Submission No 38

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

Organisation: NSW Bar Association

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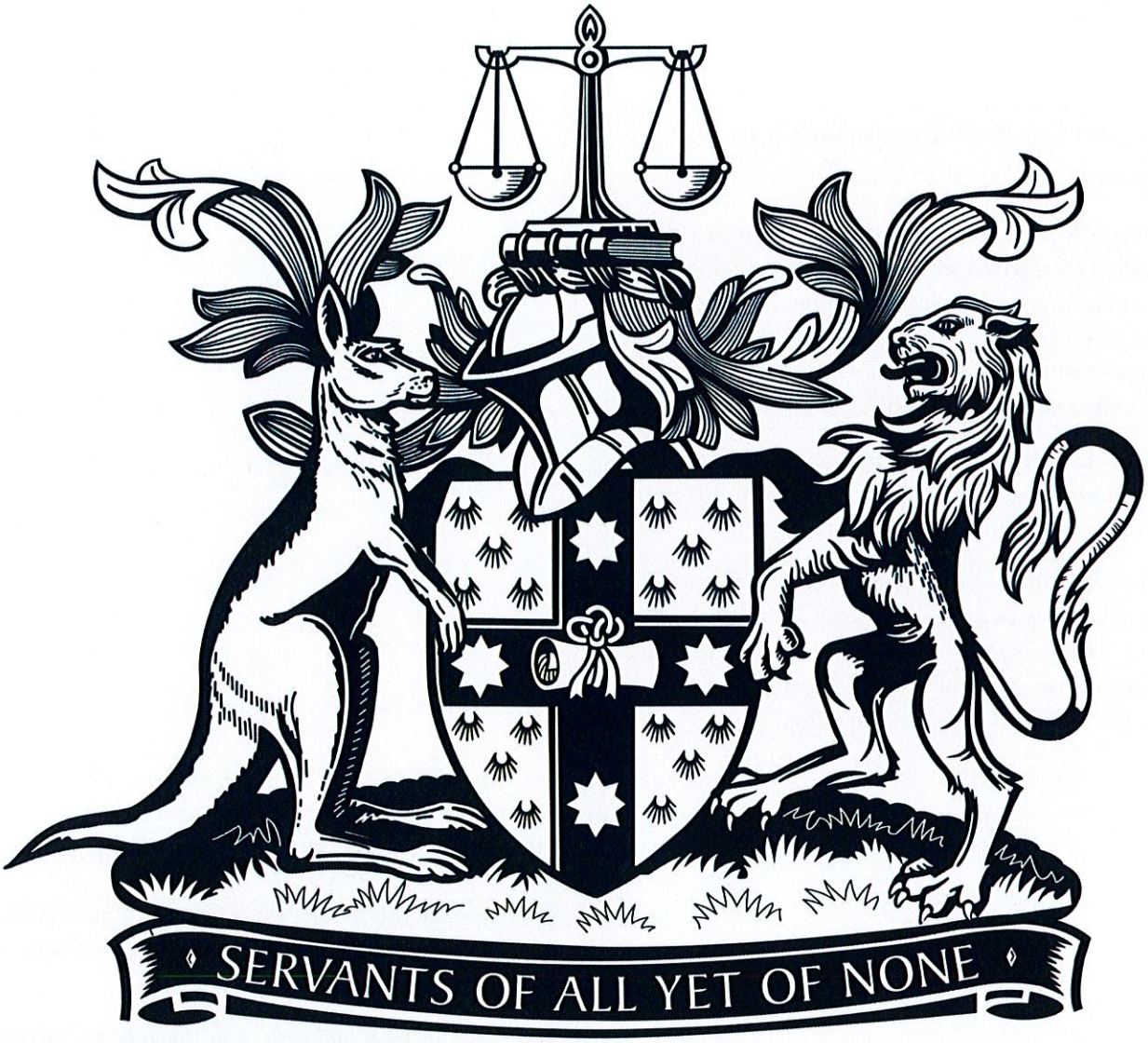

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Committee on the Independent Commission Against Corruption - Inquiry into the reputational impact on an individual the subject of adverse findings

14 August 2020

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The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,380 barristers who principally practice in NSW.

