act.<sup>3</sup> Of these matters, only 18 were made the subject of a Commission preliminary investigation.<sup>4</sup>

During the 2018–19 period, the Commission conducted 83 compulsory examinations over 67 days. Compulsory examinations are conducted in private and are usually the subject of non-publication directions under s 112 of the ICAC Act preventing publication of the evidence and the identity of the person giving the evidence.

Also during the 2018–19 period, the Commission conducted four public inquiries over 133 days.

Three reports under s 74 of the ICAC Act were published in that period in which findings of serious corrupt conduct were made against eight persons and 46 recommendations made to reduce the likelihood of corruption recurring.

The Commission 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 Commission has conducted numerous investigations and undertaken significant corruption prevention work to strengthen NSW public administration against corruption. Up to 30 June 2020, the Commission has published 194 investigation reports under s 74 of the ICAC Act and has made in excess of 1,300 corrupt conduct findings against approximately 850 individuals. There have been significant financial savings to the public sector through the detection and prevention of corruption.

As a result of its investigations and corruption prevention work, the Commission has identified corruption risks and made hundreds of corruption prevention recommendations to address these risks. The Commission has published other corruption prevention material and conducted numerous corruption prevention seminars and training sessions.

It is important to note that the Commission is not a court or disciplinary tribunal and does not conduct prosecutions or disciplinary proceedings. Where there is admissible evidence of a criminal offence, the Commission can refer that evidence to the Director of Public Prosecutions (DPP) to consider prosecution action. Where there is evidence of a disciplinary offence or evidence warranting consideration of dismissal, the Commission may refer that evidence to the appropriate agency for consideration of disciplinary or dismissal action.

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<sup>3</sup> ICAC annual report 2018–19, table 7.

<sup>4</sup> ICAC annual report 2018–19, table 15.

## Part 2: Reputational impact

The Commission acknowledges that its investigations, particularly where they involve a public inquiry and/or a public report, can adversely impact on the reputation of those involved in the investigation. For the reasons given below, it is the Commission's contention that existing safeguards, procedures and remedies are appropriate and adequate to address such impact.

As noted in part 1 of this submission, only a very small percentage of matters received by the Commission are made the subject of a preliminary investigation. Not all preliminary investigations become full investigations and not all investigations involve a public inquiry. Many people may therefore be the subject of allegations of corruption without the allegations ever being made public or, in many cases, without even knowing they have been the subject of an allegation.

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 Commission's investigation (for example, as the result of being interviewed by Commission officers or giving evidence at a compulsory examination), Commission policy requires the Commission 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 Commission 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 Commission is also open to publishing a statement on its website to the effect that it had concluded its investigation without establishing evidence of corrupt conduct against the person or persons who were the subject of the investigation.<sup>5</sup> However, caution should be exercised in taking any such step. It may be that the publicity of publishing on the Commission's website the fact that a particular person was the subject of allegations investigated by the Commission (even where no evidence of corruption was identified) causes rather than mitigates any reputational harm, particularly in circumstances where the allegation and the fact of the Commission's investigation were not widely known. Any such step would need to be taken with the consent of the person or persons who were the subject of the investigation.

The question of reputational impact usually arises in circumstances where the Commission conducts a public inquiry and/or produces an investigation report under s 74 of the ICAC Act. While the Commission must make a report under s 74 of the ICAC Act where it has conducted a public inquiry,<sup>6</sup> it can also make such a report in the absence of a public inquiry.

Before examining the impact a public inquiry or s 74 report can have on reputation, it is appropriate to consider relevant current legislative and procedural requirements.

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<sup>5</sup> Chief Commissioner, the Hon Peter Hall QC, transcript of evidence before the Committee, 21 October 2019, pp. 10 and 11.

<sup>6</sup> Section 74(3) of the ICAC Act. Note, however, the Commission is not required to prepare a report in relation to a matter referred to the Commission by both Houses of Parliament if the Houses of Parliament have given a direction not to do so.



## Public inquiries

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

Section 31(1) of the ICAC Act provides that, for the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry. Section 6(2) of the ICAC Act provides that a decision of the Commission to conduct a public inquiry under s 31 must be authorised by the Chief Commissioner and at least one other Commissioner.

Public inquiries are important to the Commission's effectiveness in exposing and preventing corrupt conduct because they:

- widely expose serious corrupt conduct and systemic corrupt conduct
- deter corrupt conduct – public officials and others are less likely to engage in corrupt conduct if they know they will be subject to public exposure
- disrupt corrupt conduct that is ongoing
- hold public officials and others engaged in corruption publicly accountable for their actions
- hold public authorities and public officials publicly accountable for ensuring relevant policies and procedures not only adequately address corruption risks but are enforced
- encourage others to come forward with information relevant to the investigation<sup>7</sup>
- encourage the reporting of other suspected corruption
- educate the public about corruption.

Public inquiries also:

- provide transparency to the Commission's fact-finding and investigative processes
- enhance public confidence in the Commission's operations
- enable the public to assess the evidence for themselves
- provide an opportunity for those against whom unfounded allegations have been made to publicly clear their reputations or to publicly dispel rumour and speculation about corruption.<sup>8</sup>

In his January 2005 report, *Independent review of the Independent Commission Against Corruption Act 1988 – Final Report*, Bruce McClintock SC considered the Commission's power to hold public hearings and concluded:

*...public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that*

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<sup>7</sup> This is demonstrated by two recent matters. (1) The public inquiry into the conduct of employees of the City of Botany Bay Council (Operation Ricco) was announced on 16 February 2016 and evidence taken between 29 February and 17 March. In the three months after 16 February 2016, the Commission received 14 reports involving that council. Of these, five were assessed as being directly relevant to Operation Ricco and were referred to the Commission's Investigation Division. (2) The public inquiry into the conduct of NSW correctional centre officers at the Lithgow Correctional Centre (Operation Estry) was announced on 3 May 2018. During the following month, two related matters were received by the Commission that were referred to the Commission's investigation Division.

<sup>8</sup> The Commission's February 2010 public inquiry into allegations of corruption made by, or attributed to, Michael McGurk demonstrated that there was no cogent evidence supporting the rumour and speculation of corruption involving NSW public officials and others arising from audio recordings made by Mr McGurk.

*have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.*<sup>9</sup>

The Independent Panel of the Hon Murray Gleeson AC and Mr McClintock also commented on public inquiries in their July 2015 report, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*. The Independent Panel accepted that:

*...public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes.*<sup>10</sup>

Under the ICAC Act, the risk of undue prejudice to a person's reputation is one of the factors the Commission 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 Commission 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 Commission's Operations Manual, which outlines the procedure for the conduct of public inquiries, provides that considerations to be taken into account by the Commission 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

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<sup>9</sup> *Independent review of the Independent Commission Against Corruption Act 1988 – Final Report*, January 2005, paragraph 6.5.25.

<sup>10</sup> *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, July 2015, paragraph 9.4.6.

- 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.

The requirements of the ICAC Act and the Commission'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 Commission also protects against unnecessary reputational damage by 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 Commission'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 Commission to assess the evidence and to address the matters set out in s 31(2) of the ICAC Act.

As noted above, in some cases, the Commission may also conduct a public inquiry where the evidence indicates there is no likelihood of corruption but that it considers it is in the public interest to "clear the air" of unfounded allegations that are in the public domain.

At the commencement of the public inquiry, the person presiding is required to announce the general scope and purpose of the inquiry.<sup>11</sup> A person required to attend the public inquiry is entitled to be informed of the general scope and purpose of the public inquiry and the nature of the allegation or complaint being investigated.<sup>12</sup> In practice, the allegation(s) under investigation and the general scope and purpose of the public inquiry are set out in each summonses issued under s 35 of the ICAC Act, published on the Commission's website, and announced by the presiding Commissioner at the opening of the public inquiry.

