Submission No 25

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

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Date Received: 31 July 2020

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REPUTATIONAL DAMAGE INQUIRY

The Submissions of John Nicholson

What matters is to ensure the Act is rectified in a manner which retains the independence and effectiveness of the Commission.[1]

[1] Temby, Ian; Independent Commission Against Corruption Annual Report 1991-92.

Introduction

The beginning and the vision.

1. The Parliamentary Committee on the Independent Commission Against Corruption (ICAC) has determined to conduct an inquiry into the reputational impact upon an individual being adversely named in the ICAC's investigations. On the 26th May last I was invited to make a submission to the inquiry[2]. I accepted that invitation and respectfully enclose herewith my submissions.

2. The proposed inquiry will delve into and report on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:
    a) whether the existing safeguards and remedies, and how they are being used, are adequate, and
    b) whether additional safeguards and remedies are needed, and
    c) whether an exoneration protocol should be developed to deal with reputational impact, and
    d) relevant practices in other jurisdictions, and
    e) any other related matters.

3. The invitation affords to me an opportunity to canvass for consideration of the Committee four of the five recommendations I made to the Parliament in June 2017; namely:

> Recommendation 1: It is recommended that steps be taken to amend sections 8 and 9 of the ICAC Act to remove the "could" test from each section, so that findings of corrupt conduct are available only in circumstances where it was reasonable for the Commission to expect a properly instructed, reasonable tribunal of fact would come to a conclusion on the admissible evidence that the opinion or finding of the Commission underpinning the corrupt conduct finding would be sustained.
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> Recommendation 3(a): That section 9 (1)(b) and (c) be repealed on the basis that existing disciplinary tribunals and the Fairwork Commission are capable of dealing with matters to which those sections relate; or alternatively.
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> Recommendation 3(b): That section 9 (1) (b) and (c) be amended so that any ICAC finding that misconduct of a kind it has been considering as conduct falling with the description of "corrupt conduct" as identified in s.8 but which did not qualify as conduct to which s.9 (1)(a) – criminal conduct – applied should be described as "employment based misconduct" and can no longer qualify as "corrupt conduct".
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> Recommendation 4: It is recommended that through hearings of the Joint Committee Parliamentary consideration should be given to whether or not the addition of a "closed inquiry" as described in this Report would serve to advance the investigation capacity and effectiveness of the ICAC.

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[2] I have assumed the invitation possibly may have come about as a consequence of the *Report Pursuant to Sections 57B & 77A Independent Commission Against Corruption Act 1988 – Operation "Vesta"* submitted in my then (June 2017) capacity as Acting Inspector to the ICAC to the then Presiding Officers of both Houses of the NSW Parliament. I have no doubt the Joint Committee has also approached others whose views differ from mine so that a thorough and thoughtful inquiry becomes possible.

Recommendation 5: It is recommended that through hearings conducted by the Joint Committee, Parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act, and if so, in which circumstances and by what means could an "affected" person pursue exoneration.[3]

4. The ICAC was established in 1988. Its establishment had been a crucial promise during the election period leading to the installation of the Griener government. When introducing the ICAC bill to the Parliament, Premier Griener made the following points:

> There has been considerable speculation about the Government's reasons for setting up this body.... There was a general perception that people in high office in this State were susceptible to impropriety and corruption. In some cases that has been shown to be true.
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> In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption, the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.
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> No government can maintain its claim to legitimacy while there remains the cloud of suspicion and doubt that has hung over government in New South Wales. I am determined that my government will be free of that doubt and suspicion; that from this time forward the people of this State will be confident in the integrity of their Government and that they will have an institution where they can go to complain of corruption, feeling confident that their grievances will be investigated fearlessly and honestly.
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> ...This legislation is a crucial part of the Government's long-term strategy for restoring the integrity of public administration.
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> The third fundamental point I want to make is that the independent commission will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector...
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> .... [T]he bill makes specific provision to allow the commission to refer matters to other investigatory agencies to be dealt with. Obviously that will be the most sensible way to deal with the majority of matters that will come to the attention of the commission. The commission will monitor those investigations and will retain only the most significant and serious allegations of corruption.
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> .... [I]n the long term I would expect its [the commission's] primary role to become more and more one of advising departments and authorities on strategies, practices and procedures to enhance administrative integrity. In preventing corruption in the long term, the educative and consultancy functions of the commission will be far more important that its investigatory functions.... [I]t would also be crass and naïve to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its

[3] I have sourced many of the arguments and much of the material I rely upon in these submissions from the Operation "Vesta" Report identified in f.n. 2.

> success will be the enhancement of integrity and most importantly, of community confidence in public administration in this State
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> The final point I want to make by way of introduction concerns the question of civil liberties. This commission will have very formidable powers. It will effectively have the coercive powers of a Royal commission. Those are features of the legislation that I foreshadowed in the election campaign. There is an inevitable tension between the rights of individuals who are accused of wrong doing and the rights of the community at large to fair and honest government.
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> ....[T]he commission will be required to make definite findings about persons directly and substantially involved. The commission will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion. [4]

5. There is plenty of authority for the proposition that the ICAC and its Commissioners have been given extraordinary powers to investigate, expose and prevent corruption involving or affecting public officials (as defined in the ICAC Act) working in the State's public authorities and organisations, and non-government agencies funded by the State. In the absence of any Bill of Rights existing for NSW residents, where extraordinary powers of investigation are invested in a public agency or public official there is a need for strong and appropriate checks and balances to safeguard against any impropriety, maladministration and ineffective or inappropriate procedures relating to the outcomes of their activities.

The vision faces the consequences of humanity

6. As it is with any court, so it also is with any investigative commission, and other organisations staffed with humans. Human foibles, misunderstandings, and illogical, false or inaccurate assumptions frequently drive fact finding; albeit inaccurate or incomplete fact-finding resulting in errors, sometimes errors of great consequence, being made because of those foibles, misunderstanding or unsound assumptions. Likewise misunderstanding of the law will lead to unsafe application of legal principles. There is no infallibility in the law courts. Likewise there is no infallibility in investigative commissions including the ICAC. Wrong decisions will be made – as has happened in the past. While court decisions are usually subject to review by a higher court, within the ICAC the gateway to remedying a decision lacking merit is akin to passing through the eye of the needle. It is very difficult for an aggrieved individual to obtain an opportunity to rehabilitate a reputation soiled through investigative error and presented to the public as though it had be scrutinized by a court.

The Public Interest

7. One assumes the legislature introduced a "public interest" requirement into the ICAC Act as one important balancing mechanism. It is argued the legislature has placed an emphasis on the public interest as a brake upon the unnecessary use of powers overriding the traditional restraints on investigative bodies.

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[4] Premier N. Griener; Second Reading Speech. Excerpt from *Hansard*, Legislative Assembly, 26 May 1988

Section 12 enjoins the Commission when exercising its functions to "*regard the protection of the public interest and the prevention of breaches of public trust as its paramount concern.* Thus the two paramount concerns of the Commission when exercising its functions are protection of the public interest and prevention of breaches of public trust, and having regard to the public interest when so doing.

8. Whether holding a Compulsory Examination or a Public Inquiry, the Commission is again enjoined to do so only if satisfied it is in the public interest. Given the conduct of compulsory examinations and public inquiries are important Commission investigative functions, it is instructive to note the renewed emphasis on public interest and, in the case of public inquiries, more detail emphasis when the Commission determines to hold a public inquiry. The introductory sub-section (1) of section **31 Public Inquiries** of the ICAC Act provides: *For purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.* Thereafter, set out in the section are a number of factors that must be considered for the specific purpose of determining whether or not it is in the public interest to hold a public inquiry. It is open to the Commission to consider matters not referred to in the ICAC Act as influencing their "whether or not" decision. One of the specified factors the Commission is required to consider, however, is *any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry)*[5].

9. The public interest is again emphasised in that part of the ICAC Act dealing with reports to be furnished to the Presiding Officer of each House of Parliament. There is a general requirement that the Commission prepare reports in relation to matters where it has conducted a public inquiry unless otherwise directed by Parliament. However, the Commission may defer making a report if it is satisfied that it is desirable to do so in the public interest. The only exception to that provision is where both Houses of Parliament referred a matter to the Commission[6].

10. So, what is meant by "public interest"? A concept of *interest* is not confined in its meaning to curiosity or desire, but also includes concepts relating to rights, claims, or privileges, and it is argued, "legitimate and reasonable expectations" in the context of the relevant Act's provisions. "Public interest" is a difficult concept to capture with words. When considering whether or not it is in the public interest to hold a compulsory examination or public inquiry an argument is available that the public interest is served through embracing the public's legitimate and reasonable expectations of outcomes in keeping with the purpose, provisions and spirit of the ICAC Act.

