Submission No 28

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

Organisation: Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Christopher Spence and Name suppressed

Date Received: 31 July 2020

Di Girolamo Lawyers

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NSW PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION: -

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

JOINT SUBMISSION MADE ON BEHALF OF MESSRS:

BART BASSETT – FORMER MEMBER FOR LONDONDERRY

CHRISTOPHER SPENCE - FORMER MEMBER FOR THE ENTRANCE

[redacted] - [redacted]

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Executive Summary

On 6 August 1998, the Independent Commission Against Corruption ("the ICAC") commenced when the Parliament of New South Wales ("Parliament") passed the *Independent Commission Against Corruption* Act ("the ICAC Act").

The ICAC is a standing commission of inquiry charged with investigating public sector corruption. There is no place for political corruption in our society. In taking a strong stance against corruption the Parliament provided to the ICAC extraordinary powers.

Such powers defunct the civil rights and protections afforded to individuals within our criminal justice system. Enormous responsibility falls on those who hold such power. Stringent oversight is a necessity to minimise the potential damage that can flow from human fallibility.

Between 1990 and 2005, the ICAC Act was amended several times. Relevantly, this included the introduction of an Inspector to ensure greater accountability. In this 15 year period, the public maintained confidence in the work of the ICAC.

In November 2009, his Honour Judge David Ipp QC was appointed as Commissioner of the ICAC.

In October 2013, her Honour Judge Megan Latham SC was appointed as Commissioner of the ICAC.

During 2009 – 2014, several high-profile investigations were undertaken by the ICAC (hereinafter the "Ipp/Latham period"). This was a tumultuous period in the history of the ICAC.

Synonymous with the Ipp/Latham period was intense media interest in the investigations of the ICAC. Inexplicably, this included media reports naming individuals in foreshadowed investigations prior to any formal announcement from the ICAC.

There was a sense that the ICAC became a law unto itself which eroded the presumption of innocence for anyone accused of corrupt conduct. A culture of righteousness appears to have evolved. The cause requires a separate examination. One which is necessary to ensure that recent changes to the model have corrected this flaw.

During the Ipp/Latham period, the ICAC was plagued with a sentiment of disrepute which flowed from:

- allegations of improper leaks from within the ICAC to the media.
- combative and emotionally charged public inquiries.
- serious concerns that Counsel Assisting was making allegations of corrupt conduct "on the run" and without any proper and reasonable basis.

- concerns that individuals were unnecessarily treated unfairly, improperly, belittled, publicly humiliated, and suffered irreparable reputational damage.

- allegations of improper behaviour by Counsel Assisting.

- a record number of complaints made to the Inspector of the ICAC.

- video footage of Commissioner Latham noting the extraordinary powers of the ICAC which provided for a "free kick" against affected persons, whose legal representatives "could do nothing", and that this (cruel) treatment was akin to "pulling wings off a butterfly".

- the jurisdictional overreach observed by the High Court in the decision of *ICAC v Cunneen* [2015] HCA 14.

- the necessity to protect the ICAC from its own failings by introducing the *Independent Commission Against Corruption Amendment (Validation)* Act 2015.

- public animosity between the respective Inspector(s) of the ICAC and Commissioners Ipp and/or Latham.

- findings by the Inspector of the ICAC of improper behaviour and misconduct on the part of Counsel Assisting, Mr Geoffrey Watson SC.

The Parliament has recognised and acknowledged that the model required refinement to reduce the risk of overreach and poor behaviour. There was also significant public confusion to remedy.

As a result of this disturbing period, on 1 June 2016, the Parliamentary Committee on the ICAC ("the Committee") commenced an inquiry in relation to two reports of the Inspector of the ICAC. The Committee published its report on 27 October 2016.

On 23 November 2016, the Parliament assented to the *Independent Commission Against Corruption Amendment* Act 2016. This was an acknowledgment that the ICAC needed repair and permeated in significant structural and procedural changes in the ICAC model and how it functions.

This inquiry is a further acknowledgment that individuals were unfairly treated and have suffered significantly merely by being adversely named in an ICAC investigation.

