Submission No 17

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

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Reputational impact on an individual being adversely named in ICAC investigations

This submission responds to the Committee's invitation to comment on reputational impact of adverse naming by the Independent Commission Against Corruption (ICAC), including the potential development of an exoneration protocol.

In summary, we suggest that naming of individuals by ICAC is a legitimate aspect of the Commission's operation under the *Independent Commission Against Corruption Act 1988* (NSW). Adverse naming has a significant deterrent effect, individual and collective. It is a feature of investigations by other anti-corruption agencies and of investigations by royal commissions and other bodies that conduct inquiries in the public interest. Sunlight remains the best disinfectant for corruption and for the community disengagement evident at all levels of Australian government.

We note that the Act validly permits a preliminary inquiry before legal proceedings are commenced. We consider that individuals who have been adversely named by ICAC but not convicted as a result of such proceedings have mechanisms outside the Act to affirm their integrity.

Development of an exoneration protocol should be considered as part of ongoing review of ICAC's operation. However, absent an egregious misuse of power by the Commission that substantively erodes an individual's public standing without cause we do not consider establishment of a protocol is imperative.

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Reputational impact on an individual being adversely named in ICAC investigations

This submission

The submission is made by Assistant Professor Dr Bruce Baer Arnold (University of Canberra) and Associate Professor Dr Brendon Murphy (Australian Catholic University).

Both authors teach law, have published on administration and law enforcement, and have a particular interest in the operation of gatekeeper agencies at the national and state/territory levels, especially in relation to the engagement of those agencies with the professional and general communities. They have provided a range of invited testimony and submissions to parliamentary inquiries and law reform commissions, include those regarding national law enforcement and Victoria's integrity regime.

The submission does not represent what would be reasonably construed as a conflict of interest.

The submission draws on our study and publication regarding Australian and overseas watchdog agencies and on the operation of Australian law enforcement, defamation, mandatory disclosure and whistleblowing statutes.

The following paragraphs contextualise our comments and then address the specific Terms of Reference for the Committee's inquiry.

Context

The Independent Commission Against Corruption (ICAC), alongside other anti-corruption bodies such as the Independent Broad-based Anti-Corruption Commission in Victoria and the Western Australia Corruption & Crime Commission, has been criticised as a 'star chamber', overly powerful and inadequately accountable. We note that such claims are made of inquiries, such as royal commissions, that do not have the ongoing status of ICAC but like ICAC serve to reveal practices that are unethical and illegal, particularly conduct of those with substantial political and financial power.

ICAC is justified as a mechanism that addresses two problems:

- the existence of corruption within the public sector and, more broadly,
- disengagement by the community from democratic processes and the justice system that is in part attributable to perceptions of corruption

The ANU 2019 Australian Election Study reported that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s, with trust in government having reached its lowest level on record. Just 25% of Australians believe people in government can be trusted, 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'.

That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia's democracy is working. Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves.

That erosion of trust is unsurprising given

- a succession of media reports regarding infighting at the state/territory and national level within political parties (reflected in popular disquiet about the replacement of leaders and with leaked reports of what MPs say about members of their own party)
- indications of corruption at all levels of government, in particular local government (notably regarding property development) but extending to illegality that has seen Ministers in several jurisdictions serve time in a corrections institution
- damning criticisms by courts of executive accountability, for example *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 and *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732
- disregard by Ministers of community expectations regarding expenses, reflected in last week's resignation of three South Australian ministers and the state's Legislative Council President over expenses claims
- a failure on the part of Governments to address damning reports such as last month's Australian National Audit Office *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999* report
- the superficiality of 'Open Government' initiatives at the national, state/territory and local government levels, reflected in international corruption barometers.