11. Shortly put (and important to consider when contemplating whether changes to the ICAC Act or regulations is needed) an outcome the legislature is looking for from the ICAC exercising its various functions, including conducting public inquires, is protection and advancement of the public

[5] Section 31 (2)(c) Independent Commission Against Corruption Act 1988.

[6] Section 74 Independent Commission Against Corruption Act 1988

interest. A significant judicial insight was ventilated by Mahoney JA in one of the early ICAC cases that came before the Court of Appeal:

> ...It is the purpose of every judge to remedy injustice. But there are limits to what can be done. A judge may – indeed he must – act only upon the evidence before him and, accordingly, in respect only of those injustices which that evidence discloses. And what he may do is limited by what the laws of the Parliament prescribe. Those laws may themselves create injustice or injustice may result from the application of those laws to particular cases. The courts can remedy an injustice only in so far as the law allows it.[7] (my emphasis)

12. Nothing in the Second Reading speech set out above, or the Principal Objects of the Act, identifies as a purpose or anticipated product of the Act that individuals – including numbers among our community leaders – would become collateral damage as a consequence of an ICAC investigation. Indeed, section 31 of the ICAC Act, it is argued, among other things, sought to safeguard reputational damage.

The terms of reference

13. The terms of reference of this Joint Committee's inquiry are confined to *individuals adversely named in the ICAC's investigations*. This reference to "adversely named" and "ICAC's investigations" suggests the inquiry is focused more widely than a smaller cohort of "affected" persons referred to in section 74A of the ICAC Act, and adversely named, usually in public inquiries. "Affected" persons, for the purposes of these submissions are limited to persons *against whom in the Commission's opinion substantial allegations have been made in the course of or in connection with the investigation concerned*[8].

14. My submissions are generally confined to some members of that cohort identified in the ICAC Act as "affected" persons – that is to say those persons who have been adversely named in ICAC reports as having engaged in corrupt conduct, but remain uncharged, un-disciplined, or un-terminated[9]; or have been acquitted of an ICAC related charge, or vindicated or reinstated into their employment position. However, I do anticipate, and hope many of my submissions will have resonance for those individuals named in the terms of reference as the "adversely named" group.

15. But I do pause to recognise there are other individuals who have been adversely named in the course of an ICAC investigation, not necessarily at the hands of Counsel Assisting or a presiding Commissioner, and experience or believe they have experienced serious reputational damage. The reality is

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[7] Griener v Independent Commission Against Corruption 28 NSWLR 125 at 152. While Mahoney JA was in the minority and would have dismissed Premier Griener's and Minister Moore's appeals, his comments are to be read against his view that their appeals should be dismissed - that is application of the statute was requiring an injustice as he saw it.

[8] Section 74A (c) Independent Commission Against Corruption Act 1988.

[9] Section 9 (1)(a), (b), and (c) set out "could be" criteria which authorizes ICAC to make 'corrupt findings'. Failure to meet the actually nominated criteria found in (a), (b) or (c) in the legal or employment arenas has no consequence or relief from an ICAC finding of corrupt conduct.

there are many sources that publish information emanating from the ICAC and its public inquiries. Print media, radio and TV are now minnows in a pool of publishing flooded by Internet based outlets. Further, publishers have motives varying from informing, through to fake news (misinforming) through to malicious gossip and rumour. Two common targets in publicising ICAC investigations within the workplace community that cause reputational impact include retribution for some ICAC whistleblowers and the employment damage caused by some overly scrupulous departmental heads unnecessarily reporting an employee for a non-serious, non systemic incidents of no great matter. It is respectfully submitted that the Joint Committee identify the pathways leading to the adverse naming of such individuals and steps be taken to narrow the entrance to these pathways, or better still to create some system of blocking them entirely.

What does reputational damage look like?

16. Before I deal with some of the specific issues constituting the terms of reference I would like to examine the visible impacts of 'reputational impact". A useful starting point may be to rehearse the comments of Gleeson CJ:

> The Commission is not a court but an administrative body that performs investigative functions and in certain circumstances makes reports. Clearly, its determinations can have devastating consequences for individuals. The public official whose conduct may fall within the purview of the ICAC Act range from the highest to the lowest in the State, from the Governor down. Many are persons whose position in office would be untenable following a public and official finding of corruption. Yet there is no right of appeal against, or procedure for any general review of the merits of such a finding. Indeed a determination of corrupt conduct might be based upon the commission of an alleged crime, and might be followed by a trial of the individual involved and an acquittal.[10]

17. The State's then Chief Justice envisages what he describes as devastating consequences; including loss of employment; a sense of impotence in having no right of appeal against the merits of the finding. Where the ICAC finding is vindicated by subsequent conviction, such consequences may be viewed as justifiable and self-imposed. However, in the absence of a trial or other testing process, or in the case of an acquittal, the identified consequences of being adversely named are not self-imposed, nor are they morally justified. They fit Mahoney JA's description above of being injustice. They are an injustice brought about by existing statute law. It should be within the power of the Parliament to remove such clearly identified injustices lurking within the existing provisions of the ICAC Act

18. Of course, the Chief Justice's description of "devastating" should not be viewed as closing the door on what reputational injustice can look like. Consider: angry, outraged, resentful, indignant, embarrassed, heart broken, feelings of guilt, career ending concerns, alternate employment ending, frustrated, bankrupt, destitute, grieving, suicidal, mental health issues including depression and anxiety, obsessive, disillusioned, stressed and despairing as, in some way, being some of the experiences of an individual

[10] Griener v Independent Commission Against Corruption; 28 NSWLR 125 at 129.

experiencing reputational damage caused by an ICAC overreach. The personal impact can be as vast as coping with nation-wide reputational damage to dealing with damage confined to the genre of bodies doing similar work (for example Local Councils and Council areas) – or more tightly involving family, friends and business contacts – or all of the above.

To what extent is a person's reputation a right or valued interest?

19. The issue of collateral reputational impact amounting to damage being caused by the ICAC offers a valid area of inquiry once the relevant rights or interest associated with reputational damage are identified. One's reputation can be seen a right or interest worthy of recognition. It is also linked to one's privacy and honour – honour as embracing an interest or legitimate expectation of being treated with dignity and respect by virtue of being a human being. As can be seen from the previous paragraph, reputational damage can bring about more than injury to reputation.

20. The protection of a right, as a concept differs from a violation of that right. The first requires proactive action even if only respecting the right or interest; the second requires action that abuses or denigrates the right. A failure to respect or secure a right or interest constitutes a failure to protect that right. The right to reputation, privacy and honour for those who have been subject to ICAC findings that they could have committed a criminal offence, unsupported by any application of testing within the criminal jurisdiction, is a right that has not been protected by the legislature. Such protection could be secured in a Bill of Rights or amendment to the ICAC Act. Absent legislative action, it is submitted a growing cohort of individuals are being unjustly treated as a consequence of provisions within – or absent from – the ICAC Act.

21. Priestly JA noted this very problem in *Griener* when examining some remarks of the Chief Justice cited above.

> For example, as the Chief Justice points out, it would be possible: for the Commission to find, and to report to Parliament, that a public official had engaged in corrupt conduct; for the Commission to state that in its opinion consideration should be given to the prosecution of the official for a specified criminal offence; for there to be a subsequent prosecution of the official for a criminal offence constituted by the conduct found by the Commission to have been corrupt conduct; and for the official to be acquitted of the offence charged. A citizen acquitted of a criminal charge is ordinarily entitled to the benefit of the longstanding presumption of innocence until proof of guilt; and as guilt in this example would (in the majority of cases) forever be excluded by the acquittal, the presumption could not be tested. Where then would the Commission's finding stand?
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> The example is not an improbable one; in my opinion some such case is bound to happen if the Act continues in its present form. The example demonstrates that in one very real sense "findings" by the Commission of corrupt conduct should be regarded as conditional or provisional only. Yet it seems inevitable that such findings may gain general currency as final.[11]

[11] Griener –v- Independent Commission Against Corruption; 28 NSWLR 125 at 181.

22. Other statutes such as the Privacy and Personal Information Act 1988 would seem to be predicated upon a proposition that where protection of privacy is possible it would be expected from a public agency. While this analogy may seem lean picking favouring an argument of protection, it is beyond contestation that an overwhelming majority of the general population would expect a public authority to take all reasonable and appropriate steps to protect any person's privacy, reputation and honour unless the person had through his own actions lost or had abridged his or her right to privacy, reputation or honour. Unfortunately as the ICAC legislation presently stands, and in the absence of any Bill or Rights, the law unjustly denies the ICAC and the individual aggrieved the means of doing anything other than following the "finding" prescription set out in the ICAC Act.

