



Parliament of New South Wales

# Committee on the Independent Commission Against Corruption

Report 4/57 – November 2021

Reputational impact on an individual being adversely named in the ICAC's investigations





Parliament of New South Wales

Committee on the Independent Commission Against  
Corruption

Reputational impact on an individual being adversely  
named in the ICAC's investigations

Report 4/57 – November

A handwritten signature in blue ink, appearing to read 'Davis'.

Tabled: 25 November 2021

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Committee on the Independent Commission Against Corruption.**

Reputational impact on an individual being adversely named in the ICAC's investigations / Joint Committee on the Independent Commission Against Corruption. [Sydney, N.S.W.] : the Committee, 2021. 1 online resource (112 pages). (Report / Committee on the Independent Commission Against Corruption; no. 4/57)

"November 2021"

Chair: Tanya Davies.

ISBN 9781921686191

1. Privacy, Right of—New South Wales.
2. Corruption investigation—New South Wales.
3. Legislative power—New South Wales.
4. Public administration—New South Wales.
- I. Title.
- II. Davies, Tanya.
- III. Series: New South Wales. Parliament. Committee on the Independent Commission Against Corruption. Report ; no. 4/57.

323.448099944 (DDC22)

The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

# Contents

Membership	ii
Chair’s foreword	iii
Summary	iv
Findings and recommendations	vi
Chapter One – Reputational impact and the ICAC	1
The nature of reputational impact	3
Impact of the 2016 ICAC reforms	7
Chapter Two – Current safeguards and remedies	10
Existing safeguards and remedies	10
Adequacy of existing safeguards and remedies	13
Chapter Three – Potential improvements to safeguards and remedies	17
Increased use of private hearings	17
Improve safeguards against media exposure and social media	21
Increased use of suppression orders	22
Implement a publication direction protocol	23
Require mandatory findings on the ICAC website	24
Resources and funding	25
Whistle-blower protection	26
Considerations from other jurisdictions	27
Chapter Four – Exoneration Protocol	31
History of exoneration protocol and the ICAC	31
Current review process	32
An exoneration protocol	36
Alternatives to an Exoneration Protocol	40
Appendix One – Terms of reference	42
Appendix Two – Conduct of inquiry	43
Appendix Three – Submissions	44
Appendix Four – Witnesses	46
Appendix Five – Extracts from minutes	48

# Membership

<b>Chair</b>	Mrs Tanya Davies MP
<b>Deputy Chair</b>	Mrs Wendy Tuckerman MP (from 16 February 2021) The Hon Taylor Martin MLC (until 16 February 2021)
<b>Members</b>	Mr Justin Clancy MP Mr Mark Coure MP Mr Ron Hoenig MP The Hon Trevor Khan MLC (from 16 February 2021) Ms Tania Mihailuk MP Mr Jamie Parker MP The Hon Rod Roberts MLC Mr Dugald Saunders MP The Hon Adam Searle MLC
<b>Contact details</b>	ICAC Committee Parliament House 6 Macquarie Street SYDNEY NSW 2000
<b>Telephone</b>	(02) 9230 2790
<b>E-mail</b>	<a href="mailto:icaccommittee@parliament.nsw.gov.au">icaccommittee@parliament.nsw.gov.au</a>
<b>Website</b>	<a href="https://www.parliament.nsw.gov.au/committees/ICAC">https://www.parliament.nsw.gov.au/committees/ICAC</a>

## Chair's foreword

As Chair of the Committee on the Independent Commission Against Corruption (ICAC), the inquiry into reputational impact on individuals who have been adversely named in ICAC's investigations was an important issue to examine. This inquiry came about because of ongoing concerns that the reputational impact experienced by people named in investigations of the ICAC is not addressed fully by the available remedies.

Reputational impact is varied and includes economic, business, social and psychological effects. The impact can have negative and ongoing effects well after an investigation is finalised due to the current environment of online and social media.

I stress that the purpose of this inquiry was not to re-examine individual cases of the ICAC's decisions or to protect the reputations of those found to be corrupt. There is no question that the public expects that the corruption of public officials and authorities should be exposed. There is a need for the ICAC to investigate, expose and prevent serious and systemic corruption. However, there is a question of balancing the ICAC's function without causing unwarranted and unfair reputational damage to individuals.

During this inquiry, the Committee examined current safeguards and remedies to protect against reputational harm in NSW and in other Australian jurisdictions. We have made recommendations to improve the safeguards and remedies available in NSW.