There is no single and immediate solution to an increasing democratic deficit, in which people respond by disengaging from conventional politics and the justice system (evident in the contemporary United States and the re-emergence of extremist fringe parties across the globe). However, anti-corruption initiatives that are adequately resourced, sustained and vigorous will reinforce trust by the community and within the public sector. They are necessary to encourage people to speak out and to offset influence buying. The traditional maxim that sunlight is the best disinfectant for corruption – and for misplaced fears regarding corruption – holds good.

In that environment it is legitimate that ICAC is seen to vigorously investigate corruption within the NSW public sector. Such investigation will on occasion disquiet some individuals and vested interests. That disquiet is unremarkable; it is what the community expects from an anti-corruption agency and from royal commissions. An inquiry that disquiets no-one is an ineffective inquiry and thus a waste of public resources. Being identified as a person of interest in a corruption inquiry, with related findings, is a central measure of accountability. It offers significant deterrence, both specific and general.

We are conscious of the potential for abuse in any inquiry, particularly an investigation that takes place under the strong powers provided by the *Independent Commission Against Corruption Act 1988* (NSW). As we discuss below, the likelihood of abuse is minimised through appropriate selection of the Chief Commissioner and Commissioners, oversight by the Inspector of the Independent Commission Against Corruption, public and parliamentary scrutiny of ICAC's operation, and the autonomy provided under the Act.

We have not seen an egregious misuse of power by the Commission in an unjustifiable erosion of an individual's public standing. There does not appear to be a substantive basis for an exoneration protocol that is specific to ICAC. Harms regarding personal reputation are more appropriately and effectively addressed outside such a protocol. However, as we discuss below an exoneration protocol as an option may prove useful for those rare cases where a person has been wrongly implicated in a corruption inquiry.

Addressing the Terms of Reference

whether the existing safeguards and remedies, and how they are being used, are adequate

In addressing that Term of Reference, we have two comments.

The first is that adequacy should be construed as a matter of minimising unjustifiable substantive harms to personal reputation, for example loss of employment or social shunning following appearance in a report by the Commission. The reference to 'unjustifiable' is salient because the task of ICAC, consistent with contextualisation above, is to investigate and where appropriate to alert prosecutors to the scope for criminal action. ICAC's mission is broader than merely providing guidance about process improvement in public sector entities, a task that is also undertaken by the NSW Audit Office. A key facet of ICAC's mission is individual and institutional naming to provide a significant deterrent effect, individual and collective. In undertaking its mission ICAC will on occasion cause substantive harm to a reputation but that harm will be a consequence of an individual or other entity's wrongdoing and thus justifiable.

The second comment is that there have been no persuasive indications that someone's reputation has been negligently or wilfully destroyed without cause through adverse naming by the Commission. We have for example not sighted robust and sustained condemnation by the NSW Supreme Court or by the Australian High Court to the effect that ICAC is acting ultra vires, is fostering needless prosecutions (ie where there is little likelihood of convictions) or is destroying the reputation of innocent people by holding them to standards of probity that can only be met on a truly exceptional basis. In the absence of such indications there is no reason to believe that ICAC's approach to adverse naming is defective. The difficulty, it seems, is the fact that the type of conduct of interest to the ICAC is not always a criminal offence.

We discuss remedies outside the *Independent Commission Against Corruption Act 1988* (NSW) below.

whether additional safeguards and remedies are needed

Our view is that additional safeguards of reputation are not needed. We supplement that assessment with three comments.

The first is that meaningful oversight of ICAC is provided by the Inspector of the Independent Commission Against Corruption.

The second is that individuals who consider that they have been adversely named on a wrongful basis can ventilate their concerns through representations to

- the Inspector,
- individual members of the NSW Parliament,
- the Committee on the Independent Commission Against Corruption, and
- the media.

Complaints to the latter are potentially significant, given community interest in ICAC and the consequent likelihood that a claim of wrongdoing by ICAC will get traction in reporting by investigative or other journalists.