While a public inquiry is to be held in public,<sup>13</sup> the Commission may decide to hold part of the inquiry in private if it considers this to be in the public interest.<sup>14</sup> 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 Commission to investigate the allegations without that investigation being possibly prejudiced by public disclosure of the allegation(s).

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

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<sup>11</sup> Section 31(5) of the ICAC Act.

<sup>12</sup> Section 31(6) of the ICAC Act.

<sup>13</sup> Section 31(8) of the ICAC Act.

<sup>14</sup> Section 31(9) of the ICAC Act.

(e) any written submissions received by the Commission (including, but not limited to, submissions made by Counsel assisting the Commission),

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

The Commission is not to give a direction under s 112 unless satisfied that the direction is necessary or desirable in the public interest.<sup>15</sup>

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.<sup>16</sup> Section 33(2) of the ICAC Act requires the Commission 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 Commission, examine or cross-examine any witness on any matter that the Commission considers relevant.

A person's legal representative can 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 Commission. An unrepresented witness, of course, may also, where relevant, cross-examine other witnesses and identify additional relevant evidence.

The conduct of public inquiries is regulated by the Commission's Standard Directions for Public Inquiries (Appendix 2 to this submission). The Standard Directions, which are published on the Commission's website and provided to every witness, cover a number of issues including:

- authorisation to appear and legal representation
- calling of witnesses
- cross-examination of witnesses
- tender of documents into evidence
- the making of non-publication orders
- the publication of and access to evidence
- the making of submissions.

The conduct of public inquiries is also regulated by the Public Inquiry Procedural Guidelines ("the Guidelines"), issued in accordance with s 31B of the ICAC Act. The Guidelines (Appendix 3 to this submission) are also published on the Commission's website and provided to every witness.

Section 31B(2) of the ICAC Act provides that the Guidelines are to provide guidance on the following aspects of the conduct of the public inquiry:

- (a) the investigation of evidence that might exculpate affected persons,

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<sup>15</sup> Section 112(1A) of the ICAC Act.

<sup>16</sup> Section 33(1) of the ICAC Act.

- (b) the disclosure of exculpatory and other relevant evidence to affected persons,
- (c) the opportunity to cross-examine witnesses as to their credibility,
- (d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- (e) any other matter the Commission considers necessary to ensure procedural fairness.

For the purposes of s 31B of the ICAC Act, an “affected person” is a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned.<sup>17</sup>

Although the ICAC Act does not define “exculpatory” evidence, the Guidelines provide that “exculpatory evidence” is credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission’s investigation.

In conducting its public inquiries, the Commission must also observe and comply with the principles of natural justice.<sup>18</sup>

In *Mahon v Air New Zealand* [1984] AC 808, the Privy Council enumerated three principles of natural justice, which may be summarised as:

1. findings must be based upon evidence that logically tends to show the existence of facts consistent with those findings
2. the fact-finder is required to listen to any relevant evidence that conflicts with any proposed finding, and any rational argument against such a finding that the person affected by the proposed finding may wish to place or have placed before the fact-finder or would have so wished if made aware of the risk of such a finding being made
3. the fact-finder should be neither biased nor appear to be biased.

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 Commission 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.

As noted in *McCloy v Latham* [2015] NSWSC 1879 at [160], the requirements of natural justice, within the confines of the ICAC Act, are met if the witness is given adequate opportunity to put forward his or her version of events, to cross-examine witnesses who implicate him or her in corrupt conduct, and to make submissions on what findings should be made.

## Submissions

One way of affording procedural fairness is through the provision and consideration of submissions.

At the conclusion of the taking of evidence in a public inquiry, it is standard for Counsel Assisting the Commission to make written submissions. Submissions will also be prepared where the Commission

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<sup>17</sup> Section 31B(4) of the ICAC Act.

<sup>18</sup> 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.

proposes making a report under s 74 of the ICAC Act without conducting a public inquiry. In each case, the submissions set out which adverse findings Counsel Assisting contends would be open to be made by the Commission on the evidence before the Commission.

In its reports, the Commission may make observations about factors that may have allowed, caused or encouraged corrupt conduct and may make corruption prevention recommendations. As these may potentially adversely affect individuals (for example, if the Commission proposes criticising the management of a particular agency), the Commission makes corruption prevention submissions addressing the relevant causal and prevention issues.

A copy of the above submissions is provided to affected persons and submissions in response are invited from those persons.

Submissions are generally 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.

All submissions received by the Commission are taken into account before any findings are made.

In addition, s 79(A)(1) of the ICAC Act provides that the Commission is not authorised to include an adverse finding against a person in a report under s 74 unless:

- (a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and
- (b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.

Section 79(A)(2) of the ICAC Act provides that the Commission must not include in the report any information in the person's response that would identify any person who is not the subject of an adverse finding, unless the Commission:

- (a) is satisfied that it is necessary to do so in the public interest, and
- (b) is satisfied that doing so will not cause unreasonable damage to the reputation, safety or well-being of a person who is not the subject of an adverse finding, and
- (c) includes in the report a statement that the person identified is not the subject of any adverse finding.

## Section 74 reports

Section 74A of the ICAC Act provides as follows:

- (1) The Commission is authorised to include in a report under s 74:
  - (a) statements as to any of its findings, opinions and recommendations, and
  - (b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.
- (2) The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

- (a) obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence,
  - (b) the taking of action against the person for a specified disciplinary offence,
  - (c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.
- (3) An “affected” person is a person described as such in the reference made by both Houses of Parliament or against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.
- (4) Subsection (2) does not limit the kinds of statement that a report can contain concerning any such “affected” person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

Section 74B(1) of the ICAC Act sets out matters that must not be included in a report. These are:

- (a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or
- (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).

However, a finding or opinion that a person has engaged, is engaging or is about to engage in corrupt conduct (whether or not specified corrupt conduct), or in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct), is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.<sup>19</sup>

In some cases, s 74 reports by the Commission may publicly clear persons of corrupt conduct. In other cases, reports may set out adverse factual findings and findings of corrupt conduct.

The Commission adopts the following approach in determining whether corrupt conduct has occurred.

First, the Commission makes findings of relevant facts on the balance of probabilities.

The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act.

If they do, the Commission then considers s 9 of the ICAC Act and the jurisdictional requirements of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on

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<sup>19</sup> Section 74B(2) of the ICAC Act.

which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

With respect to s 13(3A) of the ICAC Act, the above approach is consistent with the decision of the NSW Court of Appeal in *Duncan v ICAC* [2016] NSWCA 143. As noted by Basten JA at [598]:

*Section 8(2) and s 9(1)(a) of the ICAC Act refer to conduct which “could constitute or involve” a criminal offence; s 13(3A) requires the Commission to be satisfied that a person “has engaged in...conduct that constitutes or involves an offence”. It is clear from the legislative scheme identified above that s 13(3A) does not impose an obligation to be satisfied that an offence has in fact been committed. Rather, that as to which the Commission must be satisfied is the capacity of the facts found to constitute an offence, if proved by admissible evidence to the satisfaction of the appropriate court.*

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in familial and social relationships. This highlights the need to exercise care in making findings of corrupt conduct.

In Australia, there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission.

The standard of proof in Royal Commissions is the civil standard; that is, on the balance of probabilities. This requires reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard that has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings that may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

*...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

The Commission has a discretion not to make a finding of corrupt conduct or a finding of other conduct against a person.<sup>20</sup> That discretion has been exercised on appropriate occasions where the person has

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<sup>20</sup> Section 13(2A) of the ICAC Act.



fully cooperated with the Commission.<sup>21</sup> The most recent occasion when the discretion was exercised was May 2020, when the discretion was exercised in favour of three individuals.<sup>22</sup>

## Publication of information

Section 74 reports are published on the Commission's website, as are public inquiry transcripts and, more recently, public inquiry exhibits. These are removed from the website after 10 years and replaced with a brief description of the investigation without referring to the names of those involved in the investigation or subject to a corrupt conduct finding. Access to a particular report that is more than 10 years old may be provided upon written request.