We also include amongst our members judges, academics, and retired practitioners and judges. Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Public Law Section and Inquests & Inquiries Committee. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, at first instance via [redacted].

Contents

A. Introduction

1. The New South Wales Bar Association (**the Association**) thanks the Committee on the Independent Commission Against Corruption (**the Committee**) for the invitation to provide a submission to its inquiry into the reputational impact on an individual being the subject of adverse findings by the Independent Commission Against Corruption (**the ICAC**).

2. The Association agrees with previous findings and submissions about the grave impacts that adverse findings can have on individuals but also acknowledges the significance of the ICAC's role in pursuing its statutory objects, including investigating, exposing and preventing corruption involving or affecting public authorities and public officials.[1] Unless the ICAC's work and findings are to become entirely private, which would involve a radical change in approach, the prospect of reputational damage to individuals will remain. Public investigation and exposure of corrupt conduct, with all of the associated public scrutiny and deterrent effect that this is intended to achieve, is a significant feature of the existing system.

3. This submission considers two issues: first, the protection provided by existing safeguards and remedies; and second, the problematic aspects of an exoneration protocol.

4. For the purposes of the current inquiry, particular attention should be directed to existing safeguards and remedies that serve to guard against the risk of unwarranted reputational impact on an individual as a consequence of being adversely named in the ICAC's investigations, as outlined in section B of this submission. The principal safeguards and remedies that presently exist are:

   (a) the obligation that the *Independent Commission Against Corruption Act 1988* (NSW) (**the *ICAC Act***) in a procedurally fair way;

   (b) the availability of judicial review where it is contended that the ICAC has fallen into legal error, including by acting in a procedurally unfair way; and

   (c) the ability of persons to apply for, and the power of the ICAC to make, non-publication orders to suppress the publication of an individual's name and/or matters relating to an individual.

5. The notion of a separate "exoneration protocol" to deal with the reputational impact on an individual who is the subject of an adverse finding by the ICAC is problematic, as outlined in section C of this submission, for at least the following reasons:

   (a) the acquittal of an individual on a particular criminal charge relating to matters that have been the subject of corrupt conduct findings by the ICAC does not, in and of itself, constitute a judicial "exoneration" of the person in relation to the findings made by the ICAC; and

   (b) any "exoneration procedure" would therefore necessarily involve some further and separate form of review of the ICAC's investigation and findings. The details of such a procedure do not appear to have been developed and on scrutiny give rise to a number of problems, particularly having regard to the potential forms of such a procedure.

6. These issues are examined in turn below.

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[1] Section 2A(a)(i) of the *Independent Commission Against Corruption Act 1988* (NSW) (***ICAC Act***).

B. Existing safeguards and remedies – adequate protection provided

7. There are a number of existing safeguards and remedies available to individuals, the ICAC and the Inspector of the ICAC that address, in different ways, the risk of unwarranted reputational damage being caused to an individual as a result of adverse findings by the ICAC. The Committee discussed many of the existing safeguards and remedies in its November 2019 report titled *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC.*[2]

Obligation to act in a procedurally fair way

8. The ICAC is obliged to act in a procedurally fair way. The precise content of that obligation is variable and will depend on the circumstances of the case.[3] This obligation exists in part because of the possibility that a public inquiry may result in a report that includes adverse findings against an individual and harm that individual's reputation accordingly.[4] The obligation is reflected in, and in part derives from, provisions of the *ICAC Act*. The provisions include those that empower the ICAC to authorise a person who is "substantially and directly interested in any subject-matter of a public inquiry" to:

   (1) appear at the inquiry or a specified inquiry;[5]

   (2) be legally represented at the inquiry;[6] and

   (3) with the Commissioner's leave, examine or cross-examine any witness on any matter that the ICAC considers relevant.[7]

9. The ICAC has also issued Procedural Guidelines (**the Guidelines**), which are directed to the ICAC's staff and counsel appointed under section 106 of the *ICAC Act* to assist the ICAC (**Counsel Assisting**). The Guidelines were issued in accordance with section 31B of the *ICAC Act*, which was introduced following recommendations made by this Committee.[8] The Guidelines impose a number of obligations to ensure the ICAC's staff, Counsel Assisting and Commissioners act in a procedurally fair way.