The Committee had robust discussions regarding the recommendations in this report. As a result, we have identified certain areas that warrant further review, including an examination of the existing mechanism for judicial review and if a merits review process should be considered as part of the procedural fairness framework that ICAC operates within, which may go further to protecting unwarranted reputational harm.

The Committee heard from a variety of stakeholders during the inquiry process and I would like to thank each and every one of them for their participation. The experts in this area assisted the Committee greatly in gaining a better understanding of key issues in this inquiry. I would also like to acknowledge the individuals who told us their experiences, which were sometimes difficult to discuss but offered a valuable and personal insight into reputational impact.

In addition, I would like to thank my Committee colleagues for their valuable contributions throughout the inquiry process. Finally, I would like to thank the Committee staff for their professionalism and support in conducting the inquiry.

**Tanya Davies MP**

Chair

## Summary

The Independent Commission Against Corruption has significant powers in exposing serious and systemic corrupt conduct as set out in the *Independent Commission Against Corruption Act 1988* (the ICAC Act). It should be robust and fearless when it performs its functions, without political interference and external influences including the media. However, there is a tension with the powers and functions of anti-corruption bodies such as the ICAC when exposing corruption and causing unwarranted reputational harm to individuals.

This inquiry did not aim to protect the reputational damage of those found to be corrupt nor is it an investigation of any particular complaint or a reconsideration of the ICAC's decisions. The Committee agrees that reputational damage should be a deterrent for those considering engaging in corrupt conduct.

This inquiry confirmed the Committee's support that the ICAC is necessary to investigating, exposing and preventing corruption in NSW. The people of NSW expect public authorities and public officials to be held to account when they conduct corrupt behaviour and breach public trust. However, the Committee considers that additional safeguards and remedies are needed.

The reputational impact experienced by people named in investigations of the ICAC can be serious. The Committee found that the nature of reputational impact is varied and includes economic, business, social and psychological effects. The impact can have negative and ongoing effects well after an investigation is finalised. This is heightened through media reports, which are readily available online and through social media.

The nature of this exposure has changed and the Committee notes that this may go beyond the initial intent of the ICAC. To alleviate this, the Committee recommends that the ICAC should consider implementing mental health protocols for individuals as part of ICAC's investigations.

The Committee also notes the significant reforms in 2016 which included amendments to the ICAC Act and updates to the ICAC's policies and procedures. These reforms have had positive impacts on how the ICAC conducts its investigations and minimises reputational harm. The Committee found, however, that there are individuals who were not afforded the benefits of these reforms and experience ongoing adverse reputational impacts.

The Committee understands that there is currently a broad range of safeguards in place to minimise reputational impact on individuals being adversely named in the ICAC's investigations. These safeguards are reflected in the ICAC Act and also in the ICAC's operations manual and procedural fairness guidelines. While these procedures are in place, the Committee considers that stringent monitoring of these procedures is necessary to ensure they are properly conducted and to strengthen their adequacy.

Further, the Committee remains concerned with unwarranted reputational damage to individuals named in investigations where findings are not ultimately made against those persons.

A concerning aspect of the current operating model of the ICAC is that people who are called as witnesses or persons of interest can be placed under a cloud of assumed guilt because they

are linked to an ICAC investigation. This issue is heightened as there can be some years between the first announcement of an inquiry and the final report. More needs to be done to protect individuals during this investigation process.

The Committee also found that the ICAC can take further steps in clearing an individual's reputation through updating the relevant ICAC investigation page following a judicial proceeding. The ICAC publishes its findings on their website which includes recommendations, referral to other authorities and the outcome concerning any criminal or disciplinary proceedings. However, there were concerns that this does not occur in all instances.

The issue of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act) was also examined by the Committee. The amendment to the ICAC Act was introduced following the decision of the High Court in *ICAC v Cunneen*. The Validation Act does not reverse the High Court decision, but validates action taken by the ICAC before 15 April 2015. The Committee found that the Validation Act impacts an individuals' ability to seek a judicial review prior to 2015. This was a public policy decision taken by the NSW Parliament in the wake of the *Cunneen* decision to ensure the ICAC retained the powers and functions deemed necessary for its task. However, there were a small group of persons who had legal rights prior to the enactment of the *Validation Act* as a result of the *Cunneen* decision and had gone to court to have findings against them set aside. Their case was settled with the ICAC and orders were to be entered by the NSW Court of Appeal. These legal rights were retrospectively extinguished by the *Validation Act*. The Parliament was not informed of this matter during the debate and vote on the *Validation Act*. The Committee is of the view this limited cohort of persons should have those legal rights reinstated by legislation.

