Submission No 9

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

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JOINT COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

Review of aspects of the Independent Commission of Corruption Act 1988

The Submissions of John Nicholson SC

But the result is that the conduct which can be (and indeed, must be) stigmatised as "corrupt conduct" is greatly widened. Conduct which would have but an improbable possibility of leading to dismissal must yet be categorised by the Commission as corrupt within the Act.[1]

NSW's past experience with the ICAC's flaws:
The answer to unintended consequences is to fix the design of the institution, not to deny its value[2]***.***

[1] Mahoney JA: *Griener v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at p.168-169.
[2] Griener, N, reported Sydney Morning Herald *Our Straight Man in Trumpism*; article, Harcher, P. Aug 15-16 2020 at p.30.

Submission Summary

Reporting exposés of corruption promptly has relevance because the public can avoid its consequences sooner rather than later; criminal trials are more likely to receive reliable evidence; offenders should be sentenced as close to the occasion of their offending as circumstances allow and there is an unintended cruelty occasioned by lengthy delays.

As matters presently stand there is no framework establishing time spans for furnishing reports where investigation is conducted via public inquiries. However, once a report has been completed the Commission is required to furnish it to the Parliament as soon as possible.

Factors, such as the nature of the corrupt conduct under investigation, the number of persons of interest under investigation, the numbers of witness required to establish the corruption alleged, the length of time consumed by the public inquiry, the audience for whom the report is intended; and the numbers, if any, of Commission staff involved in the report's preparation, may be determinative of the time taken to prepare a report.

There is a need for transparency related to time taken to prepare reports. A starting time and a conclusion date should be nominated by the Commission once the investigation has finished and submissions from interested parties have been received at the Commission. The Commission should nominate a conclusion date that accommodates the Commission's reasonable needs. Parties nominated should include relevant Commission staff, the Inspector, and persons of interest.

A three months period should be considered as a normal report preparation period. Six months should be reserved for the more complex, complicated and involved public inquiries, and those public inquiries that had a longer duration than the norm.

Once a time frame has been nominated by the Commission, it may be that circumstances require the Commission to set a fresh, and later conclusion date. In those circumstances the relevant parties, including the Inspector should be advised of the newly set conclusion date. In the event that more than two new conclusion dates are set, or, in the opinion of the Inspector, the total reporting period resulting from a third or subsequent time has become unreasonably long, the Inspector should be authorised to determine whether or not any of the persons of interest wish to complain, and if one or more does wish to complain, be further authorised to seek reasons from the Commission as to the cause or causes of the delay. (The detail contained in the last sentence does not appear in the original submission).

Judicial Review: The existing limited pathways for declaratory relief were referred to. There difficulties aggrieved person would have in obtain merits review identified.

A solution, not relying upon the Supreme Court's jurisdiction was advanced. That solution was predicated upon a basis that an acquittal has an impact upon the Commission finding in respect of s.9 (1)(a) ICAC Act test. The thesis advanced is that a Commission finding in respect of s.9 (1)(a) is conditional and necessarily relies upon an assumption by the Commission. A no-bill entered by the DDP and an acquittal in a criminal trial demonstrate that the Commissions finding in respect of the s.9 test was misconceived, because the relevant conduct finding has demonstrated that conduct could not amount to, or involve a criminal offence.

It is argued that being so, the ICAC Act can be amended the ICAC Act authorising the setting aside of a s.9 (1)(a) finding in circumstances where the DPP has found a no-bill, or the outcome of a criminal trial was an acquittal so that it becomes an administrative function that can be performed by the Inspector.

Powers of the Inspector: The submission seeks three additions to the Inspector's legislated functions; namely: a function involving time standards as set out earlier; a function involving setting aside a s.9 (1)(a) finding by the Inspector in circumstances as set out earlier in the submission, and a third function involving the Inspector having access to contester role when the Commission performs it function created by s.31 ICAC Act 1988.

Introduction

1. In 2020 the Joint Parliamentary Committee on the ICAC conducted an inquiry into reputational impact on individuals being adversely named in the ICAC's investigation. The group of individuals impacted upon fell into two groups – those witnesses and others inadvertently referred to in the course of a public inquiry who were not persons of interest so far as the inquiry was concerned, and those persons who were adversely "affected" persons, who subsequently were not prosecuted, prosecuted but acquitted, not disciplined or terminated from employment. In November 2021 the Committee published its report, where- in it made nine recommendations. Recommendations 6, 8, and 9 are the focus of these submissions:
   Recommendation 6: That the Committee review whether there should be time standards in place for the ICAC to finalise reports, who should develop them, what those standards should be, whether they should be legislated and where there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.

   Recommendation 8: That the Committee review the Inspector of the ICAC's powers under the ICAC Act.

   Recommendation 9: That the Committee review the existing mechanism of judicial review.

2. The NSW Parliamentary Committee on the Independent Commission Against Corruption is now conducting an inquiry on these aspects of the Independent Commission Against Corruption Act 1988 (the Act) to determine whether the Act continues to be effective and appropriate with particular reference to three issues:
   1 Time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions;
   2 the existing mechanism of judicial review; and
   3 the role and powers of the Inspector of the ICAC.