Messrs Bart Bassett, Christopher Spence, and [redacted] were such individuals. No findings of corrupt conduct were made against them. Yet they were publicly humiliated and belittled. Their respective reputations severely damaged. They have suffered mentally, physically, and financially.

A pre-requisite to reputational rehabilitation is accountability. It is implored on this Committee to examine what caused the ICAC to apparently spiral out of control. Only then can the Committee be satisfied that proper safeguards and remedies are in place to ensure that the risk of any such further abusive behaviour is diminished.

Remarkably, not one officer of the ICAC has ever been held to public account for misbehaviour. The officers of the ICAC appear to exist in a vacuum void of misbehaviour. There has simply been no vigilant oversight. This lack of accountability appears to be at the heart of an institution that itself became untouchable.

A torch needs to be shone to examine how individuals such as Messrs Bassett, Spence, and [redacted] could be accused of corrupt behaviour when none was never found to exist. The gate to the public inquiry should never have been opened. Their political careers were emasculated. Whilst there is no mechanism for re-instatement as members of Parliament, their ability to serve in the public sector (based on merit) should not be prejudiced.

Officers of the ICAC and Counsel Assisting must operate in an environment where there are significant consequences to misbehaviour or abuse on their part. At the heart of this submission is ensuring that allegations of corruption are never again made with frivolity and recklessness.

And that the participants, namely officers of the ICAC and Counsel Assisting, responsible in the improper making of such allegations are held to account. Without such measures the risk remains that the sins of the past will be repeated. This would allow the horrific cruelling of the careers and lives of innocent individuals.

Exoneration Protocol

The Committee should consider the implementation of the following measures as part of and/or the development of an exoneration protocol:

(i) A public announcement made in Parliament, acknowledging and apologising to a category of individuals defined as "innocent individuals" who have been subjected to abuse and/or improper reputational damage from being adversely named in an ICAC investigation – including Messrs Bassett, Spence and [redacted].

(ii) The announcement referred to in (i) above be published in each major print media, ie. The Australian, Daily Telegraph, Australian Financial Review, and Sydney Morning Herald.

(iii) All media reports and references relating to an innocent individual in an investigation of the ICAC investigation be expunged from electronic search engines.

(iv) Innocent individuals who lost a public appointment or position because he or she was adversely named in an ICAC investigation are to be placed on a priority list for merit based public re-appointment.

(v) The formation of an independent tribunal (or alternatively, amending the *ICAC* Act to enable the Supreme Court of NSW) to consider whether innocent individuals are entitled to compensation.

Further Considerations

The Committee should give serious consideration to recommending to Parliament that:

(i) an independent commission of inquiry (such as a Royal Commission) is held to investigate and examine the inadequate behaviour of the ICAC, its officers, and Counsel Assisting during the Ipp/Latham period to determine whether existing safeguards and remedies are adequate.

(ii) the *ICAC* Act is amended to give "affected persons" a "proper voice" during a public inquiry, or alternatively the investigation process must be held in private and only final reports made public.

(iii) the *ICAC* Act is amended to provide an affected person the opportunity to offer exculpatory evidence for consideration before a decision is made to conduct a public inquiry.

(iv) s 31B of the *ICAC* Act be amended to include a media protocol to ensure anonymity of an individual being investigated until such time as there is a formal announcement from the ICAC.

(v) the *ICAC* Act is amended to require the Inspector of the ICAC to investigate any pre-emptive media leaks such as a media publication naming an individual as part of an ICAC investigation prior to any formal announcement from the ICAC.

Finally, the Committee should ensure that this inquiry does not exacerbate the reputational damage already inflicted on innocent individuals. A non-consequential finding in an ICAC report should not be used as a foil against an innocent individual – who should never had suffered reputational damage in the first place.

Background

The extraordinary powers of the ICAC where recognised in the Second Reading Speech of the *ICAC* Act, wherein Premier Greiner, on 26 May 1988, stated:

"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 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 wrongdoing and the rights of the community at large to fair and honest government".