Finally, the Committee also considered if an exoneration protocol is a possible remedy to address unwarranted reputational impact of being named in ICAC investigations. The Committee found that such a protocol is inoperable and misconceived.

It was argued that an exoneration protocol would be used where the ICAC has made findings of corrupt conduct but subsequent criminal proceedings have found the person not guilty. However, it is important to note that a person acquitted by a court of a criminal offence is not necessarily 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 to have been corrupt 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.

Another factor to consider in a discussion of an exoneration protocol is that there is no right of appeal, nor any procedure for review of the merits of an ICAC finding, commonly referred to as 'merits review'.

In conducting this inquiry, the Committee found that there are broader issues arising from reputational impact that need further examination. The Committee recommends a subsequent review of aspects of the ICAC Act, with regard but not limited to, the Inspector's powers under the ICAC Act and whether the existing mechanism of judicial review could be codified in legislation, to make its existence clearer and better understood to the wider public.



## Findings and recommendations

Finding 1 _____	3
The nature of reputational impact is varied and includes economic, business, social and psychological effects.	
Recommendation 1 _____	3
The ICAC should consider implementing mental health protocols for individuals as part of ICAC's investigations.	
Finding 2 _____	5
Media reports today are readily available, online and through social media, which heightens and prolongs the reputational impact of individuals who are involved in an ICAC proceeding.	
Finding 3 _____	7
The 2016 ICAC reforms have required that procedural fairness operates in the ICAC's investigations.	
Finding 4 _____	7
There are ongoing adverse reputational impacts on individuals whose investigations occurred prior to the 2016 amendments to the ICAC Act.	
Finding 5 _____	10
There is currently a broad range of safeguards in place to minimise reputational impact on individuals being adversely named in the ICAC's investigations.	
Finding 6 _____	13
Some reputational impact is unavoidable if the ICAC is to be effective in its work to investigate, expose and prevent corruption.	
Finding 7 _____	13
The Committee is concerned with unwarranted reputational damage from individuals named in investigations where adverse findings are not made.	
Recommendation 2 _____	14
The ICAC prepare and publish with each report a table of persons involved in that inquiry, with the indication that the person was the subject of an adverse finding, a corruption finding or was a witness only.	
Finding 8 _____	15
Many stakeholders agree that the current safeguards for reputational impact are adequate and no changes are necessary.	
Recommendation 3 _____	17

The Committee conduct a review of the threshold for determining whether to hold public hearings in both legislation and practice by the ICAC compared to like bodies in other jurisdictions.

Recommendation 4 \_\_\_\_\_ 21

That any review of the ICAC Act consider whether there should be provisions to cover breaches of the ICAC's media policy.

Recommendation 5 \_\_\_\_\_ 24

That the ICAC updates the relevant investigation page on its website following a judicial proceeding.

Finding 9 \_\_\_\_\_ 25

The Committee is concerned that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years.

Recommendation 6 \_\_\_\_\_ 25

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 whether there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.

Recommendation 7 \_\_\_\_\_ 33

That the *Independent Commission Against Corruption Amendment (Validation) Act 2015* be amended to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.

Finding 10 \_\_\_\_\_ 35

The Committee supports and commends the Inspector of the ICAC's work in dealing with complaints of misconduct and maladministration by the ICAC and its officers.

Recommendation 8 \_\_\_\_\_ 36

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

Finding 11 \_\_\_\_\_ 36

An exoneration protocol is misconceived and would be fundamentally inoperable.

Recommendation 9 \_\_\_\_\_ 36

That the Committee review the existing mechanism of judicial review.

