

**Submission
No 18**

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

Organisation: Accountability Round Table

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ACCOUNTABILITY
ROUND TABLE

SUBMISSION TO THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST
CORRUPTION NSW

Lodged on behalf of **THE ACCOUNTABILITY ROUND TABLE Ltd.**
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Introduction.

The Independent Commission Against Corruption (ICAC), is currently inquiring into the reputational impact on an individual's being adversely named in ICAC's investigations. In response to an invitation from the Committee, and in accordance with its terms of reference, The Accountability Round Table makes the present submission, with particular reference to:

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

The Accountability Round Table Ltd. (ART) is a company limited by guarantee (ABN 18 169 912 396). Its board and its members are drawn from non-partisan citizens with diverse backgrounds (journalists, lawyers, academics, former judges and former parliamentarians) and with extensive experience in parliament and government. It is dedicated to improving standards of accountability, transparency, ethical behaviour and democratic practice in Commonwealth and State parliaments and governments across Australia.

A major concern of ART is that, in recent years, honesty and integrity in government has been eroded while maladministration and misconduct in public office have noticeably increased: as merely one outcome of this, the ANU's Australian Election Studies indicates a declining level of trust of people in government – down from around 50% in the 1990s to 25% in 2019. Leadership ratings of politicians' honesty and morality between the 1990s and presently have diminished significantly.

ART recognises that strong measures to ensure openness and accountability in government, would support and assist the great majority of politicians and public servants committed to integrity in discharging the high responsibilities of their office. Furthermore, they would provide incentive for those less committed to develop greater integrity in discharging their

duties. Nevertheless, ART acknowledges that the great majority of politicians and public servants are dedicated to complete professionalism in discharging the high responsibilities of their office.

ART is animated by the principle that government is a trust given by the public to governmental officers; the officers of government, whether elected or appointed, are trustees for the people and as such are accountable to them. Governments exist to serve the common interests of the people and this, in turn, limits what is lawfully, administratively and ethically allowable to them. ART therefore aims to ensure integrity in the practices and processes of government and in the conduct of parliamentarians and public officials. ART also aims to strengthen the laws and practices of accountability in, for example, public administration, electoral systems, the responsibility of parliaments in relation to the executive, and governments' responsibility and responsiveness to their citizens. ART advocates for all Australian jurisdictions, including that of the Commonwealth, to have integrity commissions with appropriate powers.

At the same time, ART recognises the concern that any publicly funded investigative body might misuse those powers to the detriment of innocent victims of that misuse. Even in cases that involve no fault in investigative procedures, unjustified harm might be inadvertently done to reputations which do not deserve to be diminished. Quite apart from individual reputational damage, which may be devastating for the victim, the fear of these consequences might deter from public life people who otherwise would contribute usefully and immensely to it. In ART's opinion, the design and operating principles of integrity commissions must prevent, or minimise to the maximum possible extent, the risk posed by that danger. Strong measures to ensure openness and accountability in all instruments of government would assist the great majority of politicians and public servants who are committed to integrity in discharging the high responsibilities of their office.

For these reasons, ART respectfully commends the Committee on ICAC for conducting this inquiry. ART is grateful to it for the opportunity to make this submission. In its preparation, ART has considered the issues in the context of integrity commissions generally, although it has been appropriate on occasion to refer specifically to ICAC and the Independent Commission Against Corruption Act 1988. ART has also, in preparing this submission, adopted the underlying assumption that the commission will confine its investigations to serious and/or systematic corruption, and will avoid the temptation to pursue, rather than leave to more appropriate law-enforcement authorities, relatively minor/single-instance corrupt behaviour. We note that the Commission's primary statement of purpose is the protection of the public interest and the prevention of breaches of public trust is its paramount concern.

Issues raised by the terms of reference

The Committee's inquiry is into the reputational impact on an individual's being adversely named in ICAC's investigations. That issue cannot be considered in isolation. Other considerations, although ancillary to the central issue, cannot be avoided if that central issue is to be seen in its vitally important context. Those considerations are encompassed by a number of propositions, which may be summarised as follows. First, integrity commissions have an indispensable place in democratic governance, albeit that perfection in every aspect of their performance cannot reasonably be asked or expected of them. Secondly, they must be designed, managed and funded so as to minimise the occurrence and impact of mistakes. Thirdly, accurate findings of corruption where corruption exists may be followed by a criminal trial at which the verdict is that the corrupt are "not guilty" of relevant criminality. Fourthly, the reputation of integrity commissions must in these circumstances be upheld. Integrity commissions also deserve to have their reputations sustained against unjustified attacks; and this not least when, although the commission acted impeccably before making a finding of corruption, that finding is subsequently shown to be wrong. Fifthly, those who are the victims of an incorrect finding of corruption should have a remedy secured. This submission deals with each of these matters in turn.

