

**Submission
No 20**

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

Organisation: Corruption and Crime Commission

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Crime Commission

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30 July 2020

Mrs Tanya Davies, MP
Committee Chair
Committee on the Independent Commission Against Corruption
Parliament of New South Wales
6 Macquarie Street
SYDNEY NSW 2000

By email: icaccommittee@parliament.nsw.gov.au

Dear Madam Chair

Submissions for the Committee on the Independent Commission Against Corruption (ICAC) inquiry into the reputational impact on an individual adversely named in the ICAC's investigations

Thank you for your email of 18 May 2020 inviting the Corruption and Crime Commission (Commission) to make a submission to this inquiry.

The Commission provides the following information by way of submission to the inquiry in respect of the Commission's practices in this jurisdiction.

Overview of the Commission's functions


The Commission was established by the *Corruption, Crime and Misconduct Act 2003* (CCM Act) and carries out functions under that Act relating to organised crime, serious misconduct in the public sector and unexplained wealth and criminal benefits.

In relation to its serious misconduct function, the Commission assesses allegations and may decide to investigate the allegation, either on its own or in cooperation with another agency, to refer the allegation to another agency, or to take no action: CCM Act s 33.

The Commission has no power to prosecute. The Commission may make recommendations as to whether consideration should or should not be given to the prosecution of particular persons and the taking of disciplinary action against particular persons: CCM Act s 43.

Contact the Corruption and Crime Commission

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The Commission may prepare a report on any matter that has been the subject of an investigation or other action in respect of serious misconduct and may cause that report to be laid before each House of Parliament: CCM Act s 84. The report may include statements as to the Commission's assessments, opinions and recommendations and reasons for those assessments, opinions and recommendations: CCM Act s 84(3).

There is no exoneration protocol in place in relation to the Commission's functions.

Statutory provisions relevant to the reputational impact on individuals adversely named

The CCM Act contains several provisions about the effect of the Commission's recommendations and opinions.

The Commission must not publish or report a finding or opinion that a particular person is guilty of, or has committed, or is committing, or is about to commit a criminal offence or disciplinary offence: CCM Act s 217A(2).

Further, s 217A(3) provides that a finding or opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.

Similarly, a recommendation made by the Commission under s 43 (for example that consideration be given to prosecuting a particular person) is not to be taken as a finding that a person has committed or is guilty of a criminal offence or conduct that constitutes grounds for termination of their tenure, contract or services agreement: CCM Act s 43(6).

The section 86 process

CCM Act s 86 is an important provision that may assist in limiting reputational damage for a person named in a report. Section 86 requires the Commission, before reporting any matters adverse to a person or body in a report under s 84, to give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

The Commission's processes which might limit reputational damage

When reporting to Parliament, the Commission always turns its mind to s 217A and is cautious in the form of words used when reporting its opinions. As a general rule, a report will include reference to s 217A(3).

Commission reports use the word 'opinion' rather than 'finding' and the reports often point out that opinions are formed to a civil standard of proof.

On each occasion when the Commission tables a report in Parliament, careful thought is given to whether individuals ought to be named. Section 84 provides no guidance or prohibition on doing so.

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The Commission takes the view the overarching question in each case is what will best serve the public interest. Unless there is a public interest in naming a person, they will be either unnamed or anonymised.

The discretion to identify a particular person is an aspect of the wider discretion in the public interest. Another aspect of the public interest is the reasonable protection of privacy of persons.

Where an opinion of serious misconduct has been formed about an individual, the usual approach is to name that person in a Parliamentary report. Conversely, where no opinion of serious misconduct is formed, a person is less likely to be named. However, where conduct falls just short of serious misconduct, there may still be a public interest in naming an individual. While the Commission is unable to form an opinion of minor misconduct, the identification of a person may be in the public interest, particularly if they occupy a senior role.

Whistle blowers, complainants and witnesses are generally anonymised. There is an obvious need to protect those who assist the Commission and to avoid discouraging others from coming forward.

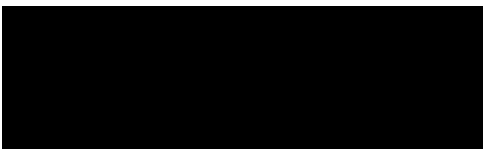
Public officers with a low level of involvement in the activities reported are not named. However, senior officers with some level of oversight where serious misconduct has been allowed to flourish may be identified for reasons of accountability.

Of course, those are only general guidelines. A particular report may warrant a different approach, depending on the circumstances.

Regardless of whether a person is named, or not, or is anonymised, the CCM Act s 86 process is followed. The Commission takes a broad view of the meaning of 'adverse' in s 86. There does not need to be a finding of serious misconduct against a person. If a report mentions anything that could reasonably be construed as negative about a person, that person is given an opportunity to make representations to the Commission. These representations are considered and, if appropriate, the Commission may incorporate them into its report.

I trust this information is helpful to the Committee for the purposes of its inquiry. If any additional information is required, please do not hesitate to contact me.

Yours faithfully



Ray Warnes
Chief Executive