# Chapter One – Reputational impact and the ICAC

- 1.1 There is a need for anti-corruption bodies which investigate, expose and prevent corruption involving or affecting public authorities and officials. When individuals who have been elected or employed to serve in the best interests of the public engage in serious or systemic corruption, it is a damning indictment on those individuals. It can also have negative effects on those institutions that have been established to put the public's needs foremost.
- 1.2 The ICAC, as an independent anti-corruption body, should be robust and fearless when it performs its powers and functions. It should be untainted by political interference and external influences including the media. However, there is a tension with anti-corruption bodies performing their roles while maintaining the need to protect the reputation of innocent individuals.
- 1.3 Former ICAC Commissioner the Hon. David Ipp AO QC described the challenges regarding the powers and procedures of anti-corruption bodies and individual rights. He stated:
- How to combat corruption is a controversial topic, and there is little unanimity on some of the thorny issues it raises, particularly the powers that anti-corruption agencies should be given and the procedures they should adopt ...One has to weigh against the evil and destructive consequences of corruption, and the difficulties in detecting and in prosecuting it, legitimate concerns that the powers of an anti-corruption agency detract from civil rights.<sup>1</sup>
- 1.4 Similarly, former Inspector of the ICAC the Hon. John Nicholson SC agreed that that there should be a balance between the powers of an anti-corruption body and the rights of individuals. He outlined that:
- ... in the absence of any bill of rights for existing NSW residents, where extraordinary powers of investigation are invested in a public agency [the ICAC] ... there is a need for strong and appropriate checks and balances to safeguard any impropriety, maladministration and ineffective or inappropriate procedures relating to the outcome of their activities.<sup>2</sup>
- 1.5 The Accountability Round Table adds that the concerns that any publicly funded investigative body might misuse its powers to the detriment of innocent victims of that misuse, should be recognised. They highlighted that 'even in cases that involve no fault in investigative procedures, unjustified harm might be inadvertently done to reputations which do not deserve to be diminished.'<sup>3</sup>

---

<sup>1</sup> The Hon. David Ipp AO QC, [Conference Opening – Accountability and the Law in 2017](#), Accountability and the Law: Anti-corruption Agencies in Australia, Conference, August 2017, p 3.

<sup>2</sup> [Submission 25](#), The Hon. John Nicholson SC, p 4.

<sup>3</sup> The Accountability Round Table is a non-profit group that focuses on improving accountability, transparency, ethical behaviour and democratic practice in Australian governments. [Submission 18](#), Accountability Round Table, p 2.

- 1.6 The purpose of this inquiry is not to protect the reputational damage of those found to be corrupt. The Committee agrees that reputational damage should be a deterrent for those considering engaging in corrupt conduct. The Committee considers that there should be a balance between how the ICAC uses its powers without causing unwarranted and unfair reputational damage to innocent individuals.
- 1.7 The potential impact of ICAC investigations on personal reputations was identified and actively canvassed as part of the Commission's establishment in 1988. Premier the Hon. Nick Greiner AC's second reading speech on the introduction of the Independent Commission Against Corruption Bill 1988 stated that:
- [the ICAC] will be required to make definite findings about persons directly and substantially involved. The [ICAC] will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion.<sup>4</sup>
- 1.8 This Committee's report in 1990 noted the damage to reputations specifically, as a 'side effect' of unrestricted ICAC public hearings. The Committee reported that 'reputations can be unfairly and unnecessarily damaged in [ICAC] public hearings. Specific steps need to be taken to guard against this occurring.'<sup>5</sup>
- 1.9 Since then, the Committee has continued to be concerned about the reputational damage caused to individuals as a result of ICAC investigations. In the 2019 review into the annual reports of the ICAC and the Inspector of the ICAC (the Inspector), the Committee found that the reputational impact experienced by people named in ICAC investigations can be serious, and is not addressed fully by the available remedies.<sup>6</sup>
- 1.10 In its annual review, the Committee reported representations from people describing the varying impact on their reputations from having been named in the ICAC's investigations, and noted the lack of suitable means to alleviate this impact.<sup>7</sup> In response, the Committee resolved to examine these concerns in greater detail in the light of current circumstances.
- 1.11 As part of this inquiry, the Committee heard that the public perception of an ICAC hearing greatly affects a witness or person of interest's reputation similar to how they would be treated during a criminal trial. While the ICAC's purpose and functions are different from the courts, the structure of its public hearings are similar to a court proceeding. A Commissioner presides over a public hearing, similar to a judge and witnesses sit on the stand. The Committee notes that,

---

<sup>4</sup> New South Wales, Legislative Assembly, [Parliamentary Debates](#), 26 May 1988 (Nick Greiner, Premier, Treasurer and Minister for Ethnic Affairs, Independent Commission Against Corruption Bill, second reading), p 675.

<sup>5</sup> Committee on the ICAC, [Inquiry into Committee Procedures and the Rights of Witnesses](#), First Report, Parliament of New South Wales, November 1990, p 16.