10. First, the Guidelines impose requirements regarding the investigation and consideration of exculpatory evidence[9] in relation to an affected person (that is, "a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned").[10]

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2 See [2.49]-[2.75].

3 See *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214, 215 cited with approval in *Duncan v ICAC* [2016] NSWCA 143, [693] (Basten JA, with whom Bathurst CJ and Beazley JA agreed on this issue).

4 See *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 27E (Gleeson CJ) cited with approval in *Duncan v ICAC* [2016] NSWCA 143, [688] (Basten JA, with whom Bathurst CJ and Beazley JA agreed on this issue). See also the Committee on the ICAC, *Report 2/56 Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* (October 2016), [2.18] (**2016 Committee Report**).

5 *ICAC Act* ss 32, 33.

6 Ibid.

7 *ICAC Act* s 35.

8 NSW, *Parliamentary Debates*, Legislative Assembly, 15 November 2016, 41 (Mike Baird, Premier); 2016 Committee Report, above n 4, [2.13]-[2.37] (recommendations 14-19).

9 The Guidelines, [2.2]. "Exculpatory evidence" is defined in the Guidelines to mean "credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission's investigation".

10 *ICAC Act* s 31B(4).

In particular, the Guidelines stipulate that the ICAC's "investigation strategy should include consideration of any reasonable steps that can be taken to identify and follow investigative leads which suggest that exculpatory evidence exists" and that staff "should bring to the attention of the investigation case manager exculpatory evidence of which they are aware and investigative leads that suggest to them, on reasonable grounds, that exculpatory evidence may exist".[11] They also oblige the senior case lawyer on an investigation and a public inquiry to provide all exculpatory evidence to Counsel Assisting, including any evidence that comes to his or her attention after the investigation phase and during the public inquiry.[12] Similarly, they oblige Counsel Assisting to bring such evidence to the attention of the presiding Commissioner, who may direct that further investigation take place.[13] These obligations amplify the ethical obligations that apply to Counsel Assisting.[14]

11. Second, the Guidelines regulate the disclosure of exculpatory and other relevant evidence to affected persons. In particular, the ICAC must:

    (1) provide an affected person with material that is adverse to that person and upon which the ICAC may rely;

    (2) give the affected person a reasonable opportunity to consider and respond to that material; and

    (3) where the ICAC conducts a public hearing, provide an affected person with any exculpatory evidence in its possession.[15]

12. Similarly, Counsel Assisting is required to disclose to an affected person:

    (1) the substance of evidence where Counsel Assisting intends to rely on such evidence to contend that an adverse finding should be made against that person[16] and the evidentiary grounds for those findings;[17] and

    (2) information affecting a witness's credibility where Counsel Assisting intends to contend that the witness's evidence should be preferred over that of the affected person for the purpose of the ICAC making a finding about the affected person.[18]

    The presiding Commissioner may grant leave to a person with a sufficient interest to cross-examine a witness during the course of a public inquiry, including as to the witness's credibility where it is sufficiently relevant to the investigation.[19] Further, if potential adverse findings are identified during the drafting of the investigation report that were not identified in Counsel Assisting's submissions, the ICAC will notify the affected person of the proposed potential adverse finding and provide the person with an opportunity to make submissions in relation to it.[20]

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[11] The Guidelines, [3.2].
[12] Ibid, [3.6].
[13] Ibid.
[14] *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 97-100.
[15] The Guidelines, [4.1], [7.4].
[16] Ibid, [4.2].
[17] Ibid, [7.5].
[18] Ibid, [4.3].
[19] Ibid, [5.1]-[5.3].
[20] Ibid, [7.6].

13. Third, the Guidelines provide that it is open to an affected person to seek to place exculpatory evidence before the ICAC.[21] When an affected person makes such a request, Counsel Assisting is required to consult with the presiding Commissioner as to whether:

(1) the ICAC should undertake further investigations in light of the evidence;

(2) any person nominated by the affected person to give exculpatory evidence should be called to give evidence; and/or

(3) a document the affected person contends is exculpatory should be tendered.[22]

14. Fourth, the Guidelines provide that a person required to appear before the ICAC at a public inquiry must be given reasonable notice of that requirement in order to prepare for, and participate in, the public inquiry, including time to seek legal advice or arrange for legal representation.[23] The presiding Commissioner can also adjourn the evidence of a witness to enable him or her sufficient time to prepare before giving evidence, or giving further evidence, or to consider evidence placed before the public inquiry in which he or she previously did not have knowledge.[24]