The principal function of the ICAC is to investigate complaints of corrupt conduct affecting the probity of public authorities and officials.

The powers afforded to the ICAC including those undertaken at a public inquiry provide for a jurisdiction that is diametrically opposed to the democratic rights that would otherwise protect each citizen within the confines of our criminal justice system.

Example

Case A

Politician A is investigated by the NSW Police for an alleged assault. The investigation is conducted in private. At the conclusion of the investigation the Police determine that there is no evidence to support a charge. Politician A incurs no reputational damage.

Case B

Politician B is investigated by the ICAC for the alleged acceptance of a bribe. As part of the investigation the ICAC undertakes a public inquiry. The allegation is made public, and Politician B has no right of reply. The reputation of Politician B is significantly damaged notwithstanding no ultimate adverse finding by the ICAC.

There are two significant points of differentiation – the first, is that the ICAC is armed with the power of compulsion. This eradicates the right to remain silent of the accused individual who is referred to as an "affected person" as defined pursuant to s 74A (3) of the *ICAC* Act.

The second, lies in the power of the ICAC to hold a public inquiry. Relevantly, at a public inquiry:

- the investigation phase is continuing.
- an affected person is not permitted to respond to the opening address made by Counsel Assisting.

- the power of compulsion means that an affected person or a witness must answer questions rather than elect an otherwise democratic right of silence.

- the ability of a legal representative of an affected person to cross-examine a witness is severely diminished.

- the rules of evidence do not apply.

- findings of corruption are made pursuant to the civil not criminal burden of proof.

It is imperative that the Committee acknowledges that significant points of differentiation between the "inquisitorial" ICAC model and our "adversarial" criminal justice system provide considerable confusion within the community.

The academic explanation between the two systems often deployed in defence of the ICAC model does not avail the public confusion, nor afford any reputational protection to an individual adversely named in an ICAC investigation.

The public is accustomed to a police investigation being undertaken in private thus avoiding any unnecessary reputational damage – if the investigation fails to bear fruit worthy of a prosecution the matter ends, and the person's reputation remains intact.

If, however, an accused is charged of an offence, then the public lens is only activated in a Court of law. The investigation phase has concluded. The prosecutor must be satisfied that there is a proper and reasonable basis upon which to make and sustain any allegation against the accused.

Most importantly, there are conventions and principles which apply to how the media reports a criminal hearing. This safety net is non-existent in the current ICAC model.

During the Ipp/Latham period, an affected person appearing before the ICAC in a public inquiry would make the "walk of shame" towards an awaiting media scrum and bystanders who would hurl abuse. At that juncture there is both public humiliation and significant reputational damage.

The mental strain and distress are debilitating. For an innocent "affected person" it is pure torture. An incomprehensible mental public flogging that borders on the inhumane.

The inherent prejudice of the ICAC model is that the public lens is activated during the investigation phase via the public inquiry. The prejudice is amplified by the fact that the public only hears the ICAC narrative. The affected person has little if any active voice which is always subject to the discretion of the Commissioner.

Its beggar's belief to suggest that the human mind can remain open to an affected person's presumption of innocence in that environment.

The academic supporters of this barbaric model assert that transparency dictates that an inquiry must be in public. Well if that is so, then the public has the right to hear both sides of

the story and not just the pre-determined narrative of the ICAC and its Counsel Assisting. As a starting proposition this would mean that:

- affected persons should have the right to reply to the opening address of Counsel Assisting.

- affected persons should be allowed to cross-examine witnesses without putting forward his/her positive case.

- the rules of evidence should apply.

If the public inquiry is to remain as a component of the investigation phase, then the *ICAC* Act should be amended to provide an affected person with a proper voice. This should also reduce the risk of abusing the extraordinary powers afforded to the officers of the ICAC and Counsel Assisting.

The Ipp/Latham Period and Geoffrey Watson SC

The public inquiries held during the Ipp/Latham period wherein Mr Geoffrey Watson SC was Counsel Assisting were combative and emotionally charged.

