

Minimising reputational damage arising from ICAC investigations

By Jonathan Hyde¹

The playwright Shelley observed in *The Cenci*, act 4, scene 2, line 137, that:

The breath of accusation kills an innocent name, and leaves for lame acquittal the poor life, which is a mask without it.

Unfortunately it would seem all too apparent that there are examples of reputations having been significantly damaged in the course of ICAC investigations.² ICAC in its submission to the Parliamentary Joint Committee rightly concedes as much:

*The Commission acknowledges that its investigations, particularly where they involve a public inquiry and/or a public report, can adversely impact on the reputation of those involved in the investigation.*³

Similarly it naturally follows that findings of corrupt conduct may affect individuals personally, professionally or in employment, as well as in familial relationships.⁴

The true vice for individuals named in ICAC is that very often being named is accompanied by salacious media reporting with an almost inevitable conclusion in the court of public opinion that, *'where there is smoke there is fire'*.

While there are a number of sensible and practical safeguards presently available that go some way to ameliorating damage to an individual's reputation enshrined in *The ICAC Act* and protocols, there nonetheless remains an administrative process that lends itself to potentially highly destructive and irreparable public damage for individuals.⁵

It is inevitably the case that given a principal object of *The ICAC Act* is to *'investigate, expose and prevent corruption involving or affecting public authorities and public officials'* a level of collateral damage is both to be expected and arguably unavoidable. The question for consideration is not how to prevent damage to reputation, but rather how to strike the correct balance between the right to reputation without diminishing the primary object and purpose of *The ICAC Act*. It is in this context that the following is proposed.



A Public Direction Protocol

Part 2A of *The ICAC Act* provides that a principal object of the Act is for, *'the education of public authorities, public officials and members of the public about corruption'*. Section 13(1)(h) - (j) contemplates that an important function of the Commission is to raise public 'awareness and education'. Section 31B(2)(e) of the Act also usefully provides that the Commissioner can issue guidelines as it considers necessary to ensure procedural fairness.

Consistent with the objects of *The ICAC Act*, there is no impediment to a Commissioner at the commencement of public hearings from giving a broad direction regarding the possibility of reputational damage to individuals being named and called to give evidence before the Commission. Such a direction could be in a standardised form in much the same way that a judge in a criminal trial provides directions to a jury. The direction could include some explanation as to the following:

- (a) That an ICAC investigation is not a criminal trial.
- (b) That ICAC proceedings have the potential to cause harm to individuals in the form of damage to reputation and there is every possibility that any such

damage to reputation may be without foundation, depending on the ultimate outcome of an investigation.

- (c) That there are differences in the standard of proof between criminal proceedings and an ICAC investigation. The threshold is far lower in the ICAC than in a criminal trial.
 - (d) A warning that simply because an individual is called or named in the ICAC proceedings, one ought not draw adverse conclusions as to whether they have engaged in serious corrupt conduct in the absence of a positive finding to that effect.
 - (e) That at the conclusion of the proceedings or at some suitable point in time the Commissioner will cause to be published in a prominent publication the names of individuals that may have either given evidence or been the subject of inquiry, informing the public that no adverse findings were made in relation to particular individuals.
- The benefits of 'front end loading' a direction in this way would include:
- (a) That the public is better informed as to the workings of the ICAC.
 - (b) That there would be less likelihood of members of the public and media drawing premature and unwarranted conclusions.
 - (c) It would inform the public that caution needs to be exercised because people may be called or named, but that does not necessarily mean that there has been corrupt conduct.

A Publication Protocol

In a similar vein to the Public Direction Protocol, at the conclusion of an investigation if it seems to the Commissioner that persons have been named and are unlikely to be the subject of corruption findings, their names could be published in a prominent publication which states that fact.



There is no good reason why any public statement should be confined to persons the subject of complaint or investigation and it might be that witnesses in appropriately defined circumstances might benefit from some public acknowledgement that they have not been the subject of corruption findings. This could be left to the discretion of the Commissioner and to any individual that considers that their reputation has been unfairly harmed.

The positive benefit to the Commission in having a publication protocol seems to be that:

- (a) It would avoid ongoing reputational damage to persons not subject to adverse findings as a consequence of their involvement in ICAC proceedings.
- (b) An individual's reputation may be restored in a timely manner without having to wait for final findings and recommendations.
- (c) The general public may generally be better informed.
- (d) Such a publication would do no more than already occurs on the ICAC website, save that it would have some greater public prominence in so far as it would attract a wider audience.

Exoneration Protocol

The last topic that I would like to consider is the presently debated 'exoneration protocol'. A number of the submissions made to the ICAC Parliamentary Committee extol the virtues of an exoneration policy. At first blush there is a superficial attraction to such a protocol, however for the reasons that follow there are perhaps too many fundamental impediments.

The first challenge that is likely to arise is in relation to the respective burdens of proof for criminal proceedings, as opposed to what is essentially an administrative investigative process in the ICAC. Allegations of corruption and attendant findings are determined on the balance of probability, whereas in criminal proceedings the Crown is required to prove each element of a charge to a standard of beyond reasonable doubt. The differing standards of proof might well mean that a charge remains unproven in a criminal trial, however adopting a lower standard of proof on the balance of probability, a different outcome might result in the ICAC.

Another fundamental challenge is how one might reconcile the different rules of evidence in a criminal trial, as compared to proceedings before the ICAC, which are far less constrained by the rules of evidence, and with the Commissioner effectively unconstrained in how evidence is obtained or used. The ICAC proceedings are more inquisitorial in nature and witnesses can be compelled to give evidence against their interests and do not enjoy the age old common law right to silence. Evidence obtained in this manner may support a finding of corruption before the ICAC but would not be available in a criminal trial.

Added to the challenges outlined above is the difficulty in reconciling a prosecuting authority's decision not to charge a person and the ICAC's findings of corruption. Some of the reasons for not proceeding with a charge might include an absence of admissible evidence to prove each element of a charge, or lack of a witness to give certain

evidence because they are no longer available for whatever reason.

The matters referred to above are just some of the issues that would tell against an exoneration protocol and are by no means an exhaustive list.

Any funding contemplated for use in an exoneration protocol might be better deployed in publicly identifying individuals who have suffered unfair reputational damage in the process of the ICAC performing its important public function, which has at its heart the uncovering of corruption.⁶

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ENDNOTES

- 1 Jonathan Hyde is a barrister at New Chambers and specialises in public and administrative law, with particular expertise in anti-corruption matters, royal commissions and commissions of inquiry. In 2018–2019 Jonathan was appointed Counsel Assisting the Australian Commission for Law Enforcement Integrity in connection with a number of significant corruption matters. He is a part-time judge for the Australian Defence Force and Chairs the RSL NSW Discipline and Conduct Tribunal.
- 2 ICAC's Submission No: 38 to the Parliamentary Inquiry.
- 3 NSW Independent Commission Against Corruption Submission to the Committee on the ICAC: 14 July 2020 at p.6.
- 4 NSW Independent Commission Against Corruption Submission to the Committee on the ICAC 14 July 2020 at p.14.
- 5 See ICAC guidelines re exculpatory evidence; the requirement to disclose adverse evidence; non-publication orders regarding evidence at a compulsory hearing.
- 6 This opinion formed part of an in-person private briefing provided by Jonathan Hyde to members of the Parliamentary Committee on the Independent Commission Against Corruption.