15. By allowing an affected person, either himself or herself or through a legal representative to:

(1) place exculpatory evidence before the ICAC;

(2) respond to potential adverse findings; and

(3) seek to cross-examine witnesses who might provide evidence that forms the basis of potential adverse findings against him or her,

the Guidelines give an affected person an opportunity to persuade the ICAC not to make potential adverse findings that might otherwise cause reputational damage. These obligations of procedural fairness bear particular attention by the Committee for the purposes of its current inquiry because the primary and most important protection against unwarranted reputational damage to individuals is the conduct of a fair hearing before any adverse findings are made.

The availability of judicial review where the ICAC falls into legal error

16. There is no right of appeal from an adverse finding of the ICAC. However, the Supreme Court has jurisdiction to ensure that administrative tribunals, such as the ICAC, carry out their functions and perform their duties according to law.[25] It follows that if the ICAC makes an adverse finding against an individual, the individual may seek judicial review in the Supreme Court. This includes if the individual considers that he or she was not afforded procedural fairness before the finding was made.

17. In *Duncan v ICAC*,[26] McDougall J reviewed the case law as to the jurisdiction of the Supreme Court to review findings by the ICAC and identified the following grounds of review as available, where relevant, in any proceedings for judicial review of a finding by the ICAC:

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[21] Ibid, [3.7].
[22] The Guidelines, [3.7].
[23] Ibid, 6.1.
[24] Ibid, 6.9.
[25] *Greiner v ICAC* (1992) 28 NSWLR 125, 130B (Gleeson CJ).
[26] [2014] NSWSC 1018.

(a) there is a material error of law on the face of the record (which includes the reasons given for the decision – see section 69(4) of the *Supreme Court Act 1970* (NSW));

(b) the reasoning is not objectively reasonable, in the sense that the decision 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 based on a process of logical reasoning from proven facts or proper inferences therefrom;

(c) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;

(d) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and

(e) there has been a material denial of natural justice.[27]

18. If the Supreme Court determines that the ICAC made an error on the basis of one of the above grounds when making a finding it can make a declaration of invalidity with respect to that finding, such as a declaration that a person was denied procedural fairness.[28] The Supreme Court also has power to grant a declaration that proposed conduct of the ICAC, such as making certain findings[29] or investigating a particular allegation,[30] would exceed the ICAC's jurisdiction.

19. Individuals have previously used judicial review to challenge findings made by the ICAC or potential findings that might be made by the ICAC and to restrain the ICAC from investigating an allegation, with some success. In *Balog v Independent Commission Against Corruption*,[31] the High Court declared that the ICAC was not entitled in any report pursuant to section 74 of the *ICAC Act* (as it was then) to include a statement of any finding by it that the appellant was or may have been guilty of a criminal offence or corrupt conduct (other than a statement as to whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence).[32] Similarly, in *Greiner v ICAC*,[33] the Court of Appeal made declarations that the ICAC reports in which adverse findings were made against the plaintiffs were made without or in excess of jurisdiction and were nullities, and that the determinations that the plaintiffs had engaged in corrupt conduct were wrong in law. Further, in *Duncan v ICAC*,[34] McDougall J found that the findings the ICAC made against one plaintiff did not support the conclusion that his conduct could involve a criminal offence, although he rejected the challenges brought by the other plaintiffs to findings the ICAC had made against them.[35] In *ICAC v Cunneen*,[36] a majority of the High Court dismissed an appeal from a declaration made by the Court

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27 *Duncan v ICAC* [2014] NSWSC 1018, [35]; cited in Committee on the ICAC, 2016 Committee Report, above n 4, [2.11].

28 See, eg, *Greiner v ICAC* (1992) 28 NSWLR 125, 148E (Gleeson CJ); *Duncan v ICAC* [2014] NSWSC 1018, [35]. See also 2016 Committee Report, above n 4, [2.12] citing *Duncan v ICAC* [2014] NSWSC 1018, [30]-[35] and [244].