Integrity commissions are indispensable

This point should be beyond argument. Corruption in any of its multiplicity of forms is utterly incompatible with good governance. When serious or systemic, its corrosive effect on the rule of law, on the proper dispensation of public resources, and on the confidence and trust of the public in the institutions which ought to be devoted to their service, is destructive of everything which good governance should represent. Yet, we know that those with power interact with others who have the means to influence its exercise, the temptation in some to benefit corruptly from that interaction will inevitably be irresistible. Allowed any leeway, serious and systemic corruption will feed upon itself to the point that its interstices will infect not only most or all aspects of public life but also the way society itself interacts with its members.

Integrity commissions must be fit for purpose

It is essential that integrity commissions be independent. It is a tenet of their work without which, it will be fatally compromised. They must also be appropriately designed, empowered and funded, and with staff appointees and members whose relevant expertise and integrity, coupled with their discretion and wisdom, are themselves beyond question. An integrity commission the design of which is seriously defective would be worse than no commission at all.

A proper finding of corruption may be followed by a “not guilty” verdict at trial.

The reputational impact on an individual being adversely named in ICAC's investigations arises in an acute form in one set of circumstances which fall squarely within the Committee's terms of reference. An adverse naming may be followed by a criminal prosecution. That proceeding may result in a verdict of not guilty. But, as the Committee notes at paragraph 1.23 of its discussion paper, the role of ICAC differs from that of both prosecuting authorities and the courts. It follows from those differences that there is no necessary incompatibility between a proper ICAC finding of corruption and a jury verdict of not guilty even where there is much overlapping of the evidence which is relied upon in each proceeding.

The reputation of the commission must in these circumstances be upheld.

ART is aware of a number of instances where persons found by ICAC to have engaged in corrupt activity have subsequently been found not guilty after a trial in which that activity was the subject of criminal charges. At least in some of these instances, there have been no reason for the informed and objective observer to think that the ICAC findings were other than justified. Yet the accused and sections of the media have used the verdicts as a basis not only for stringent, and unfair, criticism of ICAC, but also for unsustainable claims that innocence has been proved. To the extent that ICAC's reputation has thereby been unjustly tarnished, that reputational damage has been contrary not simply to the interests of the Commission, but also to the public at large.

The victims of an incorrect finding of corruption should have a remedy.

While it is self-evidently important that the ICAC's reputation not be unjustly tarnished, it is no less self-evident that a significant injustice is done to all who are wrongly declared by an integrity commission to be corrupt. This is perhaps most obviously true when a “not guilty” verdict follows a trial during which it becomes clear that the commission's finding of corruption was wrong because no corruption was involved. But it is also true even when, through no fault in the investigative or decision-making processes of the commission, an incorrect conclusion has been reached.

Prevention of mistakes is better than a remedy when mistakes are made

A well designed integrity commission that is also administered with appropriate professionalism will prevent or minimise mistaken findings of corruption. Every endeavour must therefore be made to achieve that result. ART notes with respectful approval the provisions of s.31B of the *Independent Commission Against Corruption Act 1988* and the

guidelines made under it. These provisions and guidelines serve as a primary means of avoiding mistakes. Their wisely judicious administration provides a secondary means to the same end. It is also, in the opinion of ART, important that where justice would be advanced by the publication of a statement that no corruption was found, such a statement should be made by the integrity commission that came to that conclusion. Regular review that a commission were following the procedures as set out in the Act would give integrity to the commission particularly when public criticism were invoked.

Redress for wrongful reputational damage

Every means of avoiding wrongful reputational damage, or of providing redress where avoidance has been unsuccessful, must be adopted. For the reasons given by the Committee at clause 1.22 of its discussion paper, an exoneration protocol is not the solution.