There is a plethora of media articles that referred to these public hearings as "show trials", and ultimately Mr Watson SC earned himself the moniker of "Hollywood".

Many senior members of the NSW Bar where critical of the cavalier and reckless behaviour of Mr Watson SC. Many "affected persons" and witnesses felt that they were unfairly treated and not given a "fair go".

To the rational observer it was plain that Mr Watson SC categorised witnesses as either "black hats" or "white hats". It appeared impossible for a pre-classified "black hat" to become a "white hat". However, if faced with personal criticism or embarrassment, Mr Watson SC appeared nonchalant in his capacity to turn a "white hat" into a "black hat".

The irony of the following passage from Premier Greiner in the Second Reading Speech of the *ICAC* Act, should not be lost on the Committee:

"*Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified.*"

The starting point is to look at the salacious headlines caused by the opening addresses of Mr Watson SC as Counsel Assisting. Those comments are printed without challenge, nor is there any permissible response from an affected person thus creating in the mind of the reader a fallacy of truth.

This Submission will focus on the investigation known as Operation Spicer, and the significant reputational damage suffered to Messrs Bart Bassett, Christopher Spence, and [redacted].

As a result of the failings which occurred during the Ipp/Latham period, the *ICAC* Act was recently amended to incorporate a (new) three Commissioner model under Chief Commissioner Peter Hall QC. Guidelines and protocols were also put in place in relation to the behaviour of Counsel Assisting.

Mr Hall QC, in his book entitled, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* states:

> "The position of counsel assisting has in a general sense been equated to that of a Crown Prosecutor in that it is his or her duty to perform his or her function in a fair and even-handed way …… The comparison is valid in the sense that ultimately, a commission of inquiry is concerned to establish the truth of matters it investigates and hence care must be exercised in seeking evidence both for and against any working hypothesis and in providing a fair opportunity for those who may be the subject of adverse findings to be heard and deal with them. That of course does not limit the role of counsel assisting in the development of plans and strategies with commission investigators to flush out evidence on an issue." (emphasis added)

Mr Bruce McClintock SC, Inspector of the ICAC, in his report dated 19 December 2019, entitled, *Report pursuant to sections 57B (5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B (1) (d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act* (hereinafter "the McClintock Report"), stated in relation to the role of Counsel Assisting (generally):

> "26. It is important to note that counsel assisting behaves with moderation. As Salmon LJ said in discussing inquisitorial processes:
>
> *An opening statement will also assist the Press in reporting the proceedings. The statement should be an impartial summary of the investigation and avoid any comments likely to make sensational headlines. It should be emphasised that until the evidence has been heard it would be wrong to draw any conclusions.*
>
> 27. These remarks apply with force to counsel assisting's conduct in eliciting evidence at a public inquiry. While publicity and sensational headlines may be an inevitable accompaniment of many ICAC public inquiries, that should not be because of counsel assisting's behaviour but rather a result of the evidence elicited fairly and dispassionately.

28. Further, counsel assisting should carry out his duties or her duties with independence and bring his or her own judgment to bear on decisions as to the conduct of the investigation or inquiry, no doubt in consultation with the relevant Commissioner. See Bretherton v Kaye & Winneke [1971] VR 111, 125; Hall op.cit. p. 494. Crucially, counsel assisting should not be a mere mouthpiece for a body such as the Commission and should not be perceived by observers to be so. This is crucial because inevitably investigating bodies such as the Commission or Royal Commissions or the police force tend to want to conclude an investigation with a finding of guilt or a charge. It can be very hard at the end of, say, a year-long investigation to say that nothing happened or, in the case of the ICAC, there was no corrupt conduct. That is why counsel assisting's independence is important – counsel is the gatekeeper whose duty it is to assess the evidence and put or permit only submissions fairly based on it and, when appropriate, to say no adverse findings should be made. One final point concerning independence: there is a real risk of "capture" of counsel by the organisation for whom he is working, which increases the longer he or she works with it and the more enquiries he or she appears in." (emphasis added)

The McClintock Report makes several adverse findings in relation to the manner in which Mr Watson SC acted as Counsel Assisting in Operation Spicer.