In addition, the Commission publishes information concerning any criminal or disciplinary proceedings and any relevant litigation.

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.<sup>23</sup> 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.

Details of all litigation involving the Commission, including the outcome of that litigation, are published in the Commission's annual report.

How this works can be demonstrated by the case of John Kinghorn.

A finding of corrupt conduct was made against Mr Kinghorn (and others) in the Commission's July 2013 report, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* (Operation Jasper). The report and finding were published on the Commission's website. Mr Kinghorn subsequently challenged the corrupt conduct finding.

On 29 July 2014, the Supreme Court made a declaration that the corrupt conduct finding affecting Mr Kinghorn was not made according to law and was a nullity (*Duncan & Ors v ICAC* [2014] NSWSC 1018). The Commission filed a summons seeking leave to appeal that decision. On 15 April 2015, the High Court delivered its judgment in *Cunneen*.<sup>24</sup> That judgment affected the corrupt conduct finding against Mr Kinghorn because it was made on the basis that his conduct could affect the "efficacy" rather than the "probity" of the exercise of official functions.

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<sup>21</sup> The Commission's witness cooperation policy notes that a potential benefit from fully cooperating with the Commission is that the Commission may exercise its discretion not to make a finding that a person has engaged in corrupt conduct, even where the factual findings would permit such a finding.

<sup>22</sup> See *Investigation into the over-payment of public funds by the University of Sydney for security services*, May 2020, pp. 32, 33 and 50.

<sup>23</sup> In addition, information concerning recommendations for consideration of prosecution and the outcome of such recommendations over the past five years is also published under the "Prosecution briefs with the DPP and outcomes" section of the Commission's website.

<sup>24</sup> *ICAC v Cunneen* [2015] HCA 14.

As the Commission then had no arguable basis to sustain its appeal, the Commission consented to the dismissal of its summons seeking leave to appeal.<sup>25</sup> A note explaining that the corrupt conduct finding against Mr Kinghorn had been declared a nullity by the Supreme Court was placed on the Commission's website entry for Operation Jasper.<sup>26</sup> Details of the litigation and the outcome were published in the Commission's 2015–16 annual report, which is published on the Commission's website.

## Judicial review

The Commission's proceedings are subject to judicial review in certain circumstances. As noted by Gleeson CJ in *Greiner*:

*...the Supreme Court has both an inherent and a statutory jurisdiction to supervise the functioning of administrative tribunals, to ensure that they carry out their functions and perform their duties in accordance with law.*<sup>27</sup>

Generally, the grounds for judicial review are:

- jurisdictional error
- breach of the principles of natural justice
- relevant matters have not been taken into account by the decision-maker, or irrelevant matters have been taken into account
- excess of jurisdiction.<sup>28</sup>

A finding that the Commission has made a legal or procedural error can lead to a declaration that a particular finding is a nullity.

## The ICAC Inspector

Another avenue for complaint by aggrieved persons is the Inspector of the Independent Commission Against Corruption ("the Inspector").

Under s 57B(1) of the ICAC Act, the Inspector has the following functions:

- (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
- (b) to 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
- (c) to 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

<sup>25</sup> This was prior to 6 May 2015 when the *Independent Commission Against Corruption (Validation) Act 2015* came into effect.

<sup>26</sup> Details concerning Operation Jasper have been temporarily removed from the Commission's investigation website page so as to not cause any prejudice to current criminal proceedings.

<sup>27</sup> *Greiner v ICAC* (1992) 28 NSWLR 125 at [130].

<sup>28</sup> See also *Duncan v ICAC* [2014] NSWSC 1018 at [35].

- (d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

Section 57B(4) of the ICAC Act provides that conduct is of a kind that amounts to maladministration if it involves 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.

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.

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

- investigate any aspect of the Commission's operations;
- investigate any conduct of Commission officers;
- access and take copies of Commission records;
- require Commission officers to supply information or produce documents;
- require Commission officers to attend before the Inspector and answer questions or produce documents;
- investigate and assess complaints about the Commission and Commission officers;
- make or hold an inquiry;
- refer matters relating to the Commission or Commission officers to other public authorities or public officials for consideration of action; and
- recommend disciplinary action or criminal prosecution against officers of the Commission.

## Conclusion

It is the Commission's contention that current safeguards and remedies referred to above are appropriate and adequate to protect reputations from unwarranted adverse impact. In these circumstances, no additional safeguards or remedies are required.

## Part 3: There is no need for an “exoneration protocol”

This part of the Commission’s submission sets out some of the history concerning the issue of what became termed an “exoneration protocol”. In the context in which it was raised, an exoneration protocol, it was argued, was necessary to accommodate a situation where a person found to have engaged in corrupt conduct was subsequently either not prosecuted or, if prosecuted, acquitted of any criminal offence relevant to the conduct the subject of the corrupt conduct finding.

For the reasons set out below, the Commission contends that such an exoneration protocol is misconceived and there is no need for such a protocol.

Before examining the context in which the concept of an exoneration protocol arose, it is relevant to have regard to the 2015 independent review of the Commission’s jurisdiction.

### The 2015 Independent Panel review

In 2015, the Hon Murray Gleeson AC and Bruce McClintock SC were commissioned as an Independent Panel to consider and report on the Commission’s jurisdiction. One of the specific matters the Independent Panel was required to consider under its terms of reference was “whether any limits or enhancements, substantive or procedural, should be applied to the exercise of the ICAC’s powers”.<sup>29</sup>

As part of its terms of reference, the Independent Panel considered the proportion of corrupt conduct findings that are ultimately reflected in criminal convictions. The Independent Panel noted the proportion was relatively low but considered this underlined the differences between an investigative process and the administration of criminal justice. It was noted with respect to a person against whom a corrupt finding had been made that:

*If the person in question is later charged with the relevant criminal offence and acquitted, the finding of corrupt conduct stands. The same applies if the person is never charged with any offence.*<sup>30</sup>

The Independent Panel noted that the Commission:

*...may well be making its findings, including those of corrupt conduct under section 13 of the Act, on material different from that which will be available to a criminal court subsequently determining the guilt or innocence of the person in question. It is obvious that the results must, in some circumstances, be different and that there will be fewer findings of guilt than there will be of corrupt conduct.*<sup>31</sup>

<sup>29</sup> *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* report, 30 July 2015, p. vi.

<sup>30</sup> *Ibid*, paragraph 2.8.8.

<sup>31</sup> *Ibid*, paragraph 12.2.10.

The Independent Panel did not recommend any legislative change to address this matter.<sup>32</sup>

The Independent Panel also considered whether provision should be made for general merits review of findings of corrupt conduct but did not recommend such a course which "...would involve an inappropriate confusion of administrative and judicial powers".<sup>33</sup>

There was no suggestion by the Independent Panel that anything like an exoneration protocol was required or appropriate.

## The May 2016 Inspector Report

The concept of an exoneration protocol was identified in the 12 May 2016 *Report to the Premier: The Inspector's Review of the ICAC* ("the 2016 Inspector Report").