The third is the courts. Individual who have been improperly or wrongly investigated have the option of taking legal proceedings against the ICAC. Although that option is admittedly

expensive, cases such as the matter involving Margaret Cunneen SC demonstrate that judicial review is an effective control.[1]

whether an exoneration protocol should be developed to deal with reputational impact

As legal scholars with an interest in public administration, particularly the operation of integrity watchdogs such as ICAC with strong powers, we consider that ongoing review within the agency about the scope for performance improvement is desirable. That review is properly complemented by external scrutiny, a process in which the NSW Parliamentary Committee on the Independent Commission Against Corruption and the media both have a major responsibility. On that basis consideration should be given to development of an exoneration profile.

Given our preceding comments however we see no basis for regarding development and implementation of the protocol as being imperative. We note that watchdogs across Australia, most recently the Independent Broad-based Anti-Corruption Commission in Victoria, have noted that funding constraints tangibly impact on their work regarding education and prosecution of corruption. That incapacitation is discussed in a separate submission by Dr Arnold (University of Canberra) and Dr Wendy Bonython (Bond University) to the Victorian Parliament's Integrity & Oversight Committee regarding the education and prevention functions of that state's integrity agencies.

We accordingly suggest that any development of an exoneration profile not be at the expense of IBAC's higher priority tasks. We note for example the salience of referral by the State Insurance Regulatory Authority of concerns regarding icare and administration of the NSW workers' insurance scheme.

The Committee has sought comment on specific matters regarding an exoneration protocol. Bearing in mind our preceding comments we address those matters as follows.

In what circumstances would an exoneration protocol be useful? We envisage those circumstances would be restricted to instances where ICAC has clearly been mistaken, has wrongly identified an individual and is acknowledging an error that has resulted in lowering the reputation of the individual in the minds of reasonable people. In other words, a correction statement communicates to the world at large that ICAC erred. The protocol, as noted below, would not bring into being a cause of action for compensation analogous to damages for injury to reputation through defamation. We consider, however, that this scenario is unlikely given the general evidence-based decision necessary to conduct an investigation set out in sections 20 and 20A of the Act.

Who should have access to an exoneration protocol? Given our comments above we consider that the correction statement would be public (for example through a media release, information on the ICAC website and statement by the Minister to the NSW Parliament).

In terms of who might seek a correction we are conscious that a protocol might be misused by an individual who has been legitimately named by ICAC during the course of investigation but has not been convicted of a criminal offence. This is an important factor, given the ICAC does not operate in accordance with the standard of proof otherwise required to sustain criminal conviction, and the fact that corrupt conduct may not constitute a criminal offence. On that basis if an exoneration protocol is developed there should be a threshold, analogous to the

[1] *Cunneen and Ors v Independent Commission Against Corruption* [2014] NSWSC 1571; *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421; *Cunneen v Independent Commission Against Corruption* [2015] NSWCA 46; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1.

defamation regime, that requires the individual to provide the Inspector of the Independent Commission Against Corruption with sufficient evidence to demonstrate an unjustifiable loss of reputation. That loss must be substantive rather than a matter of injured pride.

What kinds of reputational impact may be relevant to consider? We suggest that NSW law regarding defamation offers a framework for construing reputational impact, encompassing for example loss of employment, restricted promotion opportunities, disaffiliation from community organisations and expressions of public contempt such as 'egging' alongside recognition that some statements merely reduce reputations to the level that they deserve and that some individuals are already properly held in such low repute that naming does not cause substantive harm.

How might an exoneration protocol work in practice? See above.

Should an exoneration protocol apply retrospectively, to cover cases of reputational impact from the past? In principle an exoneration profile might apply retrospectively. In practice it would be appropriate to set the equivalent of a limitation period, given that the passage of time would inhibit ready identification of wrongful naming and consequent harm.

What are the reasons for not developing an exoneration protocol? See above.

relevant practices in other jurisdictions, and any other related matters.