In paragraphs 29 – 40 of the McClintock Report, the following adverse findings are made in relation to the behaviour of Mr Watson SC:

(i) "I consider that Mr Watson's conduct as shown in the passage of evidence I have set out in [8] was inappropriate and unfair to the witness he was examining at the time and to Mr Gallacher. It must have been obvious that putting such a question to Mr Williams would inevitably have serious consequences for Mr Gallacher, specifically, that he would be required to stand aside or resign as a Minister. Yet, he was not present either in person or by counsel, had no notice of the allegation and no opportunity to answer it. See [54 – 62] below. This seems to me a serious lapse of procedural fairness. Further, whatever Mr Watson's subjective intention, any reasonable lay observer would have thought what occurred had elements of unfairness. The tone of the questions is sneering, contemptuous, verges on bullying and is inconsistent with the duty of fair conduct imposed on counsel assisting." (at paragraph 29)

(ii) "…. putting aside their unacceptably hectoring tone, must inevitably have given the appearance to a reasonable observer that Mr Watson's

independence as counsel assisting had been compromised." (at paragraph 30)

(iii) "The same must also be said about Mr Watson's role in offering the inducement to Dr Cornwell. That should have been left to the Commission staff in consultation with the Commissioner as the time. I regard his involvement as inappropriate." (at paragraph 30)

(iv) "That said, it was a significant failure of process which damaged the public standing of the Commission and should not have happened." (at paragraph 33)

(v) "That question, despite Mr Watson's expression of regret, was reported on the Sydney Morning website within minutes of it occurring, under the headline: *Take a cab out to Malabar: ICAC witness Tim Koelma warned he could be jailed for lying.* The opening sentence of the article was: *A lunchtime visit to a Sydney jail was suggested to a key witness at a corruption inquiry as a reminder of the consequences of lying.* I regard this as a threat and an entirely inappropriate one. The passage and its reporting are not likely to have enhanced the reputation of the Commission for fair conduct of its public inquiries." (at paragraph 34)

(vi) "Sexualised references such as this are, in my view, inappropriate. They trivialise and debase what is a serious occasion when a witness' reputation and career may be at stake." (at paragraph 36)

(vii) "Of equal concern are the remarks which Mr Watson apparently made to an Australian Financial Review journalist and which were reported in that journal on 25 July 2014." (at paragraph 39)

(viii) "I am unable to see how Mr Watson's description of his purpose to "upset" the witness is consistent with his duties as counsel assisting. It is no part of his role to upset witnesses – many might think that approach would be less likely to get to the truth than permitting the witness to give evidence in a calm and rational manner, challenging him or her where appropriate. To the extent that he carried that purpose into action it was inappropriate and unfair." (at paragraph 40)

The behaviour of Mr Watson SC as Counsel Assisting in Operation Spicer was poor, and adversely effected all affected persons including Messrs Bart Bassett, Chris Spence, and [redacted].

Operation Spicer – Bassett, Spence, and [redacted]

Messrs Bart Bassett, Chris Spence, and [redacted] were "affected" persons in Operation Spicer as defined by s 74A (3) of the *ICAC* Act.

The following scope and purpose of the investigation related to Messrs Bassett, Spence, and [redacted]:

"*a.* *whether, between April 2009 and April 2012, certain Members of Parliament, including Christopher Hartcher MP,* [redacted]*, and Christopher Spence MP, and other, including Timothy Koelma and Raymond Carter, corruptly solicited, received and concealed payments from various sources in return for certain Members of Parliament agreeing to favour the interests of those responsible for the payments;*

b. *whether, between December 2010 and November 2011, certain Members of Parliament, including Christopher Hartcher MP,* [redacted]*, and Christopher Spence MP, and others, including Raymond Carter, solicited, received and failed to disclose political donations from companies, including prohibited donors, contrary to the Election Funding, Expenditure and Disclosure Act 1981;*

……..

m. *whether certain companies and persons including Buildev Pty Limited, ……. and …… influenced or sought to influence a public official, namely Bart Bassett, to make planning decisions for their benefit;"*

Bart Bassett

In 2010, Mr Bassett was preselected as the Liberal Party candidate to contest the seat of Londonderry.

