

**Submission  
No 26**

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

**Organisation:** SA Independent Commissioner Against Corruption

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Mrs Tanya Davies MP  
Committee Chair  
Committee on the Independent Commission Against Corruption  
Parliament House  
6 Macquarie Street SYDNEY NSW 2000

By email: [icaccommittee@parliament.nsw.gov.au](mailto:icaccommittee@parliament.nsw.gov.au)

Dear Chair

**Inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations**

I refer to your email dated 18 May 2020 inviting me to make a submission to your inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations.

I am pleased to provide the following submission.

I note the inquiry's Terms of Reference and the helpful discussion paper published by the Committee.

In the circumstances my submission is addressed to the fourth term of reference namely, relevant practices in other jurisdictions.

As the Committee observes in its discussion paper, in South Australia the Independent Commissioner Against Corruption (Independent Commissioner) is an anti-corruption body that is oversighted by a parliamentary committee (the Crime and Public Integrity Policy Committee) and a reviewer, whose functions and powers are set out in Schedule 4 of the *Independent Commissioner Against Corruption Act 2012 (SA)* (the ICAC Act).

The ICAC Act also sets out the functions and powers of the Independent Commissioner and the Office for Public Integrity (OPI). More particularly, section 7 of the ICAC Act sets out the functions of the Independent Commissioner and section 17 sets out the functions of the OPI.

In simple terms the function of the OPI is to receive and assess complaints and reports about corruption, misconduct and maladministration in public administration and to refer complaints or reports to inquiry agencies, public authorities and public officers or make recommendations to the Independent Commissioner in relation to complaints and reports.

The functions of the Independent Commissioner are varied but for the purposes of your inquiry those functions include identifying corruption in public administration and investigating it and referring it for prosecution, or referring it to a law enforcement agency for investigation and prosecution (section 7(1)(a)(i) and (ii)). The term "law enforcement agency" is defined in section 4 of the ICAC Act to include various federal law enforcement agencies, South Australia Police and the various anti-corruption bodies around Australia. The functions also include identifying serious or systemic misconduct or maladministration in public administration and exercising the powers of an inquiry agency (i.e. the Ombudsman) to deal with it in appropriate circumstances (section 7(1)(ca) and (cb)).

The term 'corruption in public administration' is defined in section 5 of the ICAC Act. The definition is broad and in essence extends to any offence (including attempts and ancillary offences) committed by a public officer while acting in his or her capacity as a public officer (including former public officers and prospective public officers) (section 5(1)). Misconduct and maladministration are also defined in the ICAC Act (section 5(3) and (4) respectively), as is the concept of what constitutes 'serious or systemic' misconduct or maladministration (section 4(2)). The term 'public officer' is defined in section 4 of the ICAC Act by reference to Schedule 1 of the ICAC Act, which provides a list of public officers along with the public authority responsible for the relevant public officers and the Minister responsible for the relevant public authority.

As is apparent from the Independent Commissioner's functions, the Independent Commissioner is not a prosecuting authority. Where a matter of corruption has been investigated by the Independent Commissioner using the powers set out in the ICAC Act and it is determined by the Independent Commissioner that there is sufficient evidence to warrant the matter being considered for prosecution, the matter is referred to the Director of Public Prosecutions (DPP) for an independent assessment of whether a prosecution should be commenced. The DPP applies the DPP Prosecution Policy and Guidelines for the purpose of making that assessment.

I note that your inquiry is directed at reputational impact on an individual being adversely named in the NSW ICAC's investigations. I note also that the Committee's discussion paper refers to the possibility of an exoneration protocol. The South Australian ICAC Act does not provide for an exoneration protocol. However, I note that the South Australian ICAC Act does acknowledge and address the reputational harm that might arise from an investigation undertaken by the Independent Commissioner.

In this regard, section 3 of the ICAC Act sets out the primary objects of the Act. Among those primary objects is the object at section 3(c) namely:

to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).

With this primary object in mind, there are various protections offered by the ICAC Act in relation to a person's reputation. These include:

- Investigations are undertaken in private. There is no facility for public hearings in the ICAC Act or associated legislation;
- There is capacity in the ICAC Act for the Independent Commissioner, the Deputy Independent Commissioner or an examiner appointed by the Independent Commissioner to conduct an examination for the purposes of an investigation into corruption in public administration (section 29) the process and procedure for which are set out in Schedule 2 of the ICAC Act.

Any such examination must be held in private (Schedule 2, clause (3)) and the examiner may give a non-communication direction in relation to the examination (Schedule 2, clause (9)). The examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence (Schedule 2, clause (10)).

Further, while the Independent Commissioner may, in writing, vary or revoke a non-communication direction (Schedule 2, clause (11)), the Commissioner must not do so if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence (Schedule 2, clause (12)).

Additionally, the reputation of a person is a factor that the examiner must or may consider (depending upon the circumstances) when deciding whether to include a notation on a summons requiring a person to attend at an examination or a notice to produce documents issued under clause 5 of Schedule 2 to the effect that disclosure of information about the summons or notice, or any official matter connected with it, is prohibited except in the circumstances, if any, specified in the notation (Schedule 2, clause 6(2)(a) and (b)).