23. It needs to be remembered the longstanding presumption of innocence is more that just a legal device the consequence of which is to place the burden of proof upon the prosecution in a criminal case. The presumption of innocence is a social norm frequently playing its place within the social arena when allegations of unacceptable behaviour against others are advanced. Frequently an allegation by itself is insufficient to establish its contents as a fact, and may be followed by the question: "Why do you say that?" That is to say, calling for some material that would establish the allegation. Thus, it is the presumption of innocence at work within the social norm.

24. For those persons who have been found to have engaged in corrupt conduct and the DPP having considered their case commences prosecution, care needs to be taken, particularly in jury trials that the tribunal of fact understands no matter what the ICAC said, the presumption of innocence applies within the court system. Juries may need to be told not to search the internet for material on the accused persons. It would be difficult not to conclude within the trial context those persons start with their entitlement to be presumed innocent as compromised – particularly so when the individual was involved in a high profile public inquiry.

25. A useful starting point in respect of standards one might expect to be maintained in NSW is found in Article 17 of the International Covenant on Civil and Political Rights (hereafter ICCPR), which it is acknowledged does not apply in New South Wales. However, it is important to recognise that the international community accords to privacy, human rights status through inter alia the ICCPR. The ICCPR was signed by the Australian Government in December 1972 and ratified in August 1980. While its rights and obligations, including the rights to privacy, honour and reputation have not been incorporated in Australian law, both the ACT and Victorian governments have incorporated a right to privacy into their legislative framework and jurisprudence. Reference has also been made above to the NSW Privacy legislation, which it is conceded is a small step in the right direction.

26. Article 17 of the ICCPR provides that:
    (1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home, correspondence, nor to unlawful attacks on his honour and reputation;

(2) Everyone has the right to the protection of the law against such interference or attacks.

27. It is not argued the impact to privacy occasioned initially by announcement of ICAC's public and official findings is unlawful – but rather, where those findings do not withstand the test provided by the criminal law, that such findings remain active and still supported by the ICAC. It is in those circumstances where the right to protection of privacy, honour and reputation should step in, not because the initial findings were unlawful, but because, even though those findings failed the criminal law test the ICAC recommended, their remaining on the ICAC record as public and official findings becomes unjust and unjustifiable.

Are the existing safeguards and remedies adequate?

28. No.

29. The establishment of an ICAC was a discriminatory action. The discrimination was against public officials and authorities (as both are defined in the ICAC Act). All Commonwealth government employees, and most employees in non-NSW State work places were not caught up in the legislation and are not subject to corruption investigations initiated by the ICAC. While this discrimination may be both necessary and justifiable, it cannot be seen as having no ongoing consequences. My argument is the very fact there is such discrimination means the ICAC, and the Parliament who legislated its existence, need to harness every means to minimise adverse consequences to those within the discrimination circle whose reputational fate is within the reach of the ICAC. The means by which minimisation can occur is to focus on creating adequate and reliable safeguards and remedies.

30. Within the context of *reputational impact on an individual adversely named in the ICAC investigation* this inquiry seeks to examine within this term of reference: a) whether the existing safeguards and remedies are adequate and b) whether the way in which those safeguards and remedies are being used is adequate.

31. These questions can only be answered once the safeguards and remedies available are identified. The starting point is to determine where those safeguards and remedies are to be found. It is argued sources of safeguards and remedies are most likely to be found in the provisions of the ICAC Act or in some other provisions or practices elsewhere applying.

32. Also of relevance is the nature of the conduct causing reputational impacts upon those being adversely named. As a matter of common sense the relevant conduct extends beyond the simple fact that the individual was adversely named. That fact, of course, must carry its own impact, but it is also the cause of, and consequence from the adverse naming that will also contribute to the reputational impact.

33. Writing in 1992 Wayne Roser observed[12]:

> The only real fetters on the way that the Commission exercises his wide-ranging powers are the limited powers granted to the Operations Review Committee[13] and the Parliamentary Joint Committee which have been described as "in a very real sense ... a toothless tiger as far as genuine oversight of the Independent Commission Against Corruption is concerned"[14]. This lack of accountability has been strongly criticised particularly because the powers are exercised at the discretion of the Commissioner. Some argue that the authority of the Commission should be fettered, with guidelines relating to priorities, policies and practices. Hearing procedures should be more structured, and more detailed terms of reference published, to stop a "fishing expedition" as occurred in the North Coast Inquiry. Guidelines would require notice of possible allegations or findings and allow a better opportunity to reply. (Some citation references omitted).

34. While Roser's article was written in the ICAC's early days and before the demise of the Operations Review Committee, criticism has continued though the three decades since it was established. Significantly, many of the criticisms are ventilated by courts concerned at the indefinite and uncertain conations contained within the various sections of the ICAC Act. The courts have linked such indefinite and uncertain conations as being at the heart of unwarranted adverse naming of "affected" persons[15].

35. So far as I am aware, in the absence of any Bill of Rights, there is no other legislation, (other that the Supreme Court Act) that provides relief or even an avenue to relief in the event the ICAC makes an error in fact or in respect of its understanding of the law.

36. As set out earlier, the ICAC Act's emphasis on decisions being made in the public interest, assuming the public interest is conscientiously pursued, provides a potential albeit uncertain safeguard to having an individual adversely nominated individual. It is clear the legislature intended it to be so.

37. Another safeguard it is said is the Commission's allowance of legal representatives to appear for those persons the Commission believes are substantially and directly interested in any subject matter of the hearing. However, representation is within the gift of the Commissioner – there is no right for such representation. There is, of course, some need for legal representation. Most persons of interest would have little experience in advocacy or the skills to respond to the requirements and procedures of the Commission. But, my sense is that legal representatives who have appeared before the Commission for persons of interest have generally been unimpressed with the experience. The difficulty is the Commission is not a

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[12] Roser W.G; *The Independent Commission Against Corruption: The New Star Chamber?* 16 Criminal Law Journal 225 at p.232

[13] Part 6 of the ICAC Act establishing the Operations Review Committee was repealed subsequent to this article being written.

[14] Bursten M. and Hogg R. *Anti-Corruption Commission: Has it been Worth the Wait?* (1988) 13 Legal Services Bulletin 146 at 148-149.

[15] See for example Balog v Independent Commission Against Corruption [1990] HCA 28; Griener v Independent Commission Against Corruption 28 NSWLR 125; Independent Commission Against Corruption v Margaret Cunneen & Others; [2015] HCA 14.

court – it is an administrative body – but not an administrative tribunal. It is an investigative body – but not bound by any of the restrictions and standards applying to the police force when it is involved in investigation. Another distinction not experienced by the police is the Commission's powers to investigate through the medium of public inquiry. It is to be remembered the Commission's primary brief is to reduce corrupt practices within the NSW public service not to fill the courts with criminal trials based upon a proposition that an individual could be involved in a criminal matter.

38. However, ICAC's public inquiries present with mechanisms designed by Courts and tribunals – raised dais for the a presiding officer, namely the Commissioner, all present rising on arrival and departure of the Commissioner; bar table for legal representatives, appearances announced, decorum and respect born in the courts being extended to the Commissioner, an area of seating provided for members of the public and media. sworn oaths of honest answer being administered to witnesses prior to giving evidence, (including a capacity to identify and recommend prosecution for deliberately untruthful answers) questions and answers passing to and fro between legal representatives and witnesses; arguments being made in respect of objections and rulings being given in respect of those objections, partial advocacy on the part of Counsel Assisting and the legal representatives for persons of interest; submissions being made at the conclusion of evidence, and public and official findings, including findings having criminal law charge consequences, being delivered with reasons supporting them at the conclusion of the hearing. All the solemnity, pomp and circumstance of a criminal court. But such an appearance is an exercise in mimicry.

39. What is the value of legal representation in the face of courtroom safeguards and protections for witnesses being stifled; and s.17 of the ICAC Act permitting unbounded discretion in conduct of the public inquiry. What is the value of legal representation when no specific charge or terms of reference limit the scope of the inquiry? While the "evidence" may be admissible before the ICAC it may not be admissible before a court. The Commission is not bound by the rules or practice of evidence and can inform itself in such manner as it thinks appropriate. Its duties of disclosure do not match those required in a criminal trial. It is required to exercise its functions with as little formality and technicality as possible and inquiries and compulsory conferences conducted with as little adversarial approach as possible and written submissions are accepted as far as possible.