3. Based upon my past experience as Acting Inspector and earlier as Assistant Inspector I have been invited by the Committee to make a submission to the inquiry. I am conscious I retired from the Inspectorship in mid 2017, now five years ago, and the absence of daily involvement with the inspectorate may well impact upon the quality of any submission I make. Nonetheless, there is capacity to improve the ICAC Act and it appears the areas of the Committee's concern are areas well supported by complainants from the public and legal profession.

Time Standards – Investigation Reports

   Recommendation 6: That the Committee review whether there should be time standards in place for the ICAC to finalise reports, who should develop them, what those standards should be, whether they should be legislated and where there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.

4. There is every reason why reports should be promptly prepared and furnished once the ICAC has obtained all material relevant to the outcome of an inquiry. Proper and effective functioning of ICAC as a well-oiled machine may be important. But it is

hardly the end of the matter. Where corrupt conduct exists, it is important the public are aware of it and have an opportunity to avoid its consequences. Again, if corrupt conduct of a criminal nature is happening, an important principle of the criminal law is that a trial must be fair to both sides. That requires witnesses to be able to recall events accurately. The longer the time lapse to trial the less reliable memory usually is. The less reliable the evidence may become. Moreover, if a conviction arises as a consequence of an ICAC investigation, punishment of that offence should be administered as close in time to the offence as is possible. Long delays in revealing crime to the prosecutors of crime constitutes a serious impairment to the criminal justice system. In other words, in matters where criminal offending is a focus of an ICAC investigation, there are reasons of fairness that cry out for prompt reports. There is also a question of unrecognised and prolonged unintended cruelty to adversely affected persons arising from any uncalled-for delay in preparing ICAC reports.

5. Unlike police investigations, there are three features the ICAC investigations have that can carry major adverse consequences for those persons who are/were targets of its investigations. The targeted person is required to attend the ICAC, if not daily as a requirement of knowing what is before the Commission, then at a time when his/her evidence is being taken. The first feature is the public ventilation of allegations of corrupt behaviour and material relied on by the Commission which may support those allegations. This unsavoury content, however damaging to the target can be published as news or feature in published commentary during the public inquiry and beyond. Internet coverage and commentary may well exceed in coverage and viciousness that of the printed and television coverage. Created by media reporters and photographers, a "walk of shame" into the building housing the ICAC precincts usually precedes, constitutes and follows the breaking news of daily evidence taking.

6. The second feature is the presentation of a report to Parliament, and possibly to some other authority, reviewing the material and publicising the findings and opinions of the ICAC. The consequence of a report to the Parliament is that once tabled its contents become subject to parliamentary privilege and can thereafter be disclosed without fear of character defamation of the target. Publication of contents of or published commentary upon the reports and its opinions may well occur not only upon its release but years afterwards, in both the news media and internet social platforms, particularly if subsequent charges are laid by the DPP. Personally, it seems to me, that media coverage of ICAC hearings is greater in coverage and detail than coverage of criminal court prosecutions.

7. The third feature centres on the scope of the ICAC to label in its report that a nominated "affected" person has engaged in, or is engaging in, or is about to engage in corrupt conduct (whether or not specified corrupt conduct); or that a person has engaged in, or is engaging in, or is about to engage in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct)[3].

8. From the ICAC's announcement of the targeted public inquiry, until the publication of report is a period of horror, stress and turmoil for those undergoing investigation, their families and often their close friends. In many if not most cases, the publication

[3] Section 74B (2) ICAC Act 1988

of the report may be a half-way point with criminal or disciplinary proceedings to follow. In those situations, the horror, stress and turmoil continue. In that cohort of cases where the ICAC seeks DPP consideration of criminal proceedings, the outcomes reveal about 50% result in no prosecution, or acquittals or sometimes death intervenes[4], the period of horror, stress and turmoil became unwarranted. Likewise, in disciplinary matter outcomes where dismissal or no further action taken seems to occur in about 60% of cases[5]. All of that unintended cruelty and injustice can be diminished by establishing reasonable time standards for issuing of reports.

Legislation – only one time standard legislated

9. There is inadequate provision for time standards in the existing legislation. I have confined my submissions only to reports arising out of public inquiries. There are provisions for other types of reports, e.g. Annual Reports and Special Reports which are accommodated by their own legislative requirements not dealt with here.

   S.74 **Reports on referred matters etc**
   (1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
   (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
   (3) The Commission shall prepare reports in relation to matters as to which the Commission has conducted a public inquiry, unless the Houses of Parliament have given different directions under subsection (2).
   (4) The Commission shall furnish reports prepared under this section to the presiding officer of each House of Parliament…
   (7) A report required under this section shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.
   (8) The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest, except as regards a matter referred to the Commission by both Houses of Parliament...

   Subsections (5), (6) and 9 have been repealed.

10. On analysis, subsection (1) provides an option for the preparation of a report in respect of any matters where an investigation has been undertaken. However, s.74B (2) and (3) – (with a seldom used exception) - compel reports to be prepared in respect of matters referred to the Commission by Parliament and in respect of all other matters where a public inquiry has been conducted. That is to say, a requirement arising from the s.74B is that preparation of reports is mandatory (with the seldom used exception) in respect of inquiries covered by subsections (2) and (3). Subsection (7) provides that reports required by subsections (2) and (3) shall be furnished as soon a possible once the Commission has concluded its involvement in the matter. Subsection (4) requires that the report be furnished to the presiding officer of each House of Parliament.