On 26 March 2011, Mr Bassett was elected as a Member of Parliament for the seat of Londonderry.

On 6 August 2014, during the public hearing in Operation Spicer, Mr Watson SC alleged that a company related to Mr Nathan Tinkler, Broadwalk Resources donated separate cheques of $35,000 and $18,000 to the Free Enterprise Foundation. Mr Watson SC further alleged that the sum of $18,000 was credited to the political campaign of Mr Bassett leading into the 2011 State election.

At no time prior to 6 August 2014, was Mr Bassett spoken to by any officer of the ICAC. The allegation which took the form of the above scope and purpose *m*. set out above came as a complete surprise to Mr Bassett.

The purported "influence" in scope *m*. related to a Development Application (hereinafter "the DA") for a nursing home that Buildev had made to the Hawkesbury Council in 2008. The DA was recommended for approval by the Council staff.

As Mayor of Hawkesbury, Mr Bassett voted in favour of the DA to break a 5-5 deadlock amongst the Councillors.

Mr Bassett never once voted against a Council staff recommendation.

The allegation set out in *m*. caused immediate and significant reputational damage to Mr Bassett.

The Operation Spicer Report found no evidence of any corrupt conduct on the part of Mr Bassett. There was no proper nor reasonable basis to make the allegation.

Importantly, without this limb of the allegation the matter would not have fallen within the remit of the ICAC, but rather would have been a matter for the Electoral Funding Authority. In turn, Mr Bassett would have avoided the public humiliation of an ICAC investigation.

Christopher Spence and [redacted]

On 5 March 2009, Mr Tim Koelma registered the business name "Eightbyfive".

The investigation examined income received by Eightbyfive from three sources, namely Australian Water Holdings ("AWH"), Gazcorp, and Patinak Farm.

In late 2009, Mr Spence was preselected as the Liberal Party candidate for the seat of The Entrance, and Mr [redacted] was preselected as the Liberal Party candidate for the seat of [redacted]

Messrs Spence and [redacted] received income from Eightbyfive.

The Operation Spicer Report found no evidence of any corrupt conduct on the part of Messrs Spence and [redacted]. There was no proper nor reasonable basis to make any allegation that Messrs Spence and [redacted] favoured the interests of AWH, Gazcorp, or Patinack Farm.

Importantly, without this second limb of the allegation set out in *a*. the matter would not have fallen within the remit of the ICAC, but rather would have been a matter for the Electoral Funding Authority. In turn, Messrs Spence and [redacted] would have avoided the public humiliation of an ICAC investigation.

On 9 January 2017, the NSW Electoral Commission ("NSWEC") completed its investigation into donations made to the NSW Liberal Party candidates in the lead up to the 2011 State Election. The payments investigated by the NSWEC were those also examined by the ICAC from AWH, Gazcorp, and Patinak Farm relating to funds received by Messrs Spence and [redacted].

The NSWEC concluded as follows:

"The NSWEC received advice from the Crown Solicitor's Office that there was, in this instance, insufficient evidence to prove that:

- ***These donors were property developers according to the EFED Act definition; and***
- ***Payments made to Spence and [redacted] were political donations as defined by the EFED Act."***

Reputational Damage

Had a proper analysis of the facts been undertaken by the ICAC, and in particular, by Mr Watson SC as the ultimate gatekeeper the allegations would never have been advanced against Messrs Bassett, Spence, and [redacted] during the course of a public hearing.

On 18 February 2014, the ICAC announced that a public inquiry would be held into the investigations referred to as Operation Credo and Spicer.

On the same day, Messrs Spence and [redacted] were stood down from the NSW Liberal Party. In Parliament, they were forced to sit with the crossbench. Politically, they were ostracised, ridiculed, and humiliated.