40. Others have claimed the selection criteria applying to Commissioners, given the high standard of personal, learning and experience criteria, including character and judgment skills that must necessarily apply to successful candidates to that Office is an important safeguard. Alas, the hopeful intent of those involved in appointing the Commissioner does not necessarily guarantee the outcome they desire.

41. A very small number of adversely named "affected persons" have been successful in securing Supreme Court or High Court relief. However, the

litigation path in pursuit of review is narrow in the extreme, but a successful few, primarily arguing want of jurisdiction have seen it as a means of remedy.

42. The Office of Inspector to the ICAC has jurisdiction to entertain complaints, but does not have any judicial power or function when reviewing complaints. At best the limited remedy the Inspector's Office can offer is perhaps a better understanding of the existence of the extensive powers available to the ICAC to do what it has done.

43. The findings, recommendations and reasoning of the Commission are not binding upon the DPP or upon any court or tribunal. But there is, I understand, an arrangement between the ICAC and the DPP whereby the ICAC has direct access to reasons why the DPP has chosen not to pursue a recommendation. The ICAC also seems to have a capacity after a report has been delivered to Parliament recommending prosecutions, to argue further directly with the DPP over any decision of his not to prosecute. That capacity granted to the ICAC to argue its case to the DPP with a view to changing his decision may not be something the adversely named person is aware of.

44. All in all, the existing safeguards and remedies are minimal, ephemeral, and mirage like. This was no accident. In satisfying an election mandate, Premier Griener was keen to present a strong, robust and impregnable corruption buster. Time has shown that effectiveness does not require impregnability.

45. The answer to the Joint Committee's question marked (a) *whether the existing safeguards and remedies, and how they are being used are adequate* is that the existing safeguards and remedies are inadequate or non-existing. Such safeguards as do exist (such as acting in the public interest) are entirely under control of, and the gift of the Commission and the presiding Commissioner. As best I can apprehend, there is no capacity of the individual dealing with the ICAC to initiate a safeguard action

Are additional safeguards and remedies needed?

46. Yes

A Question of leakage

47. Earlier I noted from the Second Reading speech the Premier said: *The Commission will be required to make definite findings about persons and substantially involved. The Commission will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to definite conclusions.*

48. Earlier in his speech the Premier had also commented: *...[I]t would be crass and naïve to measure the success of the independent commission by how many convictions it gets...* " and: *...[T]he measure of its success will be the enhancement of integrity and most importantly, of community confidence in public administration in this State.* My argument is the reputation of too many individuals has been sullied by allegations unsupported by definite

conclusions because sections 7, 8 and 9 permit findings of 'corrupt conduct to be made in circumstances where the criminal law does not permit such findings to be made in trials. As the tables below illustrate, it would also seem the ICAC is very interested in the number of convictions it gets, and has a direct level of participation in the prosecution process to get them. Its level of participation in the prosecution process goes beyond what is, (or if I am wrong) what should be provided by legislation and also is a cause for concern. Given the number of public inquiries the ICAC conducts some might think its success rate in the conviction column is not great. Again, I suggest a look at sections 7, 8 and 9 may offer an explanation.

49. The leakage between ICAC's finding of corrupt conduct based upon one or more of the subsections to section 9 (1) and court finding of guilt, or departmental findings of dismissal or discipline over ICAC's 30+ years is significant. There is also a number of persons that the Commission believed were directly and substantially involved in the subject matter of the public inquiry, who having endured a public inquiry have been found not to be engaged in corrupt conduct; but still have had their name and personal reputation impugned publically before the Commission in session and its media reporters. If one includes those who have been adversely named as a consequence of compulsory examination or public inquiries – or who, as a consequence of section 10 or 11 complaints – have been adversely named, the numbers must have reached the hundreds.

50. But, if I understand the figures correctly, a substantial number of them were for one reason or another, not placed before the courts, not disciplined, not terminated. Some ICAC initiated cases before the court have been dismissed. Even where convictions were recorded penalties given by the courts in some cases suggest over-zealousness by the ICAC. For example numerous matters in the Local Court have been dealt with by way of non-custodial sentence outcomes. On its face such matters might well be classed as not very serious, and/or as having no systemic features. The Local Court has resolved a number of ICAC matters with suspended sentences and sentences of 12 months or less. Even some of the section 10 and 11 matters have seen dismissal overturned by the industrial tribunals. What appears serious to the ICAC apparently does not always appear so serious to others making legal judgments.

51. Each year the ICAC follows the progress of matters where it has formed an opinion that a person of interest engaged in corrupt conduct and referred the matter to the DPP for consideration as to whether or not the matter should be prosecuted and if so, in which jurisdictional tier of the courts. The ICAC observations as to the progress of outstanding matters appear in its Annual Reports. The statistics recorded give an insight into the ICAC success rate and the inevitably slow rate at which progress – such as it is – is achieved. Of course the slower the progress, the longer the duration of trauma for the adversely named individuals. It is useful in understanding the overall affect of what I have reduced to categories and numbers to recognise that some of the matters will be included in two or sometime three years of Annual Reports. I have set out below what the ICAC Annual Report names *"Prosecution and*

Disciplinary Action in 2016-17 arising from ICAC investigation – progress of prosecution matters. Below is a statistical summary of those matters[16] sourced from three years of Annual Reports from 2016 to 2019. (The named categories listed below are not necessarily the names used by the ICAC's.)

2016-17[17] - Total of 57 individual's matters

Matters awaiting DPP advice	29
Insufficient evidence (Commission has accepted that advice)	3
Awaiting outcome of murder trial	3
Set down for mention	1
Local Court adjournment	1
Local Court orders brief of evidence to be served	2
Local Court trial, conviction, sentence – bond and fine	1
Matters committed for trial in District Court	3
Matters Committed for sentence in District Court	1
Listed for District Court arraignment	3
Listed for District Court trial	1
Listed in court for legal argument	2
Matters tried and dismissed	3
Matter listed for three day District Court conviction appeal	1
District Court conviction and sentence appeals – dismissed	3
District Court sentence appeal variation	1
Supreme Court – trial, convicted, sentenced - appeal initiated	3

Other outcomes for matters closed during 2016 –17[18] (Ss.10 and 11 matters)

Disciplinary Action proposed by ICAC		86
Disciplinary Action taken – dismissal	16	120
counselling	34	
resignation	32	
other	38	
No action or further action warranted		83

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[16] While I have strived for accuracy, I cannot guarantee that the tables are 100% correct. I also note some individuals had more than one matter, and sometimes in different jurisdictions, thus may be entered twice on some tables.

[17] Independent Commission against Corruption; Annual Report 2016-17; Appendix 7, Prosecution and disciplinary action arising from ICAC investigations – p.99.

[18] Independent Commission Against Corruption; Annual Report 2016-17; Appendix 4, Outcome of matters – p.94.

2017-18[19] - Total of 74 individual's matters

Matters awaiting DPP advice	29
Insufficient evidence (Commission has accepted that advice)	3
Attending to DPP requisitions	11
Matter on hold awaiting witness availability	1
Matter searching for defendant to serve CAN	1
Matter for legal argument	1
Matter where "affected" person deceased	1
Matter - proceedings discontinued due to poor health issues	1
Local Court hearing stood over	4
Local Court trial date set	3
Local Court guilty pleas awaiting sentence	5
Local Court sentences	3
Local Court sets date for committal hearing	2
Committals to District Court for trial	1
District Court sentence appeal – upheld in part	2
District Court sentence appeal dismissed	1
District Court trial matters dismissed, withdrawn or stayed	3
Supreme Court - trial, conviction, sentenced – appeal initiated	3

Other outcomes for matters closed during 2017 – 18 [20] (Ss.10 and 11 matters)

Disciplinary Action proposed by ICAC		9
Disciplinary Action taken – dismissal	44	185
counselling	40	
resignation	37	
other	64	
No action or further action warranted		83

2018 - 19[21]- Total of 69 individual's matters

Disciplinary proceedings initiated by Corrective Services	5
Matters awaiting DPP advice	14
Insufficient evidence (Commission has accepted that advice)	6
Death of defendant – proceedings discontinued	1
Attending to DPP requisitions	16
Local Court – Briefs of Evidence ordered	7
Local Court – Matters set down for mention	3
Local Court – Matters set down for trial	4
Local Court – Plea and sentence dates set	3
Local Court – Plea and sentence finalised	3
Local Court?? – Application for permanent stay	1
District Court – Permanent stay granted	1

[19] Independent Commission Against Corruption; Annual Report 2017-18; Appendix 7, Prosecution and disciplinary action arising from ICAC investigations – p.93.

