Submission No 8

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

Organisation: Office of the Inspector of the Independent Commission Against Corruption

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Mrs Tanya Davies
Chair, NSW Parliamentary ICAC Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mrs Davies

This letter sets out my views as Inspector on the matters raised in the *Discussion Paper-Reputational Impact on an Individual being adversely named in the ICAC's Investigations*.

Put shortly, I regard such a protocol as both unnecessary and inimical to the effective operation of the Commission. Further, it is likely to increase existing misperceptions of the Commission's role.

I have expressed these views on a number of previous occasions and see no reason now to come to any different conclusion. One such occasion is the memorandum referred to in paragraphs 1.31-1.35 of the Committee's Discussion Paper dated May 2020- Attachment Q to the *Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section57B(1)(d) thereof into the Independent Commission Against Corruption's procedures to dealing counsel assisting in investigations and enquiries under Part 4 of the Act*. In that memorandum which was dated 25 November 2019 I said:

15. *In the Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC by the Joint Parliamentary Committee on the Independent Commission Against Corruption to which I refer above there are references to the issue of reputational impact and methods of dealing with it, for example, by way of some form of exoneration protocol. This is a slightly more general issue than the one raised with me during my evidence by Mr Ron Hoenig and with which this memorandum is intended to deal. Nevertheless, may I make a couple of points.*

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 of 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 businessmen 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,

19. *I look forward to assisting the Committee in relation to this matter as well as with the role of counsel assisting.*

Thus, I agree with the position adopted by the Committee in its Report of October 2016. The relevant parts of that report are referred to in paragraphs 1.21-1.23 of the Discussion Paper. It follows that I disagree (strongly) with the views expressed by my predecessors Messrs Levine and Nicholson.

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This matter was also dealt with in the Report of the *Independent Panel-Review of the Jurisdiction of the ICAC* in which I prepared with the Hon. Murray Gleeson AC in 2015:

3.4.1 *As an administrative body, the ICAC is subject to the supervisory role of the Supreme Court of New South Wales exercised under the Supreme Court Act 1970. The Supreme Court has both an inherent and a statutory jurisdiction to ensure that the ICAC carries out its functions and performs its duties in accordance with law. The decision in Cunneen was an exercise of that jurisdiction.*

3.4.2 *There is an important difference between the kind of judicial review referred to in paragraph 3.4.1 and an appeal of the kind that exists in respect of a judicial decision. The presently relevant grounds of potential judicial review of an ICAC report were summarised by McDougall J in Duncan v ICAC as follows:*

(1) *there is a material error of law on the face of the record (which includes the reasons given for the decision…);*

(2) *the reasoning is not objectively reasonable, in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences therefrom;*

(3) *there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;*

(4) *relevant matters have not been taken into account, or irrelevant matters have been taken into account; and*

(5) *there has been a material denial of natural justice.*

3.4.3 *What is not available as a ground of review is the most common ground in appeals from a court: that the decision was wrong because it was affected by a mistake of fact. In brief, there is no merits review of an ICAC finding.*

3.4.4 *The reason no merits review is available is the administrative nature of the process. What is involved is not a judicial decision; it is an investigator's report of his or her findings and opinions at the conclusion of the investigation.*

3.4.5 *To make merits review available in respect of ICAC reports would require either a substantial alteration to the character of the Supreme*

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Court's jurisdiction under the Supreme Court Act, which, in turn, would have consequences in respect of other administrative bodies, or the creation of a new form of internal or external review.

3.4.6 The New South Wales Bar Association made a submission to the Panel which recognised the problem referred to in paragraphs 3.4.4 and 3.4.5. It argued that an appropriate form of review would be one analogous to that undertaken by the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977 (Cth), with any counterpart of section 5(1)(h) framed in more expansive language such as: "the decision was not reasonably supported by the evidence or other material before the Commission".

3.4.7 The ground in section 5(1)(h) is "that there was no evidence or other material to justify the making of the decision". That is not merits review. What is proposed seems more like an expanded form of what is sometimes called Wednesbury unreasonableness. It appears close to administrative oversight rather than judicial review.

3.4.8 In addition to the risk of confusion of judicial and administrative functions, the Panel considers that to provide for merits review would add to the problem of misunderstanding as to the ICAC's role. It would make it look even more like a court.[footnotes omitted]

Subject to two matters, I do not wish to add anything to the views I have expressed previously and which are set out or referred to above. The first such matter is to consider the meaning of the word "exoneration" as used in this context. It seems to be assumed that a subsequent acquittal of a person found to have engaged in corrupt conduct by the ICAC is an "exoneration". That is not the case. The reason for such an acquittal might, for example, be that the evidence before the court differed from that before the ICAC. For example, a confession of guilt of corrupt conduct by the person being prosecuted to the ICAC may very well not be admissible in those criminal proceedings. I pointed to examples in paragraph 18 of my 25 November 2019 memorandum. Put shortly, such an acquittal does not vitiate an earlier finding of corrupt conduct by the ICAC. It cannot, therefore, be seen as an "exoneration", whatever that word is intended to mean.

The second such matter is that any "exoneration protocol" will involve cost which will inevitably be born ultimately by taxpayers of New South Wales. It will also absorb the resources of the ICAC which are stretched at the best of times. This would particularly be so if Mr Levine's proposal that an application to the Supreme Court for the expungement of the ICAC records or to have the findings set aside, as set out in paragraph 1.15 the Discussion Paper, were to be adopted.

I do not believe any rational cost benefit analysis favours adoption of this proposal.

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There is one additional matter that is not directly raised by the terms of reference for this inquiry but which could conveniently be considered in it. That is the protection by the Commission of the identity of persons who have a mere association with an investigation but who themselves are not being investigated or are the subject of allegations of corrupt conduct.

My Office has dealt with several complaints over the years from persons who have been caught up in a Commission public inquiry but have not themselves been the subject of an investigation. Those complainants have often raised concerns about the reputational impact of being involved in a Commission inquiry. I am a strong supporter of the educational function that public inquiries serve which have been invaluable in exposing corrupt conduct in NSW for over 30 years. That should continue, but this inquiry may provide an opportunity to consider ways in which the reputations of people that are simply providing information to the Commission as part of an investigation could be protected if that is thought appropriate.

I am aware that in several of its publicly released reports the Law Enforcement Conduct Commission has used pseudonyms to protect the identity of police officers who are witnesses in an investigation. Whether such an approach is appropriate for ICAC could be considered as part of this inquiry.

Yours sincerely,

Bruce McClintock SC
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