[4] Nicholson, John; May 2020, Submissions to the Joint Committee on the Independent Commission Against Corruption Reputational Damage Inquiry; Submission No. 25; *Reputational Damage Inquiry: The Submissions of John Nicholson;* paragraphs [47] – [53].
[5] Ibid.

11. When determining a timeframe, it is important to remember that the conclusion of a public hearing does not qualify as the conclusion of a matter. Submissions from relevant parties are usually received somewhere between six weeks and two months after the public hearing has concluded. Further investigation arising out of the public hearing or further submissions is also a possibility, although that would seem unlikely in the majority of cases as there does not appear to be any subsequent ICAC interaction with the persons of interest, which one would expect. There may be other reasons why an investigation remains ongoing.

12. I have difficulty understanding the scope and purpose of Subsection 7, and in particular the impact of the words "*once the Commission has concluded its involvement in the matter*". Initially, I took a view that "involvement in the matter" meant "involvement in investigating" or possibly "involvement in the public hearing". Strictly speaking the Commission's conclusion of its involvement in "the matter" would be its delivery of the report to the Parliamentary officers. But clearly that is absurd within this legislative framework. Given "investigation" and "public hearing" are words found elsewhere in s.74B, I have come to a view use of the word "matter" rather than "investigation" or "hearing" or "delivery" was a deliberate choice to avoid linking any time passage to either the end of an investigation or a public hearing of evidence.

13. "Involvement in a matter" for a court and commission usually concludes with a judgment/report from the relevant body of the final statement of findings and opinions, and in the case of a court – orders. The preparation of a report is usually the final stage of an involvement in a matter, although in ICAC's case delivery of relevant documents to another authority may well qualify as further involvement in a matter[6]. Thus, at least in my view, subsection (7) presumably is confined only to the setting of time standards for the furnishing of reports to the Parliament after the Commission has finalised its report. In cases where Parliament has referred a matter to the Commission, and in those cases where a public inquiry has been conducted the relevant report is to be furnished to each presiding officer of each House of the Parliament. Thus, all subsection (7) does is require the finished product to be "furnished" to the Parliament asap. On this view of subsection (7), it has no impact on the time frame for commencement of the preparation of the report or its finalisation. Nor, it seems is any other legislation or regulation setting a time frame for presentation of reports.

14. Nor are there any provisions in the relevant Regulations that touch upon time frames or time standards. Thus, there appears to be no prescribed time standards impacting upon reporting outcomes of investigations undertaken via public inquiries.

What factors determine time standards?

15. If I am correct, the Parliamentary Committee may need to consider what criteria is required to determine appropriate time standards for preparing a report. The report required is a Commission report. What does that mean? The ICAC Act 1988 defines "Commission" as meaning the Independent Commission Against Corruption constituted by this Act." Overall, the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the

[6] See for example s. 14 (1)(b) ICAC Act 1988.

Commission by a Commissioner is taken to have been done by the Commission[7]. Members of staff of the Commission are subject to the control and direction of the Commissioners[8]. What part, if any, and to what extent, if any are Commission staff authorised or directed to be involved in the preparation of a report? Does any such involvement speed up or result in delay preparation of a report? Is a Commissioner the sole author of an ICAC report?

16. Gathering content for the report may, to a greater or less extent, depend upon who the report is to be written for. While a report is furnished to Parliament, who is the report really written for; who are the initial target or targets of the report? True the Parliament can be one, but so can the DPP, employment disciplinary tribunals, the general public, State government employees, media organisations, academia, law reformers, etc.? The volume of content and reasoning in a report may bear some relationship to the intended receipants. Of course, there is usually more than one group that would be interested in the outcome of a report.

Purpose of Reports – Is that a Criteria?

17. Likewise, one way of discerning the purpose of a report is to determine for whom the report was written. Reports relating to disciplinary matters are unlikely to need the formality and detail of reports arising out of public inquiries or Parliamentary referral. The principal objects of the ICAC Act are to promote integrity and accountability of public administration by investigating, exposing and preventing corruption; and education of the public about corruption and its detrimental effects on public administration and community[9]. One of the principal functions of the ICAC is to educate and advise public authorities, public officials and the community of strategies to combat corrupt conduct, and promote integrity and good repute of public administration[10]. Those themes may feature particularly among the report's recommendations, if any. No doubt those themes play some greater or lesser part in every report. The ICAC Act provides for reports to be provided for others beyond Parliament. One of the ICAC's principal functions is to investigate any allegation or complaint which in the Commission's opinion implies some aspect of corrupt conduct (as defined in the Act) and communicate to appropriate authorities the results of its investigations[11]. It is to be remembered findings, opinions, history and reasoning arising out of a public hearing or referral from Parliament require the Commission to deliver those results by way of a report[12]. Delivery of a report to and tabled in the Parliament would usually see the report made available to the public; so the public could be the final target of the report writing.