[20] Independent Commission against Corruption; Annual Report 2017-18, I.C.A.C Independent Commission Against Corruption New South Wales; Appendix 4, Outcome of matters – p.90.

[21] Independent Commission against Corruption; Annual Report 2018-19, Appendix 7, Prosecution and disciplinary action arising from ICAC investigation, p. 103 -117.

District Court – Sentence appeal dismissed	1
District Court – Sentence appeal upheld in part	1
District Court – All grounds appeal dismissed	2
District Court – trial, conviction, sentence? – intent to appeal	1
Court of Criminal Appeal – appeal upheld – Supreme Ct re-trial	1

Other outcomes for matters closed during 2018- 19 [22] (Ss.10 and 11 matters)

Disciplinary Action proposed by the public authority			13
Disciplinary Action taken by it–	dismissal	40	188
	counselling	36	
	resignation	41	
	other	71	
No action or further action warranted			139

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52. It should be noted that the ICAC Act requires all of the information contained in the three-years analysis to be included in the ICAC's annual reports. As I understand the figures for these three years[23], the results of the ICAC inquiries show the following results:

> 2016-2017 – out of the 57 matters reported on in that year's Annual Report, 11 matters were finalised – 6 of them adversely to the ICAC (3 insufficient evidence and 3 District Court dismissals); there were also 3 Supreme Court trials held, and convictions obtained, and appeals initiated.
>
> 2017-18 – out of the 74 matters reported on in that year's Annual Report, 14 matters were finalised, 6 of them adversely to the ICAC (3 insufficient evidence and 3 District Court dismissals), there were a further 2 where proceedings were discontinued and again 3 Supreme Court trials resulted in convictions, and appeals initiated.
>
> 2018-19 – out of the 69 matters reported on in that year's Annual Report, 15 were finalised, 8 of them adversely to the ICAC (6 insufficient evidence, 1 District Court permanent stay, and 1 CCA conviction overturned, new trial ordered), there was a further one where proceedings were discontinued; and 1 District Court trial conviction where appeal was initiated.

53. Of the 40 matters finalised over the three years period, 20 or 50% were finalised adversely to the ICAC. Three further proceedings were discontinued

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[22] Independent Commission against Corruption; Annual Report 2018-19, Appendix 4, Outcome of matters – p.100.

with no result. Whether anyone has done this exercise over the 31 years ICAC has been functioning, is unknown to me. But if 50% reflects the overall figure of adverse results supplemented by discontinued proceedings and upheld appeals, then that converts to many individuals who have been put through sustained uncertain, uncomfortable and unsettled times.

The ICAC's relationship with the DPP

54. The powers of the ICAC extend beyond filing a report to Parliament. It is required to obtain the advice of the DPP with respect to the prosecution of any "affected" person adversely nominated to the parliament[24]. However, the ICAC is not authorized to report to parliament, that a person is guilty or has committed a specified offence, or any recommendation that a person should be prosecuted for a criminal offence[25]. Those provisions are required because the ICAC is not a court, nor a tribunal making binding decisions. But what it is entitled to do is to seek the advice of the DPP with respect to the prosecution of an "affected" person for a specified offence[26].

55. The ICAC powers and facilities are often compared to those of a Royal Commission. One way ICAC's powers go beyond Royal Commission powers, is that ICAC as a standing commission has no end-date for the exercise of its powers. A Royal Commission conducts its inquiry using the powers endowed upon it; makes findings, opinions and recommendations, including recommendations relating to the prosecutions of adversely named individuals. Having completed its report, and recommendations in respect of future activity, however described, including recommendations for prosecution, the Royal Commission is shut down. Its recommendations can be accepted and acted upon by the government or not. Whether prosecutions are instituted or not, the Royal Commission is functus. Not so for the ICAC. In respect of its referring matters to the DPP for consideration as to whether or not to prosecute, the ICAC apparently is able to participate beyond its report to parliament and deal directly with the Office of the DPP. My argument is adverse reputational impact can extend beyond a public inquiry and its report into the prosecution stage – where a prosecution is conducted and a verdict of not guilty is rendered. My further concern is whether or not such an arrangement as the ICAC apparently has with the DPP constitutes an interference with the independence of the DPP[27]. This is an important matter that needs consideration as to whether a remedy is required by the Parliament.

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[24] Section 74A (2) Independent Commission Against Corruption Act 1988.

[25] Section 74B Independent Commission Against Corruption Act 1988.

[26] Section 74A Independent Commission Against Corruption Act 1988.

[27] For example see *Office of the Inspector of the Independent Commission Against Corruption Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988 – Operation Vesta* at paragraphs 200 to 255 at pp 53-64.

Remediating – safeguards and remedies

Safeguarding the independence of the DPP

56. If safeguards are needed, and many say they are; one safeguard would be to disentangle any function ICAC has to assist in or influence the prosecution process. The ICAC is not a prosecuting body, and secondly the prosecution of those in the public who have behaved criminally should be conducted with full and complete independence by those assigned to prosecute.

57. The Second Reading speech supports this view.

> The proposed Independent Commission Against Corruption will not have power to conduct prosecutions for criminal or disciplinary offences, or to take action to dismiss public officials. Where the commission reaches the conclusion that corrupt conduct has occurred it will forward its conclusion and evidence to the Director of Public Prosecutions, department head, a Minister or whoever is the appropriate person to consider action. In so doing the commission can make recommendations. The person to whom the matter is referred is not required to follow the recommendation. However, the commission can require a report back on what action was taken. Where the commission considers that due and proper action was not taken, the commission's sanction is to report to Parliament. It is important to note that the independent commission will not be engaging in the prosecutorial role. The Director of Public Prosecutions will retain his independence in deciding whether a prosecution should be instituted.[28] (My emphasis)

58. The report on Operation Vesta examined in some detail the ICAC seeking to influence – to the point of demeaning personally a senior officer of the DPP's approach to the law – a decision made by the DPP not to prosecute two "affected" persons involved in a matter investigated by the ICAC. The episode occurred during the period ICAC was obtaining advice from the DPP as to whether prosecution was to occur. It was apparent the ICAC was not happy with the advice it obtained – namely insufficient evidence for prosecution[29].

59. On the other hand questions may rightly be asked about where does the investigation end and the prosecution process start. For the courts the formal prosecution proceedings start with the laying of the charge. But that starting point need not necessarily be the same from the DPP's position. He has responsibility for initiating a charge. An ICAC report to the Parliament is required to nominate a specified criminal offence for the consideration of the DPP. From the moment the ICAC advises the DPP of its opinion, the matter is in the hands of the prosecution for it to exercise its discretion as it sees fit.

60. The first duty of the DPP is to consider instituting a prosecution – and if so, what is the appropriate charge. The reference from the ICAC identifies a specified charged it believes appropriate. But the question of prosecution and the appropriate charge are in reality matters for the DPP; it is not bound to prosecute, and if it chooses to prosecute it is not bound to accept the specified charged identified by the ICAC. From the point at which the DPP receives the

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[28] See f.n. 4.

[29] See f.n. 16.

reference from the ICAC the independence of the DPP and his prosecutors should be recognised. The ICAC is required to seek advice from the DPP on the question of prosecuting, not to give it. ICAC has to Report to Parliament to explain its reasoning why it is referring a matter to the DPP for advice. It has the documentary and transcript material to forward on to the DPP. It is argued there is nothing in the ICAC Act that empowers the ICAC to give advice or to express its opinion directly to the DPP. The ICAC may recommend. There is a difference between making a recommendation and giving advice or argument.

61. As I read Part 5 of the ICAC ACT, the ICAC having referred a matter to the DPP for advice, may also recommend what action is to be taken by the DPP, and may require the DPP to report to it and specify the time in which the report should be made available to it. In the event the ICAC is unsatisfied there is a pathway for it to complain to the DPP and then, if still not satisfied, complain to the Attorney General. Such a power arguably is very troubling. It weakens or diminishes the independence of the prosecutor. Part 5 of the ICAC Act should be amended to preserve the independence of the DPP by exempting the DPP from accepting or complying with a request for a report from the ICAC until such time as the prosecution proceedings are finalised – whatever form that finalisation may take.

62. Likewise ICAC should not be involved in attending to DPP requisitions after it has made a decision to prosecute – and arguably also before that decision is made. The DPP should be looking to the police to conduct the requisitions, thereby ensuring his independence, and keeping the ICAC at arms length. Public perception of independence is as important as the fact of independence. As Premier Griener pointed out: *where due and proper action was not taken the commission's sanction is to report to Parliament.*

No terms of reference to contain the scope of an ICAC investigation/inquiry

63. Another important way in which the ICAC's powers exceed those of a Royal Commission, at least insofar as public inquiries are concerned is that its work is not confined by terms of reference – other than the broad and generous provisions of the ICAC Act; nor the evidential limitations imposed when proving fundamental facts attaching to specific charges. I adopt an argument offered to me in respect of commissions that both investigate and conduct public hearing. The argument postulates that such a situation can result in confusion of roles and in potential for conflicts of interest built into commissions that both investigate and conduct public hearings that tend to take on an accusatory form but without the safeguards found in courts.