29 See *Balog v ICAC* (1990) 169 CLR 625.

30 See *ICAC v Cunneen* (2015) 256 CLR 1.

31 (1990) 169 CLR 625.

32 *Balog v ICAC* (1990) 169 CLR 625, 636 (the Court).

33 (1992) 28 NSWLR 125.

34 [2014] NSWSC 1018.

35 An appeal against McDougall J's findings was dismissed (see *Duncan v ICAC* [2016] NSWCA 143).

36 (2015) 256 CLR 1.

of Appeal that the ICAC had no power to investigate an allegation identified in a summons issued to the respondent.

20. The Association recognises that judicial review can be expensive and difficult for the individual seeking review. It is also a process concerned with the legal validity of adverse findings made by the ICAC, not with the factual correctness of such findings. The Committee has previously recognised the limitations of judicial review: one of the very reasons it recommended that the Guidelines include an obligation on the ICAC to disclose all credible, relevant and significant evidence to a person of interest, including exculpatory evidence, was to remove the difficulty of seeking judicial review where a person was unaware of the full extent of evidence in his or her case.[37]

Non-publication orders

21. It is open to the ICAC to make a direction restricting the publication of evidence, either on its own initiative or on the application of a person, where it is satisfied that the direction is necessary or desirable in the public interest.[38] The direction can be made in relation to:

    (1) any evidence given before the ICAC;

    (2) the contents of any document, or a description of any thing, produced to the ICAC or seized under a search warrant issued under the *ICAC Act*;

    (3) any information that might enable a person who has given or may be about to give evidence before the ICAC to be identified or located;

    (4) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry; or

    (5) any written submissions received by the ICAC.[39]

    It is an offence for a person to make a publication contravening a direction made by the ICAC.[40]

22. The power to make a non-publication order where satisfied that the direction is necessary or desirable in the public interest is one mechanism by which adverse reputational impacts on individuals can be minimised, where justified, at least in the course of an inquiry to prevent publication of otherwise damaging material. A person can challenge the making of a non-publication order, or the refusal to make such an order, on judicial review to the Supreme Court.[41]

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37 2016 Committee Report, above n 4, [2.25].

38 *ICAC Act* ss 112(1), 112(1A).

39 *ICAC Act* s 112(1).

40 *ICAC Act* s 112(2).

41 See, eg, *Obeid v Independent Commission Against Corruption* [2015] NSWSC 1891 and *Obeid v Ipp* (2016) 338 ALR 234.

C. Problematic aspects of an exoneration protocol

23. The suggestion of an "exoneration protocol" stems from the notion that, where an individual has been the subject of adverse findings by the ICAC and the person is later charged with matters relating to the subject matter of those findings, but acquitted, the court in question may be asked to make some form of exoneration order in respect of the ICAC's adverse findings. Alternative forms of "exoneration protocol" appear to have been also raised for consideration. The concept is problematic for a number of reasons.

24. The acquittal of an individual on a particular criminal charge relating to the same or related subject matter as has been the subject of corrupt conduct findings by the ICAC may be seen, understandably, as giving rise to questions about the appropriateness of those earlier corrupt conduct findings. However, it is also important to appreciate that such an acquittal does not, of itself, demonstrate that the person has been exonerated, in the sense that the acquittal has demonstrated that the adverse findings were not available, should not have been made, and should be expunged. That is because:

(a) The ICAC makes its findings based on the balance of probabilities whereas criminal proceedings are determined by reference to proof beyond reasonable doubt. A conclusion that charges have not been proved beyond reasonable doubt does not demonstrate that the ICAC, in considering related matters according to a different standard of proof, should have made different findings;[42]

(b) The rules of evidence and other legal principles affecting the conduct of criminal proceedings do not apply in proceedings before the ICAC. For example, the privilege against self-incrimination does not apply in the ICAC's investigations[43] but is available to an individual in criminal proceedings. Evidence that formed the basis of a finding of corrupt conduct may be inadmissible or otherwise unavailable in the criminal proceedings.[44] New evidence may be available in the criminal proceedings that was not available in the ICAC inquiry;

(c) The elements of "corrupt conduct", which are defined in sections 8 and 9 of the *ICAC Act*, do not correspond with a particular criminal offence. While there may be similar criminal offences, such as misfeasance in public office or an offence under Part 7 of the *Crimes Act 1900* (NSW), there is no criminal offence of engaging in "corrupt conduct" as that term is defined in the *ICAC Act*.[45]

(d) Even in circumstances where there is not an acquittal but rather a determination by prosecuting authorities not to prosecute, no safe inference can be drawn that adverse findings were wrongly made. There are many reasons why a prosecuting authority may determine not to proceed with a prosecution for a criminal offence, including in circumstances where

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[42] This is one of the reasons underlying this Committee's previous recommendation that there be no exoneration protocol and no merits review of ICAC findings: see 2016 Committee Report, above n 4, [2.4].