The Committee's Background Paper refers to the Australian Capital Territory regime. That regime reflects the *Human Rights Act 2004* (ACT) and as far as we are aware has never been used, principally because the Territory has not established an independent anti-corruption watchdog. Practice in other jurisdictions offers little guidance. We note that legislation outside NSW provides for what might be considered as 'naming and shaming' in the community interest, with those enactments being held to be legitimate, for example as not contrary to broader human rights regimes. One instance is *Shalom v Health Services Commissioner* [2009] VSC 514 regarding naming of an individual under subsections 11(2) and 11(5) of the *Health Services (Conciliation and Review) Act 1987* (Vic).

Improving the threshold for investigation?

As we indicated above, the Act empowers the ICAC to undertake an investigation of its own volition, following a formal report, or in response to public information. The threshold for an investigation is set out in sections 20[2] and 20A[3] of the Act.

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[2] Section 20 Investigations generally: (1) 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. (2) The Commission may conduct an investigation even though no particular public official or other person has been implicated. (3) The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion)— (a) the subject-matter of the investigation is trivial, or (b) the conduct concerned occurred at too remote a time to justify investigation, or (c) if the investigation was initiated as a result of a complaint—the complaint was frivolous, vexatious or not in good faith. (4) (Repealed) (5) If the Commission decides to discontinue or not to commence an investigation of a complaint or report made to it, the Commission must inform the complainant or officer who made the report in writing of its decision and the reasons for it.

[3] Section 20A Preliminary investigations: (1) An investigation may be in the nature of a preliminary investigation. (2) A preliminary examination can be conducted, for example, for the purpose of assisting the Commission — (a) to discover or identify conduct that might be made the subject of a more complete investigation under this Act, or (b) to decide whether to make particular conduct the subject of a more complete investigation under this Act. (3) Nothing in this section affects any other provision of this Act.

These sections are expressed in broad terms, and essentially permit the Commissioner to undertake an investigation based on whatever information considered sufficient, with broad discretion. One mechanism that may serve to protect reputation is strengthening the information and evidence necessary to proceed with an investigation in the first place. There are two comments to make on this.

The first, as the Committee will be aware, is that the standard of proof necessary to issue warrants for investigation is commonly expressed in terms of "reasonable suspicion" or "reasonable grounds". That threshold is an important control in the conduct of intrusive investigations and has been held as requiring a level of evidence sufficient to induce a person to consider there is a matter worthy of investigation. Basically, it means there must be *some* evidence and not simply a hunch.[4] One potential area for improvement is a requirement for reasonable suspicion as a threshold for launching an investigation, which would require a modest alteration to s20 of the Act.

However, that suggestion needs to be put in context. The ICAC has an array of powers available within the Act that *already* contain that requirement. Search warrants issued pursuant to Part 4 Division 4 may only be issued where there are reasonable grounds for doing so.[5] The ICAC has power to apply for telecommunication intercepts, surveillance devices, as well as capacity to engage in the more intrusive investigations known as controlled operations. These warrants also require *reasonable grounds* for their issue. The current system can therefore be understood as operating with a two-step investigation threshold. The first is broadly discretionary, while the decision to proceed with investigations in the field is not discretionary and does require sufficient evidence necessary to satisfy the authorising officer there are matters open for investigation.

In this respect we do not think there is a need to alter the existing threshold. One of the risks associated with lifting the initial threshold is it may have the unintended effect of reducing the effectiveness of the ICAC's capacity to investigate the crimes of the powerful. As is well recognised, one of the defining characteristics of corruption is the tendency for there to be a paucity of evidence, sophisticated targets adept at covering their tracks, and complicit offenders mutually implicated in the conduct. A two-stage process under the current system allows maximum flexibility at inception, but also requires that once the investigation moves into the evidence-gathering phase that there are reasonable grounds for doing so.

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[4] *George v Rockett* (1990) 170 CLR 104; *R v Rondo* (2001) 126 A Crim R 562; *Lordianto & Or v Commissioner of the Australian Federal Police* [2019] HCA 39

[5] *Independent Commission Against Corruption Act 1988* (NSW) s 40.