64. Investigation requires an objective, open approach, seeking out and looking for all evidence relevant to the proposition being investigated – but can prematurely focus upon an individual before all the evidence has been discovered. Public inquiries being used as part of the investigative stage often take an accusatory approach – and that is certainly so with the ICAC public inquiries. Yet the accusatory process is not circumscribed by any actual charge (or even by prescribed terms of reference), thereby permitting a fishing

expedition, which can stray into any number of areas and serve any range of purposes of the commission (including relating to its own political and other agendas, if any).

65. The ICAC should give serious consideration to identifying in public inquiries with more specificity than it does in opening address the nature of corrupt conduct and the specified offence(s) it alleges – and accept that opening as defining the parameters of the public inquiry.

Increasing the scope of the Public Interest criteria to better protect

66. It is argued the ICAC Act provides two pathways by which an "affected" person can be referred to the DPP for its advice in respect of prosecution. When considering which of the two paths, it is important for the ICAC to remember when exercising its investigation function, that is all it is doing. True, as a consequence of the investigation it may be exposing corruption- but arguably that occurs whether an investigation is conduct by a public inquiry or not conducted by a public inquiry. Reputational damage is less likely to occur if the investigation is conducted by means other than a public inquiry.

67. The Joint Committee is urged to consider a recommendation enhancing the impact of the public interest when determining whether or not to hold a public inquiry. Arguably in the past compliance with section 31 (2) of the ICAC Act has been perfunctory and tick-a-box. With respect to the Parliament, that section overlooks what the then Premier made clear, the legislation was a component of the Government's program to *restore the integrity of public administration and public institutions* in NSW. I would argue it was also about supporting and maintaining the integrity of public administration and public institutions.

68. The High Court in 1990 sought, in a unanimous decision, to put ICAC's adverse finding in context of the true purpose of the ICAC:

> [T]he power given to the Commission in the case of a reference by Parliament to determine whether corrupt conduct may have occurred, may be occurring or may be about to occur, is a power to make a finding of a tentative kind only which, together with the limited nature of the findings which, may be expressed pursuant to s.74(5), indicates that the Commission was intended to have only a restricted capacity to make findings, its principal roles being to investigate, educate and advise and to enlist and foster public support against corrupt conduct.[30] (My emphasis)

69. It is conceded the mandatory consideration list set out in s. 31 (2) does not confine the Commission's consideration of public interest issues raised by the principal provisions of the ICAC Act. It is argued that mandatory consideration of other issues broadens the scope of relevant public interest issues to be considered in a "whether or not" scenario which currently are not being considered. In other words the proclaimed purpose of Parliament creating an ICAC is not playing its part in one of the high profile activities undertaken by the ICAC. It is also argued that has not been happening

[30] Balog v Independent Commission Against Corruption [1990] HCA 28; (1990) 169 CLR 625

70. Nor, does the current mandatory list reflect more than one of the objects of the ICAC Act, in a situation where other objectives might point to a "Not" vote being more appropriate than exposing corruption – particularly if the corruption is hard to find or identify. While investigation is a stated object of the ICAC Act – that object may in all the circumstances be satisfied without the need for a public hearing. What special features of the public inquiry under consideration would assist other objectives set out in section 2A of the ICAC Act? How does that particular public hearing prevent corruption in State government authorities ? What scientific or academic evidence is available supporting that proposition qua the public inquiry under consideration? How do public inquiries, particularly the public inquiry under consideration, educate public authorities more effectively than other methods of education? Again, what empirical evidence supports such a proposition? How does the public inquiry under consideration educate the public on the detrimental effects to public administration and to the community? Again what empirical evidence other similar public inquiries supports having this particular public inquiry? In respect of the specific matter under consideration, are there other ways in which ICAC can achieve those objectives?

71. The introductory words to section 31 (2) of the ICAC Act do not make it mandatory for the Commission, when considering "whether or not" to have a public inquiry to consider the negative case. Consideration of the "not" case should be mandatory. Consideration should be given to amending sub-section (2) so that it reads:

> (2) Without limiting the factors that it may take into account in determining whether or not to conduct a public inquiry, the Commission is to consider formally:
>
> > (i) reasons why conducting the public inquiry is in the public interest, and also
> > (ii) reasons why it is not in the public interest to conduct a public inquiry.

72. Further, I urge consideration be given to amending sub-section (2) by including other mandatory considerations involving public interest issues such including:

> *Whether the Commission has identified sufficiently the nature and circumstances of the alleged corruption and persons having a substantial and direct interest the corruption aspect the public inquiry will focus on.
> * Is the Commission willing to disclose adequate information to persons it believes have a substantial and direct interest in the corruption aspect as a term limiting scope of the public inquiry?
> *Has the Commission identified with sufficient certainty all persons involved in the alleged corrupt conduct under investigation? If not, is it in the public interest to have a public inquiry?
> *Whether and how is the public interest served by specifically identifying any of the persons the Commission believes are

substantially and directly interested in any subject matter of the hearing?
*Is it in the public interest to identify the nature, circumstances and form of the corruption though a public inquiry or can the benefit of any such identifications be achieved through some other mechanism?
*How, in the circumstances of this investigation would a public hearing advance integrity in public administration?
*How, in the circumstances of this investigation would a public hearing advance accountability of public administration?
*How, in the circumstances of this case would a public hearing prevent further corruption within public administration beyond the specific public authority associated with the persons believed to be substantially and directly interested in the subject matter of the public inquiry?
*To what extent do the investigative powers of the Commission being used prior to and during the public inquiry go beyond the investigative powers available to the police? What effect is that likely to have upon an "affected" person's criminal trial prospects and any advice the DPP may be asked to give in respect of future prosecution?
*To what extent is it anticipated the provisions of s.17 of the ICAC Act will be relied upon during the course of the public inquiry? What effect is that likely to have upon an "affected" persons trial prospects and any advice the DPP may be asked to give in respect of prosecution?
*Is there any likelihood a corrupt conduct finding will only be predicated upon relying upon the word "could" in both section 8 and section 9 assessments. If so, is it in the public interest to conduct a public inquiry?

Creating more effective legal representation

73. Legal representation effectiveness would be increased if the Commission offered a precise and rigid outline limiting the terms of investigation of the public inquiry. As noted above one advantage the ICAC enjoys is it is unconstrained in its investigation. One would, however imagine, by the time it had determined on having a public inquiry, the nature, terms, personnel and their role in the investigated corrupt conduct would have reached a stage where, detail and hopefully new evidence, more than anything else were the purposes of the inquiry. If a specified allegation, or *modus operandi*, or area of investigation was set as the inquiry's parameters, that would give legal representatives a better sense of what was relevant and what was not relevant. It would also set a more defined focus for cross-examination. An absence of precise disclosure makes it difficult for legal representatives to negative propositions, or test credit.

74. It is submitted the NSW Bar Association and the Law Society of NSW should be invited by the Joint Committee to consider ways in which legal representatives could play a more effective role in public inquiries.

Raising the Bar – striving for a prima facie case

75. Sections 7, 8 and 9 of the ICAC Act set the parameters of the "corrupt conduct" definition. The primary work of section 7 is a) to confine the concept of corrupt conduct to the various descriptions of forms of conduct set out in section 8 but not excluded by section 9. Section 7 (2) then also incorporates conspiracies and attempts to perform the conduct described by section 8 as being included in the concept of corrupt conduct. It is hard to see what work section 7 (3) does, because once a conspiratorial agreement is made the offence is committed. Likewise once an attempt has commenced, the offence is committed. The fact that no further action in respect of the conspiracy or the attempt is undertaken does not dissolve the offence – it simply becomes a matter for sentence once the offence is proved.

76. Section 8 (1) descriptions of conduct also include as corrupt conduct any conduct that *could* adversely affect indirectly the honest or impartial exercise of official functions of any public official, group of public officials, or public authority. Section 8 (2) also captures any conduct of any person (whether or not a public official) that *could* adversely affect, directly or indirectly, the exercise of official functions of any public official, group of public officials, or any public authority and which *could* involve any of the matters included on sub-sections (a) – (y). For the purpose of this submission it can be taken that matters (a) – (y) is a list of recognised criminal offending ranging from blackmail, theft, harbouring criminals, illegal gambling, illegal drug dealing, treason, homicide and conspiracy or attempt to do any of those things. Section 8 (2A) provides that corrupt conduct also includes any conduct of any person (whether or not a public official) that *could* impair public confidence in the administration and which *could* involve collusive tendering, and other dishonest conduct.