Recommendation 15 of the 2016 Inspector Report was in the following terms:

*Exoneration Protocol: Consideration should be given to the introduction into the legislation of something with such a title. It should provide that in circumstances where there is an absence of a criminal conviction arising from any prosecution based upon the same or similar or cognate facts as warranted the making by the ICAC of a finding of corrupt conduct, the person against whom the finding was made may make an application to the Supreme Court for an expunging of the records of the ICAC or to have the findings set aside. The ICAC would of necessity be a party to such proceedings.*

In making this recommendation, the then Inspector referred to what he termed the "exoneration" of Murray Kear and John Booth "in court" and the fact that the Commission's findings would "remain on the record".<sup>34</sup> In fact, neither Mr Kear nor Mr Booth were exonerated by a court from the Commission's factual or corrupt conduct findings. They were found not guilty of the criminal offences for which they were prosecuted by the DPP. In those circumstances, it was entirely appropriate that the Commission's findings "remain on the record".

As noted by the current Inspector, Bruce McClintock SC, in his June 2018, *Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar*, the acquittal of criminal charges does not provide a basis for concluding that the Commission was wrong in finding Mr Kear engaged in corrupt conduct:

*...it is worth stating that it is inevitable, because of the different evidentiary regimes that bind them that there will be different results arising out of the same circumstances in controversy before the ICAC and before the courts. That difference does not establish that one of those bodies is right and that the other is wrong in making a particular finding or decision to convict or acquit.*<sup>35</sup>

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<sup>32</sup> Ibid, p. x and paragraph 12.2.12.

<sup>33</sup> Ibid, p. x.

<sup>34</sup> Report to the Premier, *The Inspector's Review of the ICAC*, 12 May 2016, paragraph 19.

<sup>35</sup> *Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar*, 13 June 2018, paragraph 37.

The Commission responded to the 2016 Inspector Report.<sup>36</sup> In particular, the Commission noted that it did not agree with recommendation 15. The reasons given in the Commission's response remain relevant and are worthwhile repeating.

*The recommendation ignores the fact that Commission investigations are separate from criminal proceedings and demonstrates an apparent misunderstanding on the part of the Inspector of the basis upon which corrupt conduct findings are made under the ICAC Act. It also fails to take into account relevant case law.*

*Criminal courts do not operate as a mechanism for review of Commission findings. The fact that a person found to have engaged in corrupt conduct is not prosecuted for a criminal offence or, if prosecuted, not convicted does not "exonerate" that person from a corrupt conduct finding. In any event, criminal proceedings do not "exonerate" a person from a criminal offence. In a criminal court persons are "acquitted" or found "not guilty". They are not found "innocent" or "exonerated".*

*Commission investigations, including hearings, are inquisitorial, not adversarial or criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is, in effect, a standing Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission.*

*The standard of proof in Royal Commissions is the civil standard; that is, on the balance of probabilities. This requires reasonable satisfaction in making findings as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters.*

*Findings of corrupt conduct made on the basis that, for the purposes of s 9(1)(a) of the ICAC Act, the conduct could constitute or involve a criminal offence are not dependent on a person being prosecuted or convicted of that offence.*

*The Commission's task under the ICAC Act is to make findings in respect of allegations of corrupt conduct on the balance of probabilities. The Commission is not required to and cannot make a finding of criminal guilt.<sup>37</sup> What is required is for the Commission to consider whether, if the facts it has found on the balance of probabilities were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. If the Commission is satisfied this would be the case then it has the necessary satisfaction that the relevant conduct could constitute or involve a criminal offence. This approach is consistent with the decision of the NSW Court of Appeal in Greiner v ICAC (1992) 28 NSWLR 125.<sup>38</sup>*

*One reason a person may not be prosecuted is that the offence is out of time. Section 9(2) of the ICAC Act makes it clear that it does not matter that proceedings can no longer be brought or continued.*

*Another reason a person may not be prosecuted is that there may be insufficient admissible evidence. There may be many reasons for this. One possibility is that although a person has*

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<sup>36</sup> Submission to the Premier of NSW on the ICAC Inspector's report on his review of the ICAC, May 2016 (published by the Committee in June 2016 as part of its 2016 review of the Inspector's report).

<sup>37</sup> Section 74B(1) of the ICAC Act.

<sup>38</sup> Gleeson CJ at 136.

*admitted to wrongdoing in a public inquiry or compulsory examination, the evidence was subject to a declaration under s 38 of the ICAC Act which means the evidence cannot be used against the person in any civil, criminal or disciplinary proceedings. The person cannot be compelled to give evidence incriminating himself or herself in a criminal trial. Witnesses who gave evidence to the Commission may not be available to give evidence in criminal proceedings or may not be willing to do so.*

*The Commission's investigative processes are not primarily concerned with the admissibility of evidence in criminal proceedings (deliberately so). It is imperative to the work of the Commission that lines of enquiry are pursued regardless of their potential to result in a successful prosecution. A change of emphasis, which required the Commission to focus on obtaining only evidence which would be admissible in a criminal trial in order to support any corrupt conduct findings, would seriously compromise the capacity of the Commission to expose corruption.*

*Evidence before a court in any criminal prosecution will invariably be different from the evidence before the Commission. The Commission makes its factual findings on the balance of probabilities while a court determines whether the prosecution has proven its case beyond reasonable doubt. Given these differences, it is wrong to confuse the absence of a criminal prosecution with the validity of a corrupt conduct finding.*

*It is clear from cases such as Greiner and Kazal v ICAC [2013] NSWSC 53 that a finding of corrupt conduct is not dependent on a criminal offence being successfully prosecuted. In Greiner Gleeson CJ noted:*

Indeed, a determination of corrupt conduct might be based upon the commission of an alleged crime, and might be followed by a trial of the individual involved, and an acquittal. That could happen for any one of a number of reasons. It could simply be because a jury believed a witness whom the Commission disbelieved, or vice-versa. Even so, the finding of corruption would stand.<sup>39</sup>

*In Kazal, the plaintiff sought a declaration that the Commission's December 2011 report Investigation into the undisclosed conflict of interest of a senior executive of the Sydney Harbour Foreshore Authority was a nullity. The report contained a finding of corrupt conduct against Mr Kazal on the basis that his conduct could, for the purposes of s 9(1)(a) of the ICAC Act, constitute or involve a criminal offence under s 249B(2)(b) of the Crimes Act 1900. The Commission did not recommend that consideration be given to the prosecution of Mr Kazal for this offence because the Commission did not consider there was sufficient evidence admissible in a criminal court to justify such a recommendation. The essence of Mr Kazal's case was that the Commission erred in applying the civil standard of proof upon evidence that would not be admissible in a criminal trial and that in so doing the Commission made a finding of corrupt conduct when the evidence could not support a prima facie case in any criminal prosecution. In dismissing Mr Kazal's summons Harrison J held that:*

As a matter of construction, the words "unless it could constitute or involve...a criminal offence" [in s 9(1)(a) of the ICAC Act] are wholly different from words such as "unless a criminal offence has thereby been successfully prosecuted", or some

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<sup>39</sup> Gleeson CJ at 130-1.

equivalent formulation. Mr Kazal’s argument depends upon some such construction being accepted. In my view, such a construction is not available.”<sup>40</sup>

*The following excerpt from the judgment of Basten JA in the Court of Appeal case of D’Amore v ICAC [2013] NSWCA 187 is also relevant:*

It would clearly be inconsistent with both the function of the Commission and the structure of the Act generally to hold that the Commission must be satisfied beyond reasonable doubt that an offence has been committed. The Commission is not a criminal court and is not required to reach conclusions on the basis of material which would constitute admissible evidence in a criminal proceeding: cf s 17(1). So understood, s 13(3A) requires that the Commission be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence. The combined purpose of ss 13(4) and 74B, is to emphasise that the Commission is not delivering a verdict on a criminal charge.<sup>41</sup>

*Current Commission procedure does address situations where persons are not prosecuted or acquitted following a Commission recommendation that consideration be given to their prosecution. The Commission publishes on its website and in its annual reports the outcomes of all such recommendations. This means that if the DPP decides not to prosecute a person, or a person is found not guilty of a criminal offence, then this information is published on the Commission’s website and in the next annual report.*

*Recommendation 15 also ignores the possibility that there may be no criminal proceedings because the corrupt conduct found by the Commission does not involve a criminal offence. Not all findings of corrupt conduct concern the commission of a criminal offence. Conduct may be corrupt if it comes within the definition in s 8 of the ICAC Act and, for the purposes of s 9 of the ICAC Act, could also constitute or involve:*

- *a disciplinary offence, or*
- *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
- *in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.*

## The ICAC Committee inquiry

In June 2016, the ICAC Committee commenced an inquiry into the issues raised in the 2016 Inspector Report, including recommendation 15.