18. As an investigative agency targeting corrupt behaviour, the ICAC's investigations target specific persons. The Commission is authorised in its reports to include statements as to its findings, opinions and recommendations and statements of its reasoning for the findings, opinions and recommendations[13]. Those targeted persons who have findings made against them are known in Commission language as

[7] S. 6 (1) ICAC Act 1988.
[8] S.104 (3)(b) of the ICAC Act 1988.
[9] S.2A ICAC Act 1988.
[10] See s13 (1)(h) – (k) ICAC Act 1988.
[11] See S. 13 (1) (a) and (c) ICAC Act 1988.
[12] See s.74 (2) ands (3) ICAC Act 1988.
[13] S.74A (1) ICAC Act 1988.

"affected" persons. These are persons against whom substantial allegations have been made in the course of, or in connection with an investigation being conducted by the ICAC[14]. Quite obviously much of the content of any report will focus upon the activities of the relevant "affected" person. There is a requirement a report must include in respect of such a person an expression of the ICAC's opinion as to whether or not consideration should be given to obtaining advice from the DPP on prospects of prosecution; taking action in respect of a specified disciplinary offence; taking action on specified grounds in respect of ending employment[15]. Obviously, reasons for coming to an opinion would be set out within the report. That all takes time, words and more words, and authorship.

Nature of corruption, numbers of targeted persons, length of hearing, totality of evidence collected.

19. Features of public inquiries differ. Numbers of potentially "affected "persons may vary from one or two to larger numbers. Each "affected" person's role in the alleged corruption will require its own history and findings identified. The greater the number of targeted persons, the greater likelihood of larger report. The scheme and extent of corruption likewise will require identification. The more complex the scheme, or extensive the corruption, the likelihood of a larger report increases. Numbers of witnesses called, the nature and scope of the corruption being investigated, the number of targets facing allegations and the idiosyncrasies of the legal representatives will all contribute to the length of the hearing and totality of evidence and other investigative material.

20. Where evidence is circumstantial the report will need to join the individual circumstances into a convincing narrative of corruption. Where the evidence is capable of directly linking the targeted persons to the specific corrupt conduct, the narrative may take less words to explain.

21. There are so many factors associated with each individual public inquiry that no one time frame provides a pathway to establishing a reasonable time standard. So how does the Committee establish a workable time standard. While I have suggested time standards below, at the end of the day the parties who are affected by or have an interest to be served in time standards should be the ones who are afforded an opportunity to contribute. Included in that group would be representatives from the ICAC, the Inspector, the NSW Bar Association, the Law Society, and representatives who can speak on behalf of government employees and persons of interest to investigators.

Time Standards should involve transparency.

22. In respect of report writing there is a need for transparency. That, of course is a vital reason for requiring reports to be made. That transparency should extend to the final stage of the investigation, namely a time frame for report completion. It is argued once an investigation is completed, or is thought to be completed, and the submissions for counsel assisting and the party or parties have been received, a nominated date of that completion and reception of submissions should be notified to relevant Commission staff, to the Inspector and to legal representatives of the potential

[14] See s.74A (3) ICAC Act 1988.
[15] See s.74A (2) ICAC Act 1988.

"affected" persons. That notification should also contain an estimated date of report completion. The date should be one that reasonably accommodates the needs and expectations of Commission. Where the report is not one compelled by s.74B, perhaps say in relation to a disciplinary matter, the timeframe for a disciplinary matter would be something less than 6 weeks after receipt of submissions, if any. The date set for a public inquiry or Parliamentary referral would normally expire within a three months period after receipt of all submissions. In the event the inquiry had factors that reasonably called for a period longer than three months – those factors should appear on the notification, and a date set to expire within six months should then be nominated.

23. Should subsequent circumstances require a timeframe beyond the nominated date, relevant Commission staff, legal representatives of the potential "affected" persons and the Inspector should be notified of the time extension and a new nominated report-completion date.

24. In the event a nominated date is not adhered to, and the Commission sets no further nominated date, the potential "affected" person should have a pathway provided to the Inspectorate to complain. In circumstances where a complaint of non-adherence to a nominated date is lodged with the Inspectorate, or there are two or more extended nominated dates, the Inspector should be authorised to initiate contact with the Commission for an explanation of reasons why the Commission was unable to comply with earlier nominated dates set by it, and if appropriate seek the setting of a new nominated date.

25. It is to be noted I have submitted the Inspector should be afforded a new function. I deal further with this proposition when discussing the powers of the Inspector.

Other Jurisdictions

26. What standards, if any, that apply in other jurisdictions is unknown to me and I make no submissions, other than to say it may be a factor to consider but should not be the determining factor.

The Existing Mechanisms for Judicial Review

27. In its report on *Reputational impact upon an individual being adversely named in the ICAC's investigations* the Committee reported on its findings and recommendations in respect to an exoneration protocol.

    Its *Finding 11* is: An exoneration protocol is misconceived and would be fundamentally inoperable.

    Its *Recommendation 9*: That the Committee review the existing mechanism of judicial review.

28. The report sets out arguments for and against an exoneration protocol. Arguments I advanced were in favour of an exoneration protocol as a mechanism for reputational rehabilitation. My arguments, and those supporting reputational rehabilitation failed to find favour for an exoneration protocol. Even so, the Committee noted that a merits review process could provide redress for an individual following an ICAC

investigation to retain their reputation and integrity or uphold an ICAC finding[16]. That being so, I spend some time in these submissions arguing in support of investigating a non-judicial mechanism for reputational rehabilitation.