<sup>6</sup> Committee on the Independent Commission Against Corruption, [Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC](#), Report 1/57, Parliament of New South Wales, November 2019, [Finding 6] p 16.

<sup>7</sup> [Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC](#), p 16.

generally, the public may not be aware that an ICAC hearing is not a criminal trial and that it is more similar to a royal commission.

- 1.12 It is important to emphasise that the current inquiry is not an investigation of any particular complaint or a reconsideration of the ICAC's decisions. Under the *Independent Commission Against Corruption Act 1988* (the ICAC Act) the Committee cannot investigate or reconsider the ICAC's decisions or recommendations about specific complaints or investigations.<sup>8</sup>

## The nature of reputational impact

### Finding 1

**The nature of reputational impact is varied and includes economic, business, social and psychological effects.**

### Recommendation 1

**The ICAC should consider implementing mental health protocols for individuals as part of ICAC's investigations.**

- 1.13 The reputational impact arising from being named as part of an ICAC proceeding can have significant and varied ongoing negative effects for people. This can also have an effect on people's mental health. The Committee considers that introducing mental health protocols as part of ICAC proceedings may assist in reducing the psychological damage for some individuals.
- 1.14 The reputational impact on individuals can occur at the start of an ICAC inquiry, a public hearing or the tabling of an ICAC report.<sup>9</sup>
- 1.15 Evidence provided to the Committee indicated that the nature of reputational impacts varies. Former Inspector, the Hon. John Nicholson SC explained that reputational impact is more than injury to reputation, and stressed the importance of someone's reputation. In his submission, he emphasised that:
- one's reputation can be seen a right or interest worthy of recognition. It is also linked to one's privacy and honour – honour as embracing an interest or legitimate expectation of being treated with dignity and respect by virtue of being a human being.<sup>10</sup>
- 1.16 Many stakeholders told the Committee about the economic, social and psychological impact of being adversely named in the ICAC's investigation.<sup>11</sup>
- 1.17 Some stakeholders outlined their loss of income and ability to find ongoing work.

---

<sup>8</sup> [Independent Commission Against Corruption Act 1988, s 64\(2\)](#).

<sup>9</sup> [Submission 6](#), NSW Independent Commission Against Corruption, p 6.

<sup>10</sup> [Submission 25](#), The Hon. John Nicholson SC, p 8.

<sup>11</sup> [Submission 2](#), Mr Joseph Scimone, p 2; [Submission 3](#), Mr John Kinghorn, p 3; [Submission 5](#), Mr John Atkinson, p 7; [Submission 7](#), Mr John McGuigan, pp 5-6; [Submission 12](#), Name suppressed, p 1; [Submission 14](#), Mr Richard Poole, p 2; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 23](#), Dr Andrew Cornwell, p 2; [Submission 29](#), Mr Nicholas Di Girolamo, p 3-4; [Submission 41](#), Mr Greg Wyllie, p 5.

- 1.18 The Committee is particularly concerned to hear about ongoing mental health impacts on individuals and also the social impacts on family members. Some stakeholders described the reputational impact extending to family members where their ability to find work is also affected; relationships have broken down; and the social stigma of being related to a person of interest in an ICAC investigation.<sup>12</sup>
- 1.19 While there were ICAC findings against some inquiry participants, the duration of the ongoing reputational impact, lasting several years after their respective cases, is distressing. The long-lasting burden of reputational impact is illustrated in the following examples:

#### Examples of reputational impact

*“My wife and I had ‘TV news’ helicopters circling and photographing our home. We also had TV cameras photographing us as we departed our house ... My health suffered from the stress of the inquiry and to this day has not fully recovered.”<sup>13</sup>*

*“The first thing people do is look to Google to determine whether they are dealing with someone of good character ... and the first thing they see when they look up my name is ‘corruption’, and that is a very heavy word. And it has had very significant impact on the capacity to build business.”<sup>14</sup>*

*“The effect on family ... at the time my boys were all at school ... they had to walk into school and they would be asked, ‘Is your dad going to jail?’ ‘Your dad’s a crook. Your dad’s a thief’.”<sup>15</sup>*

*“On the same day, ICAC attended my workplace, camera aloft, and served me with a summons in front of the mothers of then pre-school children to whom I was teaching taekwondo. My business, reputation and livelihood suffered because of this and the adverse effects continue to this day.”<sup>16</sup>*