An application for redress is necessarily founded on the proposition that the integrity commission came to the wrong conclusion when judged against the criteria and standards applicable to investigations and processes properly conducted by the commission. Redress is not warranted when, judged against those standards, a finding of corruption is soundly based. And, because there is no necessary incompatibility between a proper ICAC finding of corruption and a jury verdict of not guilty, this proposition remains true even were that finding to be followed by an unsuccessful criminal prosecution.

The starting point must therefore be that redress is only warranted when an integrity commission makes a finding of corruption that is unjustified on the materials, and following the exercise of the powers, to which the commission had lawful access.

Under s.57B of the ICAC legislation, the Inspector may on his or her own initiative deal with complaints of abuse of power by the Commission as well as other forms of impropriety or misconduct on its part. There are here significant opportunities for redress, at least in the form of an Inspector's report or recommendation. Again, ART respectfully agrees with the appropriateness of conferring this power on the Inspector, who must be furnished with the financial and practical means of its exercise.

Notwithstanding the importance of the Inspector's role, where a finding of corruption is followed by a trial and a "not guilty" verdict, the person best placed to ascertain whether - on the materials, and in the exercise of the powers, to which the integrity commission had lawful access - the finding of corruption is unjustified, is the judge before whom the criminal trial was conducted. That judge will be familiar with the evidence called at the trial. He or she would also understand the difference between the role of the commission on the one hand and the function of a criminal trial on the other. That judge would therefore be in a position of advantage from which to ascertain the effect of that difference on the conclusions of the

commission. From that point, the judge could then determine whether the commission fell into an error on the basis of which the accused ought to be exonerated.

For these reasons, ART suggests (subject to an exception to which this submission makes reference below) that the *Independent Commission Against Corruption Act* be amended to make provision for an acquitted accused to apply to the trial judge for a review of the relevant ICAC finding.

As the Committee's discussion paper points out at paragraph 1.56, the NSW Supreme Court "has some jurisdiction to review findings made by the IBAC". Such a review may be held on the application of a person against whom a finding of corruption has been made, but before any criminal trial based upon the same general matrix of facts as those which informed the integrity commission's finding. The discussion paper refers to the grounds upon which that jurisdiction may be exercised: material error of law on the face of the record; a failure in reasoning such that no reasonable and fully informed person could have reached the Commission's conclusion; a finding unsupported by "any evidence whatsoever"; a failure to take into account relevant matters, or to take into account that which is irrelevant; and, finally, a material denial of natural justice.

Provisions giving a right of review to persons named as corrupt constitute the surest means of exoneration where a finding of corruption is unwarranted. If, however, these grounds are too narrow to ensure that an unjustified finding is corrected, injustice will be continued. Appropriately framed grounds also provide additional assurance that the integrity commission, in order to preclude a review, will do its utmost to reach the correct conclusion in the first place. But the court conducting the review must so far as possible be placed in no less advantageous position than that of the commission when the relevant investigation was conducted.

It is for these reasons that, in ART's submission, the grounds of review should be enlarged to give a right to a person named as corrupt to seek, from the trial judge following a verdict of "not guilty", or from the Supreme Court before any relevant criminal trial, a declaration that as a matter of law a particular finding - or particular findings - of fault could not be justified notwithstanding the difference in the standard of proof as between a criminal trial and an integrity commission hearing, and notwithstanding the difference in the powers and functions of an integrity commission as compared with those of a court in a criminal trial. If the application for a declaration is successful, it would follow that the relevant finding or findings should be set aside.

It possible that at the conclusion of a pre-trial review the integrity commission's finding is upheld, with those named as corrupt subsequently being tried and found not guilty. In these circumstances there should be no right to a further challenge to the commission's finding. In other words, a review by the trial judge would not in those circumstances be available to an acquitted accused.

ART's Replies to the Committee's Terms of Reference

This submission's conclusions on the four issues for particular reference are as follows:

a.	Whether the existing safeguards and remedies, and the means by which they are employed, are adequate.	Answer: No.
b.	Whether additional safeguards and remedies are needed.	Answer: Yes – possible additional safeguards are described in this submission.
c.	Whether an exoneration protocol should be developed to deal with reputational impact	Answer: No.
d.	Relevant practices in other jurisdictions.	Answer: There is none of which ART is aware.
e.	Any other related matters.	Answer: There is none of which ART is aware except to emphasise that procedures, safeguards and remedies as suggested here must be adequately funded to assure that they can be supported fully.

The Hon Barry Jones AC
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on behalf of Accountability Round Table

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