29. The report's Summary sets out succinctly the Committee's reasoning in rejecting the exoneration protocol:

> … It is important to note that a person acquitted by a court of a criminal offence is not necessarily (sic) exonerated from a previous ICAC finding. To the general public an ICAC proceeding looks similar to the courts, however the ICAC has a very different role from a criminal proceeding and a like-for-like comparison is not directly applicable. Many persons found [by the Commission] to have been corrupt (sic) are not subsequently prosecuted for any criminal offence. This is partly because of admissibility rules in court proceedings and partly because the definition of corruption in the ICAC legislation is much broader than offending against the criminal law.

30. Paradoxically, this summary identifies the very problem those seeking reputational rehabilitation are complaining of. Firstly, the general public do see, and (using the language of the ICAC Act) "could" see a like-for-like comparison. No one is surprised by that even though the differences are crucial. Given the format and procedure of a public inquiry, no one should be surprised. Nor does a report explaining the difference between criminal prosecution of "ordinary" corrupt conduct as against investigation of ICAC Act "corrupt conduct" carry much currency – because the mass general public are not informed by reports, or varying definitions of corrupt conduct, but by media reporting and internet discussion. Media reporting is not so much fussed about technical detail as about general impact. Internet platforms are not so much worried about accuracy as emotional response.

31. Next, a person acquitted by a court of a criminal offence is NOT, indeed never, exonerated from a previous ICAC finding, nor is there, currently, any easy pathway for an acquitted person to restore reputation. The reality is that no acquittal voids or nullifies any finding, opinion or recommendation made in an ICAC report. For the cohort of persons seeking reputational rehabilitation, that is a problem. That cohort are mainly subjects of a public hearing and the full impact of the ICAC media treatment. Currently, the impact of each finding, opinion and recommendation still stands. However, the proper question is: are the ICAC's findings, opinions and recommendations entitled to stand in the light of an acquittal, or decision not to prosecute, or a decision not to dismiss or discipline. Surely the answer lies in the different functions performed by courts and administrative – albeit investigative – bodies. This very problem was anticipated in *Griener v Independent Commission Against Corruption.*

> In my opinion however, it is clear from the Act's own terms, that the Act's investigative powers were and were intended to be, just that, and nothing more. That is the Act was designed to bring into the light of day facts concerning the conduct of public officials upon which others would, in appropriate cases pass final judgment. This would be done by courts or other tribunals possessing the power to make decisions affecting the rights of citizens. (I will call these "courts".) **The 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

[16] Joint Parliamentary Committee on ICAC; *Reputational impact on an individual being adversely named in the ICAC's investigations*; Report 4/57 – November 2021 at p.39, [4.48].

> find things out, make them public, and/or refer them to an appropriate authority: the law will then take its course. (My emphasis)
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> The investigative function of the Commission is easy to misunderstand. **The Commission's procedures and publicity the Act authorises to be given to them can easily lead to its pronouncements being confused with those of the courts. However, the difference is fundamental, Court decisions have final and binding effect on the rights of parties to proceedings before them. Nothing said or done by the Commission has any such effect (although in a practical sense the effect of a Commission finding may be very great).** The confusion that can be created was well-illustrated in the present case. The Commission's report was published on 19 June 1992. Later that day I saw newspaper placards, and soon afterwards headlines, saying "Greiner corrupt." Those words were a natural enough summary of the report, but all the same, oversimplified the true position to the point of inaccuracy. The fault was not all that of the newspapers, but flowed at least in part from the Act, both for the reasons already touched on and others I now come to. (My emphasis).
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> The Commissioner did not find that Mr Greiner was corrupt in any ordinary sense of the word. He found that what Mr Griener had done amounted to corrupt conduct within the meaning of ss 7,8 and 9 of the Act: whether or not such a finding is one of corrupt conduct in an ordinary sense will depend on the facts; sometimes it will, sometimes not.[17]

32. Returning to the Summary; the ICAC is not entitled to report persons as being corrupt[18], but that is the impact of its reported findings, as demonstrated in the Summary quote above. It is entitled to report that a person has engaged in corrupt conduct, but cannot report that a person has committed a criminal offence. From the general public's view there is little or no difference between a person who is guilty of corruption and a person who, an ICAC investigation has established, has engaged in corrupt conduct.

33. Yes, the ICAC definition of corruption is so much broader from and different to the corruption a criminal prosecutor must prove. The difference is significant because the ICAC definition embraces situations ranging from the obvious to possibilities not found in criminal or company law legislation but, for example, in departmental employment Codes of Conduct (e.g. "conduct that could be perceived to be a conflict of interest"). Yet another difference is the standard of proof – the criminal courts require proof beyond reasonable doubt, ICAC requires proof that corruption that fits its definition is more probable than not.

34. That these differences found in the Summary are relied upon as a basis for denying reputational rehabilitation seems at odds with logic. Surely, these very features highlight bases for reputational rehabilitation.