- There is also capacity in the ICAC Act and associated legislation for the Independent Commissioner to conduct a hearing in relation to an investigation undertaken by the Independent Commissioner into an issue of serious or systemic misconduct or maladministration. In such an instance the Independent Commissioner exercises the powers of the Ombudsman (section 24(2)(b) and (c)) and via that route has available the powers of a Royal Commission as set out in the *Royal Commissions Act 1917* (SA) (section 19, *Ombudsman Act 1972* (SA)). However, any such investigation must be undertaken in private (section 18(2), *Ombudsman Act*) and consequently there are no public hearings conducted (notwithstanding section 6 of the *Royal Commissions Act*, which states that for the purposes of that Act a Royal Commission may take evidence in public or in private).

On two occasions I determined to publish a report of my findings in relation to investigations undertaken by me of serious or systemic misconduct or maladministration in public administration. The publication of these reports was pursuant to the power in section 26 of the *Ombudsman Act*. A copy of each of these reports can be found on the ICAC website under the heading: Misconduct and maladministration investigations (<https://icac.sa.gov.au/misconduct-maladministration-investigations>).

- While the ICAC Act contains a mandate that the Independent Commissioner is to perform his or her functions in a manner that is as open and accountable as practicable (section 7(4)(a)) the ICAC Act also contains strict confidentiality provisions (section 54(1), (2) and (3)) and restricts publication of information and evidence associated with a complaint or report made under the ICAC Act (section 56). In this context publish means publish by newspaper, radio, television, internet or other electronic means of creating or sharing content with the public or participating in social networking with the public, or any similar means of communication to the public (section 4).
- The Independent Commissioner may make a public statement in connection with a particular matter if, in the Commissioner's opinion, it is appropriate to do so in the public interest and the Commissioner has had regard to among other things:
  - the risk of prejudicing the reputation of a person by making the statement (section 25(b));
  - whether the statement is necessary to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person (section 25(c)); and
  - if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under the ICAC Act, the person is not implicated in corruption, misconduct or maladministration in public

administration—whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public (section 25(d)).

I note that the subject matter of the last dot point above is touched upon in paragraph 1.52 of the Committee's discussion paper.

- The Independent Commissioner may prepare a report setting out recommendations, formulated in the course of the performance of the Commissioner's functions, for the amendment or repeal of a law (section 42(1)(a)), or findings or recommendations resulting from completed investigations by the Commissioner in respect of matters raising potential issues of corruption, misconduct or maladministration in public administration (section 42(1)(b)), or other matters arising in the course of the performance of the Commissioner's functions that the Commissioner considers to be in the public interest to disclose (section 42(1)(c)). A copy of such a report is provided to Parliament (section 42(2)) and laid before both Houses (section 42(3)).

However, the Commissioner must not prepare a report under section 42 that sets out findings or recommendations resulting from a completed investigation into a potential issue of corruption in public administration unless all criminal proceedings arising from that investigation are complete or the Commissioner is satisfied that no criminal proceedings will be commenced as a result of the investigation, in which case the report must not identify any person involved in the investigation (section 42(1a)(a)).

Similarly, the Commissioner must not prepare a report under section 42 that sets out findings or recommendations resulting from a completed investigation into a potential issue of misconduct or maladministration in public administration that identifies any person involved in the particular matter or matters the subject of the investigation unless the person consents.

- Section 55 of the ICAC Act requires that proceedings for an application for a warrant or injunction under the Act, proceedings for contempt of the Independent Commissioner and other proceedings under the Act (other than for an offence) must be heard in private unless a court or judicial officer concerned in the proceedings orders otherwise (section 55(1)). However, notwithstanding this requirement, proceedings for an offence against the ICAC Act must be heard in private if a public hearing may prejudice an investigation under the ICAC Act or unduly prejudice the reputation of a person other than the defendant.
- Lastly, Schedule 4 of the ICAC Act provides for a reviewer of the Independent Commissioner and the OPI. Part of the reviewer's function is to conduct annual reviews examining the operations of the Independent Commissioner and the OPI during each financial year (Schedule 4, clause (1)(a)). In so doing the reviewer must consider, among other things, whether there was any evidence of unreasonable invasions of privacy by the Independent Commissioner or employees of the Independent Commissioner or of the OPI (Schedule 4, clause 3(1)(a)(i)(A)) and whether undue prejudice to the reputation of any person was caused (Schedule 4, clause 3(1)(a)(i)(B)).

The protections identified above serve as a safeguard against any reputational harm that might arise as a consequence of an investigation undertaken by the Independent Commissioner and, to use the words of the Committee's discussion paper, serve to "limit reputational damage in the first instance" (p14).

Additionally, the Independent Commissioner maintains a website that includes a list of current prosecutions before the court and a list of prosecutions that have concluded. The purpose of the lists is to assist the community to understand and to track matters that are being or have been prosecuted as a result of a corruption investigation undertaken by the Independent Commissioner. Where apposite the lists identify where a prosecution has been stayed or discontinued or a person has been acquitted.

The list of current and concluded prosecutions can be accessed at: <https://icac.sa.gov.au/corruption-investigations>.

Thank you for providing the opportunity to make a submission to your inquiry. I trust that the information provided will be of assistance to the Committee.

Yours faithfully



The Hon. Bruce Lander QC  
**INDEPENDENT COMMISSIONER AGAINST CORRUPTION**