The majority of submissions to the ICAC Committee inquiry did not support an exoneration protocol.<sup>42</sup>

The ICAC Committee published its report in October 2016. Recommendation 13 in that report was that there should be no exoneration protocol. The ICAC Committee considered that “such a protocol

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<sup>40</sup> Harrison J at [33].

<sup>41</sup> Basten JA at [221].

<sup>42</sup> *Review of the Independent Commission Against Corruption: Consideration of the Inspector’s Reports*, October 2016, paragraph 2.2.



would not be appropriate” as a “...person who has been acquitted by a court of a criminal offence is not necessarily exonerated from a previous ICAC finding”.<sup>43</sup>

In reaching this conclusion, the ICAC Committee also noted (as set out in part 2 of this submission) that the Commission makes its findings on a different standard of proof from the criminal courts and that its findings are based on evidence that is not admissible in court. The ICAC Committee also noted that an exoneration protocol would lead to considerable, expensive litigation and might detract from the proper functioning of the Commission.<sup>44</sup>

The Commission, with respect, agrees with the conclusion reached by the ICAC Committee in October 2016. The Commission does not consider that anything has occurred since then that should lead to any different conclusion being reached.

## The 2017 Acting Inspector Report

In June 2017, the then acting ICAC Inspector released his *Report pursuant to sections 57B & 77A Independent Commission Against Corruption Act 1988: Operation Vesta, Andrew Kelly, Charif Kazal and Jamie Brown complaints* (“the 2017 Acting Inspector Report”).

Recommendation 5 in the 2017 Acting Inspector Report was in the following terms:

*It is recommended that through hearings conducted by the [ICAC Committee], Parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act; and if so, in what circumstances and by what means could an “affected” person pursue exoneration.*

Before examining this recommendation, it is relevant to set out some background information concerning the Commission’s findings in Operation Vesta.

In its December 2011 report, *Investigation into the undisclosed conflict of interest of a senior executive of the Sydney Harbour Foreshore Authority*, the Commission made corrupt conduct findings against Andrew Kelly, a senior executive of the Sydney Harbour Foreshore Authority (SHFA), and Charif Kazal.

The corrupt conduct finding against Mr Kelly was based on his deliberate failure to disclose a conflict of interest involving Mr Kazal and his continuing to deal with SHFA matters affecting Kazal tenancies. The corrupt conduct finding against Mr Kazal was based on him holding out the prospect of employment to Mr Kelly and paying him for his flight and accommodation for a trip they took with the intention that these would tend to influence Mr Kelly to exercise his official SHFA functions in a manner favourable to Kazal business interests.

The Commission was of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kelly for the common law offence of misconduct in public office in relation to his failure to disclose his conflict of interest. The Commission was also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kazal for an offence under s 87 of the ICAC Act of giving false evidence to the Commission. The Commission was not of the opinion that the DPP’s advice should be sought with

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid, paragraph 2.6.

respect to any other offence on the part of Mr Kazal as the Commission did not consider there was sufficient evidence that would be admissible in a court. In both cases, the DPP subsequently recommended against commencing criminal proceedings.

Mr Kazal unsuccessfully sought an order or declaration from the Supreme Court to set aside or declare invalid the Commission's report (see *Kazal v ICAC* [2013] NSWSC 53 above).

Subsequently, each of Mr Kazal, Mr Kelly and Jamie Brown made various complaints to the Inspector concerning various issues relating to the Commission's investigation and its findings. As stated in the 2017 Acting Inspector Report, the substance of their complaints was examined and "...in each case on the basis of the complaints and the existing law, their complaints have resulted in no finding of maladministration or abuse of power or improper conduct by the ICAC".<sup>45</sup>

Neither Mr Kelly nor Mr Kazal were "exonerated" from the factual or corrupt conduct findings made by the Commission.

Given that it is set out in the ICAC Committee's discussion paper,<sup>46</sup> it is important to address the following statement made in the 2017 Acting Inspector Report concerning Mr Kelly and Mr Kazal:

*The consequence is that each has been stigmatised and shamed by a finding that has not been made, and cannot be tested in an environment that has rules of evidence and procedures established over the centuries to ensure a fair and impartial hearing to them and to their opponents.*<sup>47</sup>

The Commission does not accept that the procedures it has adopted, as set out in part 2 of this submission, failed in any respect to "ensure a fair and impartial hearing". It is open to any person claiming that they have been denied a "fair and impartial hearing" to seek judicial redress on the basis of denial of procedural fairness. Although, as with other investigative commissions, the Commission is not bound by the rules or practice of evidence,<sup>48</sup> that does not mean that they are irrelevant to the Commission's proceedings or that the Commission's findings are therefore not soundly based.

## The Inspector's November 2019 memorandum

In November 2019, Mr McClintock, provided the ICAC Committee with a memorandum dealing with a number of matters arising out of his evidence before the ICAC Committee on 18 October 2019 ("the 2019 Memorandum").<sup>49</sup> The 2019 Memorandum addressed, in part, the issue of reputational damage and an exoneration protocol. It is helpful to set out the relevant paragraphs of the 2019 Memorandum:

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<sup>45</sup> Report pursuant to sections 57B & 77A Independent Commission Against Corruption Act 1988: *Operation Vesta, Andrew Kelly, Charif Kazal and Jamie Brown complaints*, June 2017, p. v.

<sup>46</sup> Discussion paper – *Reputational impact on an individual being adversely named in the ICAC's investigations*, May 2020, paragraph 1.29.

<sup>47</sup> Op cit, p. 87.

<sup>48</sup> Section 17(1) of the ICAC Act.

<sup>49</sup> The 2019 Memorandum is published as Attachment Q to the ICAC Inspector's December 2019 Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B(1)(d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act.

- 16 *First, there can be no objection to a requirement that the ICAC publish on its website the fact that a person against whom a finding of corrupt conduct has been made has been subsequently acquitted or related criminal charges. I understand that the ICAC now does so.*
- 17 *Secondly, however, the fact that a person has been acquitted of criminal charges does NOT mean that they have been exonerated from the findings of corruption made against them. The reason is that the ICAC is entitled to take account of evidence which is not admissible in criminal proceedings and commonly does so. For example, the privilege against self-incrimination does not apply in ICAC hearings and witnesses can be compelled to answer questions that may well have that effect. That evidence, however, is not admissible in criminal proceedings. Thus, it is quite possible that a person who admitted to the ICAC that he had engaged in corrupt conduct might still be acquitted because such evidence could not be used in the subsequent criminal proceedings. Such an acquittal could hardly be described as an exoneration.*
- 18 *Thirdly, an acquittal does not mean, necessarily or even probably, that a finding of corrupt conduct was wrong. It may be that the subsequent court decision was itself wrong. I dealt with such a matter in my Special report of the Inspector of the Independent Commission Against Corruption entitled "Report concerning a Complaint by Mr Murray Kear about the conduct of the Independent Commission Against Corruption in Operation Dewar (Special Report 18/04)", dated June 2018. In this connection, I note the comments of The Australian's legal affairs reporter Mr Chris Merritt in the Australian of 25 October 2019:*

But don't forget former emergency services commissioner Murray Kear and businessman Charif Kazal and John McGuigan. All were wrongly accused. ICAC's allegations against Kazal were thrown out by the DPP. Like McGuigan and his associates, Kear was exonerated in court.