77. Section 9 excludes conduct otherwise described in section 8 from being corrupt conduct unless it *could constitute or involve* one of four categories; namely: a criminal offence, a disciplinary offence, an offence that constitutes reasonable grounds for dismissing, dispensing with services or otherwise terminating services of a public official; or in the case of a Minister or an MP, conduct that *could* involve a substantial breach of an applicable code of conduct.

78. Thus corrupt conduct is possible if it *could* adversely affect impartial exercise of an official function by any public official, and *could* constitute a criminal offence. Moreover, the ICAC only needs to prove these two propositions on the balance of probabilities.

79. The issue of what constitutes corrupt conduct as encapsulated by sections 8 and 9 has troubled judges of both the Supreme Court and the High Court. Chief Justice Gleeson said of the definition of corrupt conduct:

> The ICAC Act contains a definition of corrupt conduct which is both wide and in a number of respects unclear. One of the most striking aspects of the legislative scheme that a conclusion that a person has engaged in corrupt conduct is unconditional in form, is necessarily based upon a premise which is conditional in substance. Part of the definition of corrupt conduct is that it must be conduct which

> *"could"* constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or terminating service of a public official. Thus for example, where a criminal offence is involved, a determination that a person *has* engaged in corrupt conduct is necessarily based upon a finding that the conduct of the person *could* constitute a criminal offence. In the public perception, the conditional nature of the premise upon which it is based could easily be obscured by the unconditional form of such a conclusion[31].

80. The last sentence in the citation goes to the unfairness of the reputational damage that occurs to those "affected" persons whose referral to the DPP have occurred though a public inquiry, particularly those who are not prosecuted or their charges are dismissed. The second sentence of the citation goes to the heart of the unsatisfactory features of the definition of corrupt conduct.

81. The criminal law is comprised of many offences. For a person to be guilty of an offence the law requires that the tribunal of fact must be satisfied beyond reasonable doubt that each factual element of the offence has been proved beyond reasonable doubt. Primarily, the criminal law is about establishing a series of specified facts that constitute a specified offence. Even where an opinion is required to prove an offence that opinion is converted into a fact. For example, where the fact of grievous bodily harm being occasion must be proved the jury must form an opinion that a particular injury or injuries amount to grievous bodily harm. Thus proving grievous bodily harm requires a fact-finding tribunal to be satisfied beyond reasonable doubt that really serious harm was occasioned. That finding then becomes a defined fact.

82. However, the trouble with *could* is that it calls for an opinion wherein the fact required to be found is only a possible fact rather than a definite fact. That point is made clear in citation from *Greiner's* case above.

83. Since 'corrupt conduct' needs to pass both the section 8 and the section 9 tests it permits of a double *could* test. Conduct which satisfied a *could* test is much easier to establish that conduct that constitutes a specified certain fact. Conduct which satisfies a double *could* test is easier still to establish. In the first an opinion is called for. For example: A person has been charged with a criminal offence requiring say five specific facts to be proved beyond a reasonable doubt. If only four were proved, one could say for certain the offence had not been proved. But if one applied the *could* test when only four out of the five had been proved that would still leave open the possibility that the five elements of the offence *could* have happened.

84. The double *could* test is so far below the threshold of what is required for a *prim facie* case or criminal conviction that fifty percent of "affected" persons in the three years 2016-17 – 2018-19 who were referred to the DPP and had their matters finalised were not convicted of any offence. But, of course, all were subjected to adverse reputational impact because the ICAC finding was both public and official. The bar should be set higher.

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[31] See f.n. 7 at p. 129

85. Bearing in mind the ICAC Act discriminates against State public servants – in circumstances where reputational impact may be unwarranted because of the inherent weakness in the *could* test – public servants may suffer employment termination within public authorities and yet be unable to obtain similar employment in the non State employment sector because of unfavourable publicity arising from a public inquiry and follow-up report to Parliament.

86. The test for corrupt conduct should be framed so that corrupt conduct is available only in circumstances where it was reasonable for the Commission to expect a reasonable tribunal of fact would come to a conclusion on admissible evidence that the opinion or finding of the Commission underpinning the corrupt finding would be sustained. The analysis done by Priestly JA in the *Griener* case sets a working base for a workable standard of the meaning of corrupt conduct that can be translated into the reasonable requirements before criminal prosecution is initiated.

87. In *Greiner's* case Priestly JA spends some time trying to understand how sections 8 and 9 of the ICAC Act interact with each other so that rather than the "tail wagging the Dog", "the Dog and tail would be in sync."[32] He came to the conclusion by relying upon obvious and sound assumptions in determining the meaning of "could" within its statutory construction in these two sections. He started with the assumption the meaning of "could" would *prima facie* be taken to be the same in regard to each of the possibilities available. He then reasoned the Commission would only state an opinion if it made a finding of fact that in the Commission's opinion arguably constituted a specified offence. If the ICAC recommendation was followed then the ensuing prosecutor would seek to prove the facts previously found by the Commission. The tribunal of fact before whom the prosecution was bought might not be satisfied beyond reasonable doubt of one or more of the facts necessary to be proved to constitute the criminal offence. Evidence available to the commission might not be available to the prosecution. The tribunal of fact may take a different view as to the credibility of one or more witnesses. Proof of a critical fact might not be regarded as satisfying the criminal standard[33].

88. It was through following this path Priestly JA opted for *could* to mean *would* in paragraph (a) of section 9. But his line of thinking also requires *could* to mean *would* in section 8. If *would* became the adopted standard, then that standard would meet past practice of the Local Courts when committing defendants to the District or Supreme Court for trial on indictable offences.

> The meaning of "could", at least in its relation to par (a) of s.9 (1) must be sought in the light of the relevance of this example. It seems to me that by far the most likely meaning of "could", so far as this example is concerned, is "would if the facts were found proved at a trial". If that is right, then the same meaning would fit other possibilities equally as well, and I can see nothing requiring any different construction of "could" in connection with those possibilities[34]. (My emphasis)

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[32] See f.n. 7 at p. 184

[33] See f.n. 7 at pp 185-186.

[34] Ibid

When is a finding of corrupt conduct a case of overstatement

89. There must be occasions when, as a consequence of an investigation, whether or not that investigation involved a public inquiry, the conduct under scrutiny does not reach a point where it would constitute a criminal offence assuming the admissible evidence available to the ICAC were accepted by a court. In Such circumstances the relevant conduct is unlikely to qualify as serious corrupt conduct and/or as systemic corrupt conduct[35]. However, assuming as the ICAC Act presently stands the ICAC could label such conduct as corrupt conduct that is not exactly what section 12A of the ICAC Act is encouraging the ICAC to focus on. Section 12A is about having serious and/or systemic conduct labelled as corrupt conduct. True it does not prohibit less serious or non-systemic conduct being so labelled. But reserving the label for the type of matters 12A seeks to focus attention on, would only enhance the label.

90. It is argued that it is inappropriate to have conduct that can only amount to disciplinary conduct or to resignation/termination conduct as being equated to conduct that amounts to criminal conduct. As the legislation presently stands, in circumstances where conduct as found by the ICAC amounts only to disciplinary or termination type conduct that conduct should not be labelled corrupt conduct. The legislation should be amended so that some more appropriate appellation should be allocated to findings that only fall into this category, such as *failure to abide by public service employment standards; failure to abide by ethical standards; failure to abide by the terms and conditions of an employment contract; or employment based misconduct.*

91. I am, of course, aware of an argument against the proposition that the "could" test in sections 8 and 9 should be changed. The current Inspector, Mr Bruce McClintock SC, advanced before the Joint Committee an argument that the absence of the "could" test "*would deprive the ICAC of much of its investigative power because such power is based on the definition of 'corrupt conduct'.*" There is an answer to that: The ICAC investigative purpose is primarily to expose "serious corrupt conduct" and "systemic corrupt conduct"[36] not to expose conduct that "*could* be serious corrupt conduct.

92. Moreover, if one considers the relationship between the two words: "could" and "would" it becomes obvious there is a symbiotic relationship between them – one passes through "could be serious" to arrive at "would be serious". That is, one removes most of the uncertainty that "could" creates. In other words the investigative powers of the ICAC must pass through the "could be serious" or "could be systemic" to arrive at the "would be serious" or "would be systemic". Shortly put, the impact upon the ICAC's powers of investigation would be nil. Indeed, the powers may have to be used for a greater duration to move from the position where investigators were satisfied the "could be serious" label no longer applied, but was replaced by the "would

[35] See s.12A Independent Commission Against Corruption Act 1988.

