

**Submission
No 11**

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

Name: Mr Nick Cowdery

Date Received: 28 July 2020

Inquiry into the Reputational Impact on an Individual being Adversely Named in the ICAC's Investigations

SUBMISSION BY: PROFESSOR NICHOLAS COWDERY AO QC FAAL

28 July 2020

I was invited by email message on 18 May 2020 to make a submission to the inquiry. The message was addressed to me and was sent to the email address of the New South Wales Council for Civil Liberties of which I am currently President; however, this submission is made in my personal capacity. The Council intends to make a separate submission.

I am presently (among other appointments) an Adjunct Professor in the Sydney Institute of Criminology, University of Sydney and a Visiting Professorial Fellow in the Faculty of Law, University of New South Wales. I am a former Director of Public Prosecutions for NSW (1994-2011) and I was a Barrister from 1971 to 2017. I have been an Associate (Acting) Judge of the District Court of NSW for periods in 1988, 1989 and 1990. I am a member of the Centre for Public Integrity (www.publicintegrity.org.au) Committee for a National Integrity Commission.

On 23 June 2016 I made a submission to this Committee during its Inquiry into the "ICAC Inspector's Report to Premier: The Inspector's Review of the ICAC" and a copy of that submission is **enclosed**. I adhere to the views I expressed four years ago.

As a practising criminal lawyer for over 46 years I became acutely aware of the risk of reputational damage to persons adversely named in the course of criminal proceedings and the measures available to mitigate unwarranted risk. I am also cognisant of similar risk and the need for mitigation measures in the context of ICAC inquiries. That said, in criminal proceedings and ICAC proceedings reputations are necessarily and justifiably harmed when misconduct is exposed.

One of the matters the Committee will need to keep in mind, in my view, is just what is meant by being "adversely named" in an ICAC investigation, because any measures in place to address such an event will need to be proportional to both the degree of "adversity" and the level of any resulting reputational impact. In my view that is an argument against the creation of any effective exoneration protocol of universal application.

The central issue, in my view, is the nature of measures that may be able to be put in place to help avoid unwarranted adverse naming and harm mitigation measures that may help repair reputation where the adverse naming later turns out to have been unwarranted.

PUBLIC HEARINGS

It would be unfortunate if this Committee directed this inquiry towards the desirability of public ICAC hearings; because the arguments in their favour are, in my view, unassailable. I refer to the following three papers that are also **enclosed** with this submission:

- Australia Institute National Integrity Committee: National Integrity Commission – Design Blueprint Part 3 – Public Hearings, 9 April 2018: <https://www.tai.org.au/content/national-integrity-commission-papers>

- Accountability and the Law Conference, August 2017 – paper by David Ipp AO QC, especially pages 7-9

- Paper by Hon Anthony Whealy QC, July 2018: Reputations trashed? Case studies of Charif Kazal and Murray Kear (available on the website of the Centre for Public Integrity)

The question needs only to be asked: how effective would the Hayne Royal Commission into banking and insurance have been if those proceedings had been held in private?

That said, I address the Terms of Reference and the Discussion questions in the Discussion paper.

TERMS OF REFERENCE

“a. whether the existing safeguards and remedies, and how they are being used, are adequate, and”

- In my submission they are, for the reasons illustrated in the Discussion paper. I no longer have direct experience in the practice of the ICAC, but the safeguards and remedies now available are adequate if applied in good faith.

“b. whether additional safeguards and remedies are needed, and”

- In my view there is no need for any additional safeguard or remedy to be created.

“c. whether an exoneration protocol should be developed to deal with reputational impact, and”

- In my view, no (see below).

“d. relevant practices in other jurisdictions, and”

- I make no submission about relevant practices in other jurisdictions, other than to note the ACT move towards an exoneration protocol which I do not support.

“e. any other related matters.”

DISCUSSION QUESTIONS (1)

- Is an exoneration protocol needed to deal with certain circumstances where individuals suffer reputational impact from being adversely named in the ICAC's investigations?

- If so:

- ♣ In what circumstances would an exoneration protocol be useful?
- ♣ Who should have access to an exoneration protocol?
- ♣ What kinds of reputational impact may be relevant to consider?
- ♣ How might an exoneration protocol work in practice?
- ♣ Should an exoneration protocol apply retrospectively, to cover cases of reputational impact from the past?

- If not:

- ♣ What are the reasons for not developing an exoneration protocol?

In my view an exoneration protocol is not needed and is not desirable. There would also be practical impediments in the way of designing an effective one of universal application. I repeat my submissions in relation to Recommendation 15 in my submission of 23 June 2016. I adopt the reasoning of Mr McClintock SC set out in the Discussion paper at paragraphs 1.31 to 1.35. If the measures presently in place are applied, there is no need for it – even following a public hearing.

I have previously supported consideration of the creation of a review process that may enable a wronged person to obtain acknowledgement of error in exceptional cases; but that would be different from a standing exoneration protocol.

DISCUSSION QUESTIONS (2)

- Are existing safeguards and remedies available to the ICAC and the Inspector of the ICAC adequate to minimise the risk of reputational impact from being adversely named in the ICAC's investigations?

In my view, yes. Paragraphs 1.38 to 1.56 of the Discussion paper describe adequate safeguards of this nature.

- Are there any improvements that could be made to existing remedies and safeguards? If so, how could these be implemented?

I have none to suggest.

- Are there any additional safeguards and remedies that could be considered? If so, how could these be implemented?

I have none to suggest.

DISCUSSION QUESTIONS (3)

- Are there any other examples of similar anti-corruption, investigatory or administrative bodies that have relevant practices dealing with issues relating to reputational impact?

I am sure there are (in Australia and elsewhere), but I have no specific knowledge to impart.

- Has an exoneration protocol or similar process been considered in a relevant context in other jurisdictions?

I do not know.

- What processes do other jurisdictions have in place which might limit reputational damage in the first instance?

I have no particular knowledge of such processes.