*That statement is wrong, or at best, incomplete. As to Mr Kear, see my Special Report referred to above. As to Mr McGuigan, it is incorrect to say that he "was exonerated in court". In fact, both the Supreme Court and the Court of Appeal upheld the findings of corrupt conduct made against Mr McGuigan when challenged by him. Duncan v Independent Commission Against Corruption [2016] NSWCA 143. I am unable to comment concerning Mr Kazal because I represented him prior to my appointment as Inspector in 2017.*

## Conclusion

The issue of an exoneration protocol, as raised in the May 2016 Inspector Report and in the June 2017 Acting Inspector Report, is, for the reasons given above, misconceived.

## Part 4: Relevant practices in other jurisdictions

As noted in the ICAC Committee's discussion paper,<sup>50</sup> an exoneration protocol of the type envisaged by recommendation 15 in the 2016 Inspector Report, and recommendation 5 in the 2017 Acting Inspector Report, does not appear to be in operation in any of the Australian states or territories.

The ICAC Committee's discussion paper refers to s 204(1) of the *Integrity Commission Act 2018* (ACT). That section provides:

- The commission must make protocols (the **reputational repair protocols**) about how the commission is to deal with damage to a person's reputation if -*
- (a) the commission publishes in an investigation report, special report or commission annual report -*
    - (i) a finding or opinion that a person has engaged in, is engaging in, or is about to engage in corrupt conduct; or*
    - (ii) a comment or opinion which is adverse to a person; and*
  - (b) any of the following happens:*
    - (i) the matter is referred to a prosecutorial body but the person is not prosecuted for an offence arising out of the investigation;*
    - (ii) the matter is referred to a prosecutorial body, the person is prosecuted for an offence arising out of the investigation and –*
      - (A) the prosecution is discontinued or dismissed; or*
      - (B) the person is found not guilty of the offence; or*
      - (C) the person is convicted of the offence but the conviction is quashed, nullified or set aside; or*
      - (D) the person is otherwise cleared of wrongdoing;*
    - (iii) the person is the subject of termination action arising out of the investigation and the person is cleared of wrongdoing. [original emphasis]*

This is clearly not an exoneration protocol in the sense envisaged by recommendation 15 in the 2016 Inspector Report and recommendation 5 in the 2017 Acting Inspector Report.

Enquiries with the ACT Integrity Commission indicate that the protocols required by s 204(1) have not been developed to date.<sup>51</sup>

The protocols envisaged by s 204(1) are consistent with this Commission's current practices of publishing the outcomes of its investigations, including details of any prosecution, disciplinary action or litigation, as detailed in part 3 of this submission.

<sup>50</sup> *Discussion paper – Reputational impact on an individual being adversely named in the ICAC's investigations*, May 2020, paragraph 1.61.

<sup>51</sup> Communication on 10 June 2020 with the ACT Integrity Commission chief executive officer.

## Appendix 1: Inquiry terms of reference

That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:

- a. whether the existing safeguards and remedies, and how they are being used, are adequate, and
- b. whether additional safeguards and remedies are needed, and
- c. whether an exoneration protocol should be developed to deal with reputational impact, and
- d. relevant practices in other jurisdictions, and
- e. any other related matters.

# Appendix 2: Standard Directions for Public Inquiries

## FEBRUARY 2018

These directions apply to the conduct of a public inquiry by the Independent Commission Against Corruption (the Commission). They should be read in conjunction with the Procedural Guidelines issued by the Commission under s 31B of the *Independent Commission against Corruption Act 1988* (“the ICAC Act”).

### Sitting times

1. The Commission ordinarily sits from Monday to Friday each week. Usual hearing hours are from 10:00am to 4:00pm, with a luncheon adjournment from 1:00pm to 2:00pm.

### Authorisation to appear and legal representation

2. The presiding Commissioner may authorise a person to appear at a public inquiry or a specified part of a public inquiry if it is shown to the satisfaction of the presiding Commissioner that the person is substantially and directly interested in any subject-matter of the public inquiry. Authorisation can be granted subject to conditions.
3. The presiding Commissioner may withdraw authorisation to appear or make the authorisation subject to altered or additional conditions, at any time.
4. Authorisation to appear entitles the person to whom it is granted to participate in the public inquiry subject to the presiding Commissioner’s control and to such extent as the presiding Commissioner considers appropriate.
5. The presiding Commissioner may authorise:
  - a. a person authorised to appear; or
  - b. a person giving evidence at the public inquiry;to be legally represented at the public inquiry or at a specified part of the public inquiry.
6. Where it is proposed that an application will be made for authorisation to appear and/or for a party or witness to be legally represented, the application should be made in writing (including by email) to the Commission in the first instance. The application should provide the name of the party or the witness, the names of the legal representatives who seek authorisation and the reason(s) why the party or the witness has a sufficient interest.

7. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The presiding Commissioner will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:
  - a. it can be demonstrated that there is some reasonable purpose for seeking representation of that kind;
  - b. the most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated; and
  - c. all of the lawyers involved give an undertaking, through the most senior lawyer, to inform the Commission immediately upon recognising that a conflict of interest has arisen.

#### **Conduct of the public inquiry – witnesses**

8. Subject to the control of the presiding Commissioner, Counsel Assisting will determine what witnesses to call at a public inquiry and the order in which they are called. It may be necessary to call some witnesses to give evidence on more than one occasion. In determining what evidence to place before the Commission Counsel Assisting will consider the credibility, relevance and significance of that evidence and the extent to which such evidence will assist the Commission to make factual and other findings.
9. The presiding Commissioner may decide to receive the evidence of a witness orally or by statement. The presiding Commissioner will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
10. Persons required to give evidence will be provided with appropriate notice of the time the Commission will call upon their summons to attend and give evidence. Witnesses with a particular period of unavailability are required to give notice of that unavailability to the Commission at the earliest possible opportunity.
11. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
12. All witnesses will be called to give evidence by Counsel Assisting, and then examined by Counsel Assisting. If there is more than one Counsel Assisting there may be circumstances in which a witness might be examined by more than one of the Counsel Assisting. The witness may then be cross-examined by or on behalf of any person considered by the presiding Commissioner to have sufficient interest to do so. The witness may then be examined by his or her own legal representative. Counsel Assisting may re-examine. Duplication and repetition must be avoided.

13. In determining whether a person has sufficient interest to cross-examine a witness, the presiding Commissioner may call upon the cross-examiner to:
  - a. identify the purpose of the cross-examination;
  - b. set out the issues to be canvassed; and
  - c. state whether a contrary affirmative case is to be made, and if so the details of that case.
14. Where, in the opinion of the cross-examiner, public disclosure of any of the matters referred to in paragraph 13 would substantially undermine the forensic utility of the cross-examination, the cross-examiner may, with the leave of the presiding Commissioner, address those matters in writing. To that end, the cross-examiner must be in a position to do so when called upon by the presiding Commissioner.
15. The presiding Commissioner may:
  - a. limit the particular topics or issues upon which a party can examine or cross-examine; and
  - b. impose time limits upon examination or cross examination.
16. Save as set out in paragraphs 17 to 19 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.
17. The Commission expects that, where it is to be invited to reject or not accept the evidence of a witness on a material fact or issue, on the grounds the witness deliberately gave false evidence, the evidence is unreliable, or the witness has made a mistake on a significant issue, the material grounds of such contention must be put to the witness to allow the witness an opportunity to offer an explanation.
18. What is stated in paragraph 17 is not intended to mean that:
  - (a) mere inconsistencies and unimportant differences in the evidence should be raised;
  - (b) once the grounds for rejecting or not accepting the evidence of a witness have been put by one party, other parties need to put them again; or
  - (c) the grounds for rejecting or not accepting the evidence of a witness need to be put where the Commission is on notice from statements made during the public inquiry by or on behalf of a party, or that party's evidence, or from the general way in which the party has conducted its previous questioning, or some similar source, that the witness's evidence is under challenge on those grounds.
19. Once a witness has been cross-examined on a particular issue, no further cross-examination on that issue will be allowed unless the person wishing to cross-examine the witness on that issue can demonstrate the proposed cross-examination differs to a significant degree from the cross-examination that has taken place.