35. The report refers to evidence from the Vice-President of Rule of Law, Chris Merritt. He argued an exoneration protocol was intended to address the erosion of the presumption of innocence arising from the current procedures. My argument is Mr Merritt has grossly understated the impact of acquittal and a no-bill-of-indictment being found for an ICAC "affected" person. While it is true the presumption of innocence does most of its work in the criminal courts, that is not where it stops. Justice Priestly anticipated this very post-acquittal problem:

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[17] *Greiner v Independent Commission Against Corruption;* (1992) 28 NSWLR 125 at p. 180 per Priestly JA.
[18] Section 74B (1) ICAC Act 1988a

> 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 great majority of cases) forever be excluded by the acquittal, the presumption could not be contested. Where then would the Commission finding stand. [19]

36. While I haven't done the research, it is my belief that the majority of the cohort seeking reputational rehabilitation are persons who were subjected to a public inquiry, and findings made against them included a s.9 (1)(a) – could constitute or involve a criminal offence; and may also have fallen, in the view of the ICAC Commissioner somewhere on the 8 (2) (a) – (u) or (x) and (y) test – that is, conduct which could have involved some specific nominated criminal offence.

37. In my submissions to the Reputational Damage Inquiry, I drew attention to the extent that a person's reputation amounted to a right or interest that can be recognised I linked that right to one's privacy and entitlement to honour as embracing a legitimate expectation of being treated with dignity and respect. The presumption of innocence is more than a principal of the criminal law. It requires police to investigate and gather evidence to rebut the presumption in a criminal trial. But, it also plays a function within the social milieu. It plays a part in supporting reputation. The citation above from Justice Priestly's reasoning appears based upon this proposition.

38. History has shown that in the circumstances identified by Priestly JA, the Commission's findings, opinions and recommendations stand large. It needs to be understood the way evidence is admitted into a public inquiry, tested and assessed by a tribunal focused on an investigative outcome differs significantly from the way evidence is admitted into, tested and considered in a criminal trial. Thus, after an acquittal, for the ICAC to maintain support for findings which it based upon particularly on s. 9 (1) (a) and/or also on s.8 (2) or s.8 (2A) (and thereby attracting a criminal charge which ultimately results in an acquittal) is to void and nullify the presumption of innocence; particularly where the person concerned was not a public officer. That is because such a person could not be involved in a disciplinary offence, nor provide reasonable grounds for termination of services as a public official. In other words, in the face of an acquittal, the ICAC's findings relying on s.9 (1)(a) and ss. 8 (2) or (2A) thereafter stand misconceived and wanting.

39. The ICAC's position of continuing to prefer its definition of corrupt conduct against the ordinary understanding of that term in circumstances where an acquittal is recorded against a charge nominated by the ICAC brings on the consequence of voiding and nullifying the presumption of innocence. But on closer examination it will be seen that the ICAC's passage of its finding through the s.9 (1)(a) test was a miscalculation by the Commission. Section 9 (1)(a) postulates two assumptions for the Commission to consider and accept or reject. By deciding the "conduct amounts to corrupt conduct because it could constitute or involve a criminal offence" the ICAC has chosen an assumption to progress towards a criminal justice outcome. Further, the Commission usually nominates the particular criminal offence it anticipates satisfies the terms of its assumption of constituting or involving a criminal offence.

[19] Griener v ICAC (1992) 28 NSWLR 125 at p.181.

The current legal framework:

40. Currently, there is an absence of any right of appeal against or a procedure for a review of the merits of a Commission's determination[20]. The Commission is amenable to declaratory orders, but not to certiorari[21].

41. In its report the Committee recognised the Supreme Court entertained a declaratory power to process judicial review in circumstances where the ICAC had made legal or procedural errors, the consequence of which was on occasions to declare a particular finding void. The Committee's report noted the NSW Bar Association had reported instances where an individual was successful in challenging findings made by the ICAC or potential findings that might be made by the ICAC, thereby restraining the ICAC from investigating an allegation[22]. That relief would appear to have been achieved by a more than declaratory result.

42. MinterEllison noted:

    The Supreme Court has both an inherent and a statutory jurisdiction to supervise the functioning of administrative tribunals to ensure that they carry out their functions and their duties in accordance with law. The Court may declare ICAC's determinations a nullity where:

    - there is a material error of law on the face of the record, including the reasons for decision;
    - the reasoning is not objectively reasonable, in the sense that it was not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not base on a process of logical reasoning from proven facts or proper inferences;
    - there is a finding that is not supported by any evidence whatsoever;
    - relevant matters have not been taken into account, or irrelevant matters have been taken into account; and
    - there has been a material denial of natural justice.

    However, there is no right of appeal from the ICAC's findings in the sense of a re-hearing in the way the Court of Appeal hears an appeal from the Supreme Court[23].

43. The Supreme Court's functions appear focused upon mistakes made by the ICAC in the exercise of its powers. What is the nub of the problem associated with reputational rehabilitation. Basically, it is complaints about administrative findings made in the course of an investigation. Usually, that finding is based upon the ICAC definition of "corrupt conduct". All the authorities agree the ICAC definition is far wider than the "ordinary" definition of corrupt conduct. It is also agreed that wider definition will capture more instances of "corrupt conduct" that will not withstand criminal justice scrutiny. The wider definition also clashes with the precision required in proof of specified essential elements of an offence in order to establish guilt of an offence. However, the wider definition is essential to facilitate ICAC's investigation of corrupt conduct. On its definition an ICAC finding may well have been assumed to be sound at the time it was made. But in the majority of reputational rehabilitation case the s. 9 (1)(a) and the 8 (2) and "could be or involve a criminal offence" component have failed the criminal justice scrutiny. In other words,

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[20] Ibid at p. 130.
[21] Ibid.
[22] Joint Parliamentary Committee on ICAC; *Reputational impact on an individual being adversely named in the ICAC's investigations*; Report 4/57 – November 2021 at pp.32-33 [4.10]
[23] Lexology; *ICAC challenged on director's duties and corrupt conduct*; December 16 2014. https://www.lexology.com/library/detail.aspx?g=ca94ba37-4d8e-4wf5-bd7b-610c192c796f. I note the five bullet points also appear in the Committee's report at p.32 [4.9].

the assumption made by the Commission was unsound. As events turned out the Commission's findings "could not" amount to, support or involve a criminal offence.

