

**Submission
No 19**

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

Organisation: Office of the Director of Public Prosecutions (NSW)

Date Received: 30 July 2020

OUR REFERENCE

DIRECTOR'S CHAMBERS



ODPP
New South Wales

YOUR REFERENCE

DATE
30 July 2020

Mrs Tanya Davies MP, Chair
Joint Committee on the Independent Commission Against Corruption
Parliament House
6 Macquarie Street, Sydney, NSW 2000 AUSTRALIA

icaccommittee@parliament.nsw.gov.au

Dear Mrs Davies

Reputational impact on an individual being adversely named in the ICAC's investigations

I refer to your request for submissions in respect of the above inquiry. Below I have addressed the aspects of this inquiry in relation to which I consider the ODPP to be a stakeholder.

Should an exoneration protocol be developed to deal with reputational impact?

An exoneration protocol is defined by the Hon. David Levine AO RFD QC as a process by which people found corrupt by ICAC but not convicted of any criminal offence arising from the same facts can apply to have the ICAC record expunged or have the ICAC finding set aside¹.

By reason of the difference in character of a corruption inquiry and a criminal prosecution, I have reservations as to how such a protocol could work in practice. The functions, processes and powers of ICAC differ markedly from those exercised by the Director of Public Prosecutions. Any protocol to exonerate a person named by ICAC should appropriately take account of these differences, which notably include the following:

- (a) The principal functions of ICAC are to investigate, expose and aim to prevent past, current and future corrupt conduct in the NSW public sector, amongst many others². The principal functions and responsibilities of the Director are to

¹ Paragraph 1.15, Discussion paper: reputational impact on an individual being adversely named in the ICAC's investigations / Joint Committee on the Independent Commission Against Corruption [Sydney, NSW]

² Sections 2A and 13, *Independent Commission Against Corruption Act 1988 (ICAC Act)*

institute and conduct prosecutions in NSW for indictable offences, and conduct and respond to appeals in any court, on behalf of the Crown³.

- (b) In exercising its functions, ICAC has the protection of the public interest and the prevention of breaches of public trust as its paramount concerns. The ODPP decides whether or not to prosecute a person for an alleged criminal offence and if so, on what charges. The ODPP has no investigative function, nor makes findings or expresses opinions about the alleged conduct of an accused person. The ODPP prosecutes independently, fairly and objectively in the public interest, however it has no preventative role to play in relation to breaches of public trust.
- (c) ICAC has extensive investigative powers. These include a coercive power to obtain evidence by compulsory examination of witnesses, including persons of interest to an investigation. Such a power intentionally and fundamentally departs from the checks and balances inherent in the criminal justice process in order to enable the ICAC to exercise its functions efficiently and effectively.
- (d) While the content of compulsory examinations ultimately informs ICAC's findings, an accused person's account obtained in this form is inadmissible in a criminal trial and not obtained by the ODPP as a matter of course. At trial, the prosecution must prove the accused's guilt without compelled assistance from the accused.
- (e) At the conclusion of an enquiry, ICAC can make findings or express opinions about corrupt conduct, or other specified conduct, by named persons. Where a finding of corrupt conduct could constitute a criminal offence, a finding is expressly provided not to be a finding of guilt of a criminal offence⁴. The maligned conduct may involve a broad range of potentially criminal conduct including perverting the course of justice, fraud, bribery, illegal drug dealing, homicide, tax evasion, treason and others. A finding that particular conduct is corrupt is therefore not synonymous or interchangeable with a verdict of guilty after trial for a particular criminal charge. This principle is starkly illustrated by the fact that ICAC can make findings that a person has engaged in corrupt conduct in one or more ways; they may then be prosecuted for some conduct only, and/or multiple charges in relation to certain conduct the subject of a single

³ Section 7, *Director of Public Prosecutions Act 1986 (DPP Act)*

⁴ Section 9, ICAC Act

finding of corruption; and may be found guilty of some charges at trial but not others.

- (f) Conduct which could constitute a criminal offence is not the only type of conduct which can amount to corrupt conduct under the *ICAC Act*. Findings of corrupt conduct can be made in relation to conduct constituting a disciplinary offence or a substantial breach of a Ministerial or Parliamentary code of conduct. Accordingly, some matters in which ICAC makes findings of corrupt conduct are not referred to the ODPP for potential prosecution but referred to another relevant authority for disciplinary proceedings or result in dismissal from public employment.
- (g) ICAC cannot impose any penalty; it is only empowered to find that a person engaged in corrupt conduct. An adverse finding can have significant effects on a person's reputation and life. Such effect was clearly intended by Parliament both as a deterrent and a form of punishment for undesirable conduct in the public sphere. Any reputational impact is a necessary and intended consequence of ICAC exercising its functions to expose and prevent corruption in the NSW public service.
- (h) Where ICAC finds that a person has engaged in corrupt conduct potentially amounting to a criminal offence, ICAC refers the matter to the ODPP, instigating a fresh and independent process under the criminal justice system. The matter is evaluated according to the prosecution test, which considers, amongst other things, the admissibility and strength of available evidence and prospects of success⁵.
- (i) Not all of the fruits of an ICAC investigation, being material on which ICAC bases its findings, will necessarily be admissible under the *Evidence Act* for the purpose of prosecution. The material admissible in court may not reach the standard required to prove a charge beyond reasonable doubt. The prosecution may have less evidentiary material at its disposal to prove the charge/s than ICAC had when making its findings.
- (j) ICAC has no jurisdiction to impose a penalty, whereas a guilty verdict at court invariably results in a significant penalty being imposed by the sitting judicial officer.

⁵ ODPP Prosecution Guideline 4

Given the nature, number and extent of these differences, on balance I submit that a person adversely named by ICAC and later acquitted on criminal charges should not be able to seek expungement of ICAC's findings in relation to the person, nor ICAC's records generally, solely or exclusively in reliance on an acquittal.

Likewise, any right to apply to set aside an adverse finding by the ICAC should not be similarly enlivened by a decision by the ODPP not to prosecute, as this decision falls exclusively within my purview, may take into account many of the factors under the Office's applicable Guidelines and is subject to legal professional privilege.

Yours faithfully



Lloyd Babb SC
Director of Public Prosecutions