20. The procedure to be followed by any person seeking to place evidence before the public inquiry is set out in the s 31B Procedural Guidelines.
21. Leave may be granted to any affected person (under s 74A(3) of the ICAC Act) to adduce mitigatory evidence bearing upon the exercise by the Commission of its powers under s 74A(2) of the ICAC Act. Any affected person wishing to adduce such evidence should apply for leave prior to the close of evidence at the public inquiry.

### **Conduct of the public inquiry – documents**

22. The s 31B Procedural Guidelines set out the circumstances and procedure by which access will be given to documents prior to the commencement of the public inquiry.
23. Subject to the control of the presiding Commissioner, Counsel Assisting will determine which documents are tendered, and the time at which they will be tendered.
24. A copy of any document proposed to be put to a witness in cross-examination must be provided to Counsel Assisting as soon as possible after a decision is made to use the document for such purpose. In all cases, the document must be provided to Counsel Assisting prior to the commencement of the cross-examination.
25. Any person wishing to have a document placed before the public inquiry must notify the Commission by providing a copy of the document. Commission staff may require the production of other documents. Counsel Assisting will decide whether or not to tender any document. An application may be made directly to the presiding Commissioner to tender a document only after the above procedure has been completed, and Counsel Assisting has refused to tender the document.

### **Suppression orders**

26. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
27. Parties granted confidential electronic access to documents should notify the Commission lawyer with carriage of the matter of any application for a suppression order in relation to any document or part of a document. Such notification is to be in writing and must be made as soon as possible. The application should clearly identify the material sought to be suppressed and the public interest grounds on which the material should be suppressed.
28. The presiding Commissioner will determine whether or not to hear oral submissions in support of such written applications.

29. Those making such written applications for suppression orders will be advised once the applications have been determined.

**Publication of, and access to, evidence.**

30. In respect of all evidence, oral and documentary, the following ruling will apply until vacated either generally or in respect of particular evidence:
- a. the testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence;
  - b. any person (or the legal representative of that person) having leave to appear before the Commission will have access to any book, document or writing tendered in evidence for the purpose only of appearance before the Commission and subject to any other direction made by the Commission;
  - c. for the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station, online publication or television channel may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by Counsel Assisting, subject to the conditions that:
    - i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
    - ii. any part of the contents thereof indicated by Counsel Assisting as unsuitable for publication must not be published without the leave of the Commission. Such leave can be sought, for example, if there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor to the Commission.

**Submissions**

31. Unless otherwise ordered, at the conclusion of the evidence oral submissions will not be allowed but orders will be made for the making of written submissions. The Commission may limit the particular topics or issues which may be addressed, and impose time or page limits on submissions. Ordinarily, orders will be made requiring Counsel Assisting to provide written submissions within 14 days of the close of evidence and all other parties to provide their written submissions 14 days thereafter.
32. In accordance with Commission practice, a suppression order under s112 of the ICAC Act will usually be made in relation to all written submissions. Ancillary orders may be made to permit publication of certain submissions to specified parties to ensure procedural fairness.

**Liaison with the Commission**

33. Any contact with the Commission made necessary by these directions, or other enquiries in respect of the conduct of the public inquiry, should be made through the Commission lawyer with carriage of the relevant investigation to which the public inquiry relates.

# Appendix 3: Public Inquiry Procedural Guidelines

## 1. Preliminary

- 1.1 These Procedural Guidelines (“the Guidelines”) are issued in accordance with the provisions of s 31B of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) and are directed to members of the Commission’s staff and counsel appointed under s 106 of the ICAC Act to assist the Commission (“Counsel Assisting”).
- 1.2 In accordance with s 31B of the ICAC Act, the Guidelines provide guidance to Commission staff and Counsel Assisting on a number of aspects of the conduct of public inquiries, in particular in respect of the matters referred to in s 31B(2) (a) to (e) of the ICAC Act.
- 1.3 The manner in which the Guidelines, or any one or more of them, are implemented in respect of a particular public inquiry, and the timing of such implementation, are matters that are within the discretion of the presiding Commissioner. The presiding Commissioner will take into account the following:
- a) the efficient conduct of the public inquiry;
  - b) the effective pursuit of the Commission’s functions under Part 4 of the ICAC Act;
  - c) the requirements of procedural fairness as determined by the presiding Commissioner that apply in respect of affected persons during the public inquiry in question having particular regard to the matters addressed in s 31B of the ICAC Act; and
  - d) such other matters that the presiding Commissioner considers are relevant to the public inquiry including protection of the public interest and the prevention of breaches of public trust.<sup>52</sup>

## 2. Section 31B of the ICAC Act

- 2.1 Section 31B of the ICAC Act provides that:
- (1) The Commissioners are to issue guidelines relating to the conduct of public inquiries of the Commission to members of staff of the Commission and counsel appointed under section 106 to assist the Commission.

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<sup>52</sup> Section 12 of the ICAC Act.

(2) The guidelines are to provide guidance on the following aspects of the conduct of public inquiries:

- (a) the investigation of evidence that might exculpate affected persons,
- (b) the disclosure of exculpatory and other relevant evidence to affected persons,
- (c) the opportunity to cross-examine witnesses as to their credibility,
- (d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- (e) any other matter the Commission considers necessary to ensure procedural fairness.

(3) The Commission is to arrange for the guidelines to be tabled in both Houses of Parliament and to be published on a website maintained by the Commission.

(4) In this section:

***affected person*** means a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned.

2.2 The ICAC Act does not define “exculpatory evidence”. For the purpose of the Guidelines, “exculpatory evidence” means credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission’s investigation.

### **3. The investigation and consideration of evidence that might exculpate affected persons**

3.1 A key consideration in determining what evidence to obtain during the course of an investigation is the extent to which it will enhance the ability of the Commission to establish the truth. Relevant evidence includes exculpatory evidence.

3.2 The investigation case manager is responsible for determining the most appropriate investigation strategy. The investigation strategy should include consideration of any reasonable steps that can be taken to identify and follow investigative leads which suggest that exculpatory evidence exists. Commission staff involved in the investigation should bring to the attention of the investigation case manager exculpatory evidence of which they are aware and investigative leads that suggest to them, on reasonable grounds, that exculpatory evidence may exist.

3.3 During the pre-public inquiry stage of an investigation, the investigation case manager should ensure, in consultation with the senior case lawyer assigned to the investigation, that relevant material, including exculpatory evidence, within the Commission’s holdings is registered in the Commission’s case management system and entered into the Commission’s records management systems. Any question as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer.