ICAC findings – conditional or not?

44. The work done by s.8 of the ICAC Act identifies the nature of the conduct under investigation – in that it seeks a category into which the questionable conduct falls, as well as identifying where it amounts to an impact upon the exercise of official functions, breach of trust or public confidence in the administration of justice. It also seeks to determine whether the conduct directly impacts or indirectly impacts, or there is a possibility of impact.

45. Section 9 requires that the conduct under scrutiny must fall into one of four possibilities before it can qualify as corrupt conduct. Section 7 prescribes the framework constructed by sections 8 and 9.

46. An analysis of the work done by sections 8 and particularly 9 is that the ICAC is required to base its investigative findings upon assumptions predicated upon possibilities when determining category and impact factors. Section 9 guarantees a determination based upon an assumption. Chief Justice Gleeson labelled the section 9 assumption as a "conditional" premise. Section 8 provides substantial scope for possibilities, and it is required to do so, if the material before the ICAC at decision making time reveals that it is more probable than not.

47. In about fifty per cent of referrals to the DPP and something like sixty per cent of disciplinary matters, subsequent events establish that the assumptions made by the ICAC were misconceived. That is, if the correct assumption had been made by the ICAC the outcome would not have passed the s.9 test, and quite possible the s.8 "could adversely affect" and "could involve tests".

48. In other words, the ICAC, while acting in good faith, came to a conclusion that subsequent events reveal was misconceived – because the finding of corrupt conduct by the Commission was based upon assumptions that now have no standing as a consequence of acquittal or inaction. As presently expressed, they now amount to being incorrect. An argument that the ICAC were right on Monday and therefore will remain right notwithstanding Friday's revelation that its assumptions were incorrect defies logic. The real question to be asked on Friday is, given what has now been established – that is, the investigation no longer reveals the relevant conduct "could" be a criminal offence, nor can it reveal the conduct could be a disciplinary offence. Thus, on the balance of probabilities can the investigation still reveal corrupt conduct as defined by the ICAC definitions? The answer is most overwhelmingly likely to be "No". But so far as I am aware, no other investigative body engages in, or perhaps is entitled to engage in publishing the details of its investigations that have been established to be flawed. The only value these assumptions have is historical – in the past the Commission assumed these matters fell within s.9 (1)(a). At that time, as events turned out the commission was wrong.

49. Justice Priestly was of a view that the "findings" by the Commission of corrupt conduct should be regarded as conditional or provisional only[24]. As with police force

[24] *Griener v Independent Commission Against Corruption*, (1992) 28 NSWLR 125 at 181

investigations, when an acquittal is an outcome that acquittal is recorded on the relevant person's criminal history. The police force acknowledges and abides by it unless and until fresh evidence is produced. The ICAC was set up as an investigative body and there is every reason why it should abide by the conventions of investigative bodies and accept the outcome of the courts. To do otherwise, as I have already argued, undermines the rights, interests and entitlements of the targeted person.

50. It is well settled the ICAC is not a court, but a standing administrative body that performs investigative functions and in certain circumstances makes reports[25]. As noted above, it has no power to change or pronounce upon the rights of any citizens in any legal sense. While I have argued above in cases where acquittals were recorded, or the DPP chose not to prosecute, there was a diminution in the reputational right, and allied to that in the right to a presumption of innocence – that diminution was not obtained as a consequence of a court ruling but rather is a *de facto* consequence of ICAC's public procedures including public enquiries, reports to Parliament and media releases.

51. It is understood the Committee is considering an appropriate mechanism to facilitate a merits review by the Supreme Court. The Committee recognises this is a long and costly option[26]. The Committee also noted the then Inspector drew attention to the fact that creating merits review in respect of ICAC reports would require substantial changes to the Supreme Court's Jurisdiction and would have consequences for other administrative bodies, and create confusion of judicial and administrative functions.

52. It may well be that a merits review through the Supreme Court will be what is required if reputational rehabilitation is to be achieved. But I would like the Committee to consider another option.

What about the Inspectorate:

53. The Inspectorate (which has a legislative connection to ICAC in that it is created by the same Act of Parliament), has administrative functions established to deal inter alia with complaints as serious as an abuse of power by Commission officers could handle a function focused on reputational rehabilitation. I hasten to make clear I do not regard bona fide decisions by the ICAC as amounting to any abuse of power. But, do point out that is a very substantial function entrusted to the Inspector. Like the ICAC, the Inspectorate is an administrative body. The power, I am suggesting be given to the Inspectorate differs from those it already has, but in my submission is still an administrative function.