[43] See *ICAC Act* s 26.

[44] This is another reason this Committee has previously recommended that there be no exoneration protocol and no merits review of the ICAC findings: see 2016 Committee Report, above n 4, [2.3], [2.5].

[45] This is also a reason this Committee has previously recommended that there be no exoneration protocol and no merits review of the ICAC findings: see 2016 Committee Report, above n 4, [2.6].

it arises from the same conduct supporting an adverse finding made by the ICAC. For example, the Director of Public Prosecutions may consider there to be insufficient evidence that would be admissible in criminal proceedings (notwithstanding that the same evidence was properly and lawfully taken into account by the ICAC in making an adverse finding) to proceed or it may be that the relevant statutory time limit for commencing proceedings for a criminal offence has expired.[46]

25. Once it is appreciated that the mere fact of acquittal or a failure to charge does not logically demonstrate that an adverse finding has been wrongly made by the ICAC, it must follow that any "exoneration protocol" would necessarily involve a distinct process of examining the ICAC's findings through some form of appeal or merits review. Most likely, this would involve a full-scale examination of the ICAC investigation which led to the corrupt conduct findings. Immediately questions arise as to whether such an appeal/review is to be conducted only by reference to the material that was before the ICAC at the time of making the findings, or could be extended to take account of other evidence (including fresh evidence).

26. There is no existing administrative or judicial body that is well-equipped to engage in such review. It would have significant resource implications, including for the ICAC if it was to play a role in response to a challenge of its previous findings. This could well detract from the ICAC's capacity to achieve its statutory objects, including investigating, exposing and preventing corruption involving or affecting public authorities and public officials.[47] Alternatively, it may be considered inappropriate for the ICAC to play an active role in such a review, in terms of defending the correctness of its own investigations and conclusions, including because of the risk that an apprehension of bias might be created in any subsequent investigations or public inquiries by the ICAC.[48] If so, would another agency of the State be required to participate in such a review procedure, and be provided with commensurate resources to perform that role? Given the length and complexity of many ICAC investigations, it is unlikely that any "exoneration protocol" could be straightforward, efficient or cheap.

27. On a related point, the potential broader consequences of a finding that a person should be "exonerated" need to be considered. The ICAC's findings at the conclusion of any investigation are often lengthy and complex, involving many affected parties. It would be necessary to decide, in fashioning any new "exoneration protocol", how widely the review procedure is intended to roam. For example, consideration should be given to whether the ICAC or some other body would be required to commence a fresh investigation and public inquiry, recall witnesses and/or redraft its report with a view to covering all of the ground covered by the initial investigation, or whether the review would be nominally confined to the particular findings made against a person seeking review. If the latter, consideration must be given to what impact, if any, that would have on the status of other findings contained in the ICAC's report, including about other individuals. Issues of finality loom large.

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[46] This is another reason this Committee has previously recommended that there be no exoneration protocol and no merits review of the ICAC findings: see 2016 Committee Report, above n 4, [2.6].

[47] *ICAC Act* s 2A(a)(i).

[48] Applying the principle established in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35-36 (the Court).

Conclusion

28. The Committee in conducting its review should have due regard to the safeguards against unwarranted reputational damage that already exist but also to the complications that are inherent in the concept of an "exoneration protocol". Great caution is required before recommending the adoption of such a protocol. If it is to be recommended, the fine detail of such a protocol should be well developed to guard against unexpected and unintended consequences, uncertainty and cost.

29. Thank you again for the opportunity for the Association to make a submission to this inquiry. The Association would be pleased to assist the Committee with any questions it may have. If you would like any further information, or to discuss this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, via [redacted].