[36] Ibid.

be serious" label. The "would" test only requires a greater use of the very same powers.

Developing an exoneration protocol to deal with reputational impact.

93. Many of the reasons why there should be an exoneration protocol have been raised throughout these submissions. Indeed it is a theme of these submissions. I rely upon those reasons, earlier expressed, in this sector of my submissions.

94. Earlier in these submissions the Joint Committee was invited to consider what reputational impact looked like. Based upon an analogy arising from *obiter* found in Mahoney JA remarks in *Griener's* case[37], an argument was advanced that there are occasions when application of existing statute law can produce not only injustice, but also an immoral consequence. While the State cannot be found guilty of defamation, had a person publically uttered unjustifiably that an individual was engaging in corrupt conduct, in circumstances where that individual's lawyers were able and willing to have that utterance tested before the defamation courts, such reputational damage would surely be adjudged as defamatory. Rather than have the State turn a blind eye to the occasions where unjust reputational damage done by ICAC, there needs to be a means of remediating that damage if possible. Surely that was in Justice Priestly's mind when, describing the purpose of the ICAC Act in the same case he noted:

> *The [ICAC] Act gave no power to the Commission to change or even pronounce upon the rights of any citizen in any legal sense. The Commission's power is to find things out, make them public, and/or refer them to an appropriate authority; then the law will take its course.*
>
> *...A citizen acquitted of a criminal charge is ordinarily entitled to the benefit of the longstanding presumption of innocence until guilt; and as guilt in this example would (in the great majority of cases) forever be excluded by the acquittal, the presumption could not be contested. Where then would the Commission's finding stand?*
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> *The example is not an improbable one; in my opinion such case is bound to happen if the Act continues in its present form. The example demonstrates that in one very real sense "findings" by the Commission of corrupt conduct should be regarded as conditional or provisional only. Yet it seems inevitable that such findings may gain general currency as final.* [38]

95. Justice Priestly is not alone in forming a view that the Commission's findings are conditional or provisional only. Any finding of the ICAC seeking prosecution advice against an "affected" persons must by its very purpose be no more than a temporary or transitory state of affairs. The making of an adverse finding by the Commission would always be done in circumstances where the Commission anticipated that the available evidence, its reasoning and the finding would produce a prosecution resulting in a conviction for a specified offence. This sense of tentativeness was also the unanimous view of the High Court judges in *Balog's* case:

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[37] See para 11 herein.

[38] See f.n.7 at pp. 180-181

> The power given to the Commission in the case of a reference by Parliament to determine whether corrupt conduct may have occurred, may be occurring or may be about to occur, is a power to make a finding of a tentative kind only, which, together with the limited nature of the findings which may be expressed pursuant to s.74 (5), indicates that the Commission was intended to have only a restricted capacity to make findings.[39]

While this citation from *Balog's* case refers to a reference by Parliament, the tentativeness of the ICAC findings applies to all of them.

96. As earlier discussed, reputational integrity is bound up with other important interests including honour. Honour, as earlier noted is an interest in being treated with the respect due to a fellow human. To leave a finding of engagement in corrupt conduct in circumstances where there is no redress is unjust and immoral.

97. The more so, because as earlier set out the ICAC Act is discriminatory in its impact. The ICAC's work, including it findings applies only to those in some way caught up within the definition of "public official". The millions of others in NSW not within that definition do not face any prospect of the ICAC being interested in their dealings. The form of injustice being experience by the State public service group is not a possibility for them. It is a situation that can be remedied.

98. One solution Justice Priestly suggested was of findings being "conditional" or "provisional".

99. Alternatively, an exoneration pathway could be created in the legislation permitting those individuals adversely named by the ICAC to:

a) prove reputational damage;
b) prove no prosecutorial proceedings taken, or
c) prove acquittal of charges arising out of an ICAC finding, or
d) the initial findings reported to the Parliament were without merit.

and seek to have the ICAC findings set aside. The difference between Justice Priestly's suggestion and the alternate pathway is that the ICAC would obtain a chance to be heard. Where reputational damage has been caused by or contributed to by the contents of the ICAC's report to Parliament, the question of whether some system of waiver of privilege[40] may need to be considered within the exoneration protocol, should be addressed.

100. There should be two levels of exoneration available within the exoneration protocol and an applicant for exoneration may choose one or both options:

i) the Commission's findings are unwarranted;
ii) the Commission's findings were made without merit.

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[39] See f.n. 30

[40] See s.78 (4) Independent Commission Against Corruption Act 1988

101. The Commission's finding would be judged to be unwarranted if reputational damage has occurred; and the DPP advised insufficient evidence to prosecute, or the prosecution failed for one reason or another – e.g. acquittal; conviction set aside; stay; discontinued, hung jury and no further proceedings; CCA appeal upheld and no retrial.

102. As is the case with District Court all grounds appeals, an application for exoneration on the basis a finding of the ICAC was made without merit should be determined on the papers; and only if leave is granted should oral evidence be admitted. The applicant would still have to prove reputational damage was occasioned.

103. The Commission's findings would be without merit in circumstances where for one reason or another the evidence available from the public inquiry did not support the proposition, or qualify as establishing on the balance of probabilities that serious corrupt conduct, or systemic corrupt conduct had been engaged in by the applicant.

104. Appropriate legislative changes to the ICAC Act should be considered by the Joint Committee, which would set up an exoneration pathway through an appropriate tribunal. It is argued consideration should be given to a civil administrative jurisdiction. The District or Supreme Courts or the NSW Administrative Appeals Tribunal would all be capable of providing administrative review for the purposes of setting aside findings on either of the two bases canvassed above. There should be an appeal pathway commencing with the Court of Appeal. It will be a matter for the Joint Committee to consider which of the available courts is the most appropriate.

105. The legislation should consider a timeframe during which the exoneration pathway, or more accurately an application for exoneration, is available. That timeframe should take into account – at least initially, the fact that an exoneration protocol has not been available for the 31 years the ICAC has been functioning.

106. The question of whether the approach to the tribunal should be as of right or as a matter of leave being granted should also be considered. It is submitted it should be as of right based upon then tentative nature of the finding, the discriminatory factor discussed above, and the loss of honour that the ICAC findings and the hearing have occasioned.

107. At a hearing of the exoneration application based upon a claim the findings were unwarranted, proof of the existence of reputational damage should not focus upon the validity of the cause of the damage – unless that cause – that is, the absence of any merit in the decision making process - played a substantial part in the reputational damage. (By use of the word "cause" in this paragraph, I mean specific details within the evidence, or merits of the ICAC's conduct, proceedings or aspects of its report to the Parliament.) It will be enough to prove the first ingredient of reputational damage to establish that there was an adverse naming of the individual by the

ICAC in its report to the Parliament. Other ingredients that would be needed to prove reputational damage would involve establishing some of the impact and consequences of the adverse naming earlier discussed in these submissions.

108. The legislation should also consider – and it submitted – adopt as the appropriate test that the *prima facie* position is that an exoneration application based on a claim the finding was unwarranted should be granted. The onus is on the ICAC to establish that an exoneration application should be dismissed.

109. On the other hand if the applicant for exoneration is claiming the ICAC findings were made without merit, as with any such appeal in any jurisdiction, the burden of proof, in those circumstances would be on the applicant.

Conclusion

110. At the outset of these submissions, and influencing the submissions throughout is former ICAC Commissioner Ian Temby's approach to any consideration of legislative – and one dare say – procedural changes to the ICAC: *What matters is to ensure the Act is rectified in a manner which retains the independence and effectiveness of the ICAC.* Having an integrity-seeking public authority that makes findings and expresses opinions, a substantial number of which raise issues of injustice and questions of morality, is as unsatisfactory as it is bizarre.

111. The case histories sourced from recent annual reports suggest the ICAC's investigative effectiveness has been found wanting. Corrupt conduct exposés, sourced from the investigative media, also support a sense of effectiveness found wanting.

112. Any ICAC investigation is capable of finding and exposing a source of corrupt conduct and/or a genre of corrupt conduct. It is difficult to see how an investigation concluding with a public inquiry – as distinct from a thorough investigation without a public inquiry, does a better job of exposing corrupt conduct. I doubt that the ICAC or any many others have done any research on that.

113. What is clear from the 30 years history is that reputational impact costing individuals much in suffering and much in financial terms has been an unintended consequence of the ICAC legislation.