- 3.4. Prior to the commencement of the public inquiry, the investigation case manager and the senior case lawyer should further consult in relation to the Commission's holdings to consider whether any material, including material that has not been registered in the Commission's case management system and entered into the Commission's records management systems, has become relevant to the Commission's investigation. This includes evidence that, as a consequence of the progress of the Commission's investigation, is exculpatory. Any question as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer. In the case of material that has become relevant to the Commission's investigation, but has not been registered in the case management system and entered into the Commission's records management systems, the investigation case manager should take steps to have such material registered and entered.
- 3.5 The senior case lawyer, in consultation with the investigation case manager, is responsible for determining the material that will comprise the brief to Counsel Assisting.
- 3.6 The senior case lawyer will ensure that exculpatory evidence that has been obtained during the pre-public inquiry phase of an investigation is included in the brief of evidence for Counsel Assisting. The senior case lawyer will also bring to the attention of Counsel Assisting any exculpatory evidence that comes to his or her attention during the public inquiry, the existence of which is unknown to Counsel Assisting. In either case, Counsel Assisting will bring such evidence to the attention of the presiding Commissioner, who may direct that further investigation be undertaken.
- 3.7 During the course of a public inquiry, an affected person may seek to place exculpatory evidence before the Commission. If so, the affected person should nominate in writing a person or persons who can give the evidence. The affected person should identify in writing any documentary material that the affected person contends is exculpatory. The affected person should also provide a statement of the proposed evidence or, if that is not possible, a written proof of the evidence that the affected person believes that a witness can give. Copies of the relevant documents, statements or proofs of evidence must be provided to Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the investigation, becomes known. In consultation with the presiding Commissioner, Counsel Assisting will determine whether such evidence requires further investigation by the Commission, whether any nominated person should be called to give evidence, or whether any document should be tendered.

#### **4. The disclosure of exculpatory and other relevant evidence to affected persons**

- 4.1 The Commission's duty to afford procedural fairness to an affected person requires it to provide the affected person with material that is adverse to that person and upon which the Commission may rely. The affected person should be given a reasonable opportunity to consider and respond to that material. Where the Commission's investigation includes a public inquiry, it will make available to an affected person exculpatory evidence in its possession. The timing of the disclosure of any such evidence, and the form in which disclosure will be made, are matters for the presiding Commissioner.
- 4.2 Where Counsel Assisting is aware of evidence, which is adverse to the interests of an affected person and Counsel Assisting intends to rely upon such evidence to contend that an adverse finding, or findings, against that person should be made, Counsel Assisting will ensure that the substance of that evidence is disclosed to the affected person.
- 4.3 Where Counsel Assisting intends to contend that the evidence of a witness should be preferred over that of an affected person for the purpose of the Commission making a finding about the affected person and Counsel Assisting is aware that:
- (a) the witness has made an inconsistent statement or previously given inconsistent evidence,
  - (b) the witness has been subject to an adverse finding as to credibility,
  - (c) the witness suffers, or has suffered, from any physical or mental condition that may affect the reliability of the person's evidence,
  - (d) a concession or benefit has been offered or provided to the witness to secure that person's evidence, or
  - (e) the witness has been convicted of any criminal offence or is, or has been, the subject of disciplinary proceedings relevant to the conduct of the investigation,

Counsel Assisting will disclose that information to the affected person at an appropriate time.

#### **5. The opportunity to cross-examine witnesses as to their credibility**

- 5.1 Persons that the presiding Commissioner determines have a sufficient interest may apply to cross-examine a witness during the course of a public inquiry, including as to the witness's credibility.
- 5.2 A witness may only be cross-examined with the leave of the presiding Commissioner and only in respect of a matter that the presiding Commissioner considers is relevant to the investigation.<sup>53</sup>

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<sup>53</sup> Section 34(1) of the ICAC Act.

5.3 Leave will be given to cross-examine a witness as to his or her credibility where the presiding Commissioner considers that the credibility of the witness is of sufficient relevance to the investigation.

## **6. Access to relevant documents and a reasonable time to prepare before giving evidence**

6.1 Where it is proposed to require a person to appear before the Commission at a public inquiry, the person will be given reasonable notice in order to prepare for, and participate in, the public inquiry, including to seek legal advice or arrange for legal representation. What is “reasonable notice” will depend on the particular circumstances of the case, including the individual circumstances of the person whose appearance is required, operational exigencies and the balance of convenience.

6.2 The rules of procedural fairness, as they apply to the Commission, do not require the Commission to provide a witness with access to any evidence before the witness is examined.

6.3 Where to do so would not prejudice the investigation, the Commission may provide a witness with access to relevant documents before the public inquiry or before the witness is examined. A decision as to whether relevant documents will be disclosed to a witness before the witness is required to give evidence in a public inquiry, the extent of the disclosure, and the method of disclosure will be determined by the presiding Commissioner.

6.4 Any document that is to be disclosed may be subject to the redaction of information of a private or personal nature that is not relevant to the investigation. If the information is relevant to the investigation, but its disclosure would adversely affect the privacy or reputation of a person who is not the subject of the investigation, the Commission will consider what measures should be taken to protect the privacy or reputation of that person, including whether any directions should be made under s 112 of the ICAC Act, prior to making the information available to the witness.

6.5 The Commission maintains a restricted access portal on its public website for the purpose of:

- (a) providing authorised persons (witnesses and their legal representatives and other parties deemed to have sufficient interest in the subject matter of the investigation to warrant access) with access to relevant documents, and
- (b) providing authorised persons with access to relevant documents, once a public inquiry has commenced, including documents proposed to be made exhibits.

6.6 The Commission’s restricted access portal may be used for the disclosure of relevant documents to authorised persons for the purpose of a public inquiry where, in the Commission’s opinion, the use of that website represents the best balance of efficiency and



security. Otherwise, portable electronic media storage (that is, DVD or USB) may be used for the disclosure of relevant documents to authorised persons, or the presiding Commissioner may approve the provision of physical copies of the relevant documents.

- 6.7 Where the disclosure of relevant documents to a witness prior to a public inquiry is authorised, the senior case lawyer assigned to the investigation will be responsible for making arrangements for the witness or their legal representative to have access to those documents according to the agreed method of disclosure.
- 6.8 Counsel Assisting may tender as exhibits relevant documents during the course of a public inquiry. Subject to any non-publication direction under s 112 of the ICAC Act, any person (or the legal representative of that person) having leave to appear before the Commission, or any other person who has a significant interest in the issue(s) to which the exhibit relates, is entitled to have access to the exhibit. Such access is subject to any direction made by the presiding Commissioner and will usually be provided by publishing the exhibit on the Commission's public website.
- 6.9 The presiding Commissioner may consider adjourning the evidence of a witness if satisfied it is appropriate to do so to enable the witness to have sufficient time to prepare before giving evidence, or giving further evidence, or to consider evidence placed before the public inquiry in respect of which the witness previously did not have knowledge.

## **7. Other considerations necessary to ensure procedural fairness**

- 7.1 A person required to attend a public inquiry is entitled to be informed, before or at the time of their appearance, of the nature of the allegation or complaint being investigated and the general scope and purpose of the public inquiry.<sup>54</sup> The Commission does not fail to provide procedural fairness merely by not providing this information at an earlier point in time than required.
- 7.2 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be set out in each summons served on a witness requiring attendance at the public inquiry.
- 7.3 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be announced by the presiding Commissioner at the commencement of the public inquiry and will be published on the Commission's public website. The opening address of Counsel Assisting will provide further information concerning the allegations under investigation,

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<sup>54</sup> Section 30(3) and s 31(6) of the ICAC Act.

which may include the identity of each affected person, as known by the Commission at the time of the commencement of the public inquiry.

- 7.4 The Commission will seek to ensure that an affected person has a reasonable opportunity to address material, upon which the Commission may rely, which is adverse to his or her interests.
- 7.5 Counsel Assisting should bring to the attention of any affected person, either through the process of examination of the affected person or other witnesses, the tendering of documentary or other evidence in the course of the public inquiry or by way of submissions, potential adverse findings against the affected person that Counsel Assisting contends should be made by the Commission, and the substance of the evidentiary grounds for such findings.
- 7.6 If any further potential adverse findings are identified during the drafting of the investigation report that were not identified in Counsel Assisting's submissions, the Commission will notify the relevant affected person(s) of the potential adverse finding and provide the person(s) with an opportunity to make submissions in relation to the potential adverse finding.