54. That the reputational damage was done by an administrative body, ICAC, leaves open the possibility that the legislated administrative body, also created by the ICAC Act, entrusted to oversight some aspects of the Commissions work practices, could via a mechanism of setting aside an ICAC finding under certain specified circumstances minimise the reputational impact of the original finding. I commend consideration of a mechanism that could be established whereby those persons who believe, based upon any one or more of the following post ICAC outcomes:- non-action by the DPP

[25] See *Griener v ICAC* (1992) 28 NSWLR 125 at p.129.

[26] Joint Parliamentary Committee on ICAC; *Reputational impact on an individual being adversely named in the ICAC's investigations*; Report 4/57 – November 2021 at p.33, [4.11].

in regards to prosecuting, an acquittal, non-action by a disciplinary authority, or no disciplinary action taken should be permitted to make an application to the Inspector to consider in the light of that outcome the merits of their claim, and if appropriate to do so, set aside those findings of the Commission impacted by non-acting by the relevant authority. The determination of merit would be based solely upon whether the ICAC's findings fail because of a reliance upon s. (9) (1). I would argue reputational damage can be presumed to have happened. For a setting aside determination the amount of reputational damage is not a matter that would need to be argued; it would not be an issue in any determination. The Inspector's function would be confined simply to whether or not the ICAC finding complained of, still has validity bearing in mind the provisions of s. (9) (1). The question of possible unintended consequences and factors that might undermine the Commission's investigative work in setting aside a commission's decision would need to be considered by the Committee before this option was pursued.

55. In the event that my recommendation that the Inspector, be allocated this function is rejected, I do support and recommend that steps be taken to entrust reputational reputation to the Supreme Court. While I am anticipating matters not covered by my proposed s.(9) (1) review would cover the bulk of reputational rehabilitation claims, other merit reviews will need to consider the appropriate pathway through the Supreme Court. In the past I have also suggested the District Court and the NCAT may provide appropriate jurisdictional power to conduct a merits review.

Powers of the Inspector of the ICAC

Recommendation 8: That the Committee review the Inspector of the ICAC's powers under the ICAC Act.

56. The powers of the Inspector appear to be designed to permit the Inspector to view from afar the workings of the Commission, and perhaps gain some insight into its working quality and effectiveness by examining a complaint he/she receives from members of the public who have had dealing with the Commission. Thus, the Inspector can audit the number of search warrants issued in a particular year or through the years, but cannot investigate why items were taken in a particular search warrant and what their relevance was to a particular investigation. Nor can an Inspector deal with abuses of power unless there is a complaint – even though the media may have reported the relevant event – such as counsel's opening address or a Commissioner's bullying of a witness or legal representative (unless the Inspector decides to regard it as an impropriety amounting to misconduct and is willing to write a report to Parliament and recommendations in respect of it). I am not relying upon any particular instance of either of those examples, simply using them to illustrate areas of impotence for an Inspector.

57. I have in these submissions pointed to two areas which I argue should be included in the Inspector's functions. The first was to give the Inspector a role in monitoring reporting progress; the second was to give the inspector a role in a limited number of s. (9) (1) reputational rehabilitation applications.

58. There is a further function I would ask the Committee to consider. I have in earlier submissions to the Committee referred to the importance the public interest plays in

various provisions of the ICAC Act. I argue the Inspector should be given a function that permits the Inspectorate to be satisfied that the public interest has been thoroughly considered. The reference to the public interest in the legislation that particularly concerns me is that found in s.31 ICAC Act. I have set out the portions of the Act I wish to discuss:

> **31 Public Inquiries**
> (1) For the purpose of an investigation the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
> (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the flowing:
>
> (a) The benefit of exposing to the public, and making it aware, of corrupt conduct,
> (b) The seriousness of the allegation or complaint being investigated,
> (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
> (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

59. These two subsections make clear that each investigation requires the Commission to consider whether the public interest is served by progressing the investigation through a public inquiry. More than that: - it requires the Commission to consider four specific items, but does not confine the consideration of public interest to those four issues found in ss. (2). Subsection (2) also makes clear that Commission is to consider not only "whether it is" but also "whether it is not" in the public interest. Given all four of the issues raised in ss. (2) (a) – (d) can be thoroughly dealt within a report, reasons why a public inquiry would better achieve these aims should be determined.

60. My concern is that factors supporting the "whether it is not" in the public interest are not always being considered or not being considered adequately. For this reason, if the Commission is minded to hold a public inquiry in respect of any investigation that fact should be notified to the Inspector, along with details of what the Commission anticipates the investigation will look into. The Inspector then should be able to retain counsel to argue as a contester to the holding of a public inquiry in the event the Inspector comes to a view that differs from the Commission's proposed intention.

61. I would argue that when a public interest decision is made the Commission's reasons for holding, or not holding a public inquiry should be committed to writing. Indeed, a legitimate question to be investigated by the Inspector or perhaps more widely is whether the ICAC's practice in holding public inquiries as frequently as it has, has always been in the public interest.

Conclusion

62. Each of the Recommendations under review is of importance to the effective functioning of the ICAC within a democratic nation having the rights, interests and entitlement we enjoy. The efficacy we should be looking for from the ICAC are the benefits it gives to the public in combatting corruption through its investigative powers, rather than a permanent diminishment as a consequence of its investigative powers of civil entitlements to those who have committed no crime, no disciplinary offence and no offence requiring termination of employment.