On 6 August 2014, Mr Bassett was stood down from the NSW Liberal Party. In Parliament, he too was forced to sit with the crossbench. Politically, he was also ostracised, ridiculed, and humiliated.

Furthermore, it was made clear to Messrs Bassett, Spence, and [redacted] that they would not be allowed to seek preselection as Liberal Party candidates for the 2015 NSW election. In short, their respective political careers had been destroyed.

Subsequently, all three men were cleared of any corrupt conduct. The adage "too little too late" is sadly applicable.

Unfortunately, the fact that they were adversely named in an investigation has had an everlasting dire effect on their ability to be gainfully employed. Notwithstanding the lapse in time – the reputational stain appears impossible to remove.

The Committee must acknowledge that the reputational damage of an individual is significantly damaged (perhaps beyond repair) from the moment the individual is named in the ICAC media release.

S 6 (2) of the *ICAC* Act (as amended in 2016) now provides the safeguard that a decision by the ICAC to conduct a public inquiry under s 31 must be authorised by the Chief Commissioner and at least one other Commissioner

The Committee should consider introducing one further safeguard, namely that any such decision must consider any exculpatory evidence provided to the ICAC from an affected person. The ICAC should particularise the allegations to the affected person who should then be afforded the opportunity to respond.

If such response is satisfactory to the ICAC then there are two significant benefits. The first is the protection of the reputation of the individual, and the second is the cost saving to the taxpayer of holding an expensive public inquiry.

If, however, the ICAC does not accept the response as exculpating the individual then the decision to conduct a public inquiry is made.

It imperative that those that an innocent individual who falls within this category has available a cleansing mechanism to enable proper reputational rehabilitation.

Discussion Paper

As set out in the discussion paper, the Committee is undertaking an inquiry on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:

- whether the existing safeguards and remedies, and how they are being used, are adequate, and
- whether additional safeguards and remedies are needed, and
- whether an exoneration protocol should be developed to deal with reputational impact, and
- relevant practices in other jurisdictions, and
- any other relevant matters.

Safeguards and remedies

The Ipp/Latham period exposed the fact that there was little (if any) actual safeguards to an individual's reputation when adversely named in the ICAC's investigation.

To the contrary, there was an apparent pro-active endeavour to trash reputations.

There are currently **no** statutory remedies to compensate an individual found not to have undertaken an act of corruption yet suffered significant reputational damage because of being named adversely in an ICAC investigation.

The Operation Spicer Report notes that the ICAC considered 48 individuals to be "affected persons". As defined, this means that substantial allegations were made against those 48 individuals.

At the conclusion of the Operation Spicer Report, two (2) individuals were found to have engaged in corrupt conduct. A further five (5) individuals were found to have provided false evidence to the ICAC.

This means that 41 individuals (85% of those accused of wrongdoing) were innocent of the substantial allegations made against them.

There was no safeguard prior to the allegation being made. There is currently no adverse ramification to the failed accuser – who in many instances fell hopelessly short of the mark.

The Committee should consider introducing a preliminary safeguard wherein prior to the allegation being made public:

(i) the "affected person" is informed of the allegation and provided with proper particulars of the allegation.

(ii) the "affected person" should be provided with a reasonable opportunity to respond to the allegation.

(iii) if the ICAC is not satisfied that the response extinguishes the allegation then the investigation is maintained.

The proposed remedies are set out in the section below – Exoneration Protocol. Part of that proposed protocol is accountability which should act as a deterrent and provide for an important safeguard.

Exoneration Protocol For An Innocent Individual

An exoneration protocol is required to provide reputational rehabilitation to an individual who has suffered significant damage caused merely by being adversely named in an ICAC investigation.

The Committee should consider implementing an exoneration protocol which applies to an innocent individual. The innocent individual should be defined to include either:

(i) an affected person who had no corruption finding made against him or her at the conclusion of an investigation; or

(ii) an affected person who had a corruption finding made against him or her and either:

(a) the DPP concludes that no prosecution ought to be brought; or

(b) the DPP has not commenced a prosecution within 12 months of the ICAC making the corruption finding; or

(iii) a person who has been found to have given false evidence pursuant to s 87 of the *ICAC* Act and either:

(a) the DPP concludes that no prosecution ought to be brought; or

(b) the DPP has not commenced a prosecution within 12 months of the ICAC making the corruption finding.

Any other findings made by the ICAC which may be considered adverse towards an individual, such as to the individual's credibility, should be considered non-consequential and have no impact on a person being declared an innocent individual. To put simply, if the primary (and serious) allegation of corruption had not been made then the individual would not have been exposed to any other non-consequential finding.

There must be a mechanism to enable an innocent individual to have his or her reputation restored. The "Google search" can make it extremely difficult for an innocent individual to restart a career. Human nature is such that an employer faced with two potential candidates will employ the person that does not have a reference to an ICAC investigation when you Google his or her name.

The first step in reputational rehabilitation is acknowledgement that the individual was unfairly treated. The sense of communal reacceptance requires an acknowledgement and apology for the wrongdoing and the suffering incurred by the innocent individual.

The second step involves the right of the innocent individual to have the past forgotten. The media articles that currently continue to prejudice and limit the employment opportunities of the innocent individual need to be expunged from electronic search engines.

The third step is for the community to see that the innocent individual has been reaccepted. A former member of Parliament who has resigned due to being adversely named in an ICAC investigation cannot be reinstated. However, he or she should be able to serve in the public sector again. Likewise, an individual who was forced to resign from a public sector appointment should be reinstated to a similar role.

The final step involves accountability and where warranted compensation. Without accountability there is no control mechanism to ensure the integrity of an organisation. There can be no reason why the ICAC should be immune from providing compensation as a result of its misbehaviour. Many innocent individuals have faced significant financial loss and hardship. This would also act as a strong deterrent against misbehaviour.

The Committee should consider the implementation of an exoneration protocol for the innocent individual which incorporates the following characteristics:

(i) A public announcement in Parliament, acknowledging and apologising to an innocent individual who has been subjected to abuse and/or improper reputational damage from being adversely named in an ICAC investigation – including Messrs Bassett, Spence and [redacted].

(ii) The announcement referred to in (i) above be published in each major print media, ie. The Australian, Daily Telegraph, Australian Financial Review, and Sydney Morning Herald.

(iii) All reports and references relating to an innocent individual and an investigation by the ICAC investigation be expunged from electronic search engines.

(iv) Innocent individuals who lost a public appointment because of being adversely named in an ICAC investigation are to be placed on a priority list for merit based public appointments.

(v) The formation of an independent tribunal (or alternatively, amending the *ICAC* Act to enable the Supreme Court of NSW) to consider whether an innocent individual (who falls within the exoneration category) is entitled to compensation.

Other Relevant Matters

The Committee must also recognise the severe impact that an ICAC investigation has on the family of an affected person.

There have been numerous complaints about ICAC leaks – but no action appears to be taken. Your reputation is immediately tarnished as soon as you are mentioned as being part of an ICAC investigation. Until such time as a formal announcement is made an individual should have the right to anonymity.

These pre-emptive leaks must stop.

The Committee should consider amending the *ICAC* Act to include:

(i) a media protocol that would enforce anonymity of an individual who may be part of an investigation until such time as a formal announcement is made by the ICAC; and

(ii) a requirement that the Inspector of the ICAC must investigate any pre-emptive media leaks.

In order to ensure that the current safeguards are adequate the Committee should consider making a recommendation that an independent commission of inquiry (such as a Royal Commission) is held to investigate and examine the inadequate behaviour of the ICAC, its officers, and Counsel Assisting during the Ipp/Latham period.

Finally, the Committee should consider amending the *ICAC* Act to give "affected persons" a "proper voice" during a public inquiry. The public has the right to hear both sides of the story. Without this there is a lack of transparency. Rather, providing an "affected person" with a proper voice should focus the institution to act with accountability. Alternatively, the investigation process must be held in private, and only the final report made public.

Nicholas A Di Girolamo