#### Impact on whistle-blowers

- 1.21 An inquiry participant who was an ICAC whistle-blower described their negative experience during an ICAC proceeding. They told the Committee that despite not being a witness or a person of interest, their privacy was not protected as their name was published in several documents on the ICAC website and was adversely named by other individuals during an ICAC public hearing. They add that the impact of being named as part of an ICAC proceeding still continues today where their reputation is damaged and their mental health has been affected.<sup>17</sup>

<sup>12</sup> [Submission 3](#), Mr John Kinghorn, p 2 & pp 3-4; [Submission 15](#), Name suppressed, p 1; [Submission 16](#), Name suppressed, pp 1-2; [Submission 23](#), Dr Andrew Cornwell, pp 5-6; Mr John McGuigan, [Transcript of evidence](#), 2 December 2020, p 11; Mr Richard Poole, [Transcript of evidence](#), 2 December 2020, p 13.

<sup>13</sup> [Submission 3](#), Mr John Kinghorn, p 2; pp 3-4.

<sup>14</sup> Mr John Atkinson, [Transcript of evidence](#), 2 December 2020, p 3.

<sup>15</sup> Mr Richard Poole, [Transcript of evidence](#), pp 13-14.

<sup>16</sup> [Submission 41](#), Mr Greg Wyllie, p 2.

<sup>17</sup> [Submission 12](#), Name suppressed, p 1, p 2 & p 8.

- 1.22 The Committee is aware that the Inspector has an ongoing audit regarding the welfare of witnesses. The Committee looks forward to his report, highlighting this important issue.

### Impact from media exposure

#### Finding 2

**Media reports today are readily available, online and through social media, which heightens and prolongs the reputational impact of individuals who are involved in an ICAC proceeding.**

- 1.23 The way news is reported has also changed since the creation of the ICAC. The rise of the 24 hour news cycle and social media has prolonged the impact on a person's reputation after an ICAC inquiry finishes. Many participants referred to the impact a Google search has when searching for their name.<sup>18</sup> Mr Richard Poole described it as a 'life sentence' which persists after the inquiry, and told the Committee that:

New articles feed off the old articles and the ... finding is repeated in perpetuity due to its sensational appeal.<sup>19</sup>

- 1.24 The Hon. John Nicholson SC highlighted how the media contributes to reputational impact on individuals. The way that news is reported today, readily available online and through social media, may not accurately report ICAC proceedings. He adds that:

There are many sources that publish information emanating from the ICAC and its public inquiries. Print media, radio and TV are now minnows in a pool of publishing flooded by Internet based outlets ... publishers have motives varying from informing, through to fake news (misinforming) through to malicious gossip and rumour.<sup>20</sup>

- 1.25 Mr Greg Wyllie also described that the ICAC's media release regarding a referral to the Director of Public Prosecutions (DPP) against his wife, son and his girlfriend lead to 'harassment' by the press. He described the situation at the time where 'many members of the press ... were camped outside our home yet again, harassing us and our other children as well.'<sup>21</sup>

- 1.26 As a consequence, the impacts on the mental health of individuals are heightened and prolonged. In its submission, the ICAC provided detailed guidelines about the conduct of its inquiries and how it complies with the ICAC Act (as discussed in Chapter 2). However, the Committee notes that there are no protocols in place to alleviate the impact on mental health of individuals as part of ICAC proceedings.

---

<sup>18</sup> [Submission 5](#), Mr John Atkinson, p 7 & [Transcript of evidence](#), p 3; [Submission 14](#), Mr Richard Poole, pp 2; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 29](#), Mr Nicholas Di Girolamo, p 21 & [Transcript of evidence](#), 2 December 2020, p 25.

<sup>19</sup> [Submission 14](#), Mr Richard Poole, p 2.

<sup>20</sup> [Submission 25](#), The Hon. John Nicholson SC, pp 6-7.

<sup>21</sup> [Submission 41](#), Mr Greg Wyllie, p 4.

- 1.27 Further, a concerning aspect of the current operating model of the ICAC is that people who are called as witnesses or persons of interest may be placed under a cloud of assumed guilt simply because they are linked to an ICAC investigation. ICAC investigations can proceed for years until an operation is completed and individuals may be assumed to be guilty before a final report is made by the ICAC.
- 1.28 More needs to be done to protect individuals from the commencement of an investigation process. However, it is also important to note that reputational impacts have a deterrent value, in particular through exposure in the media. The intent of the legislation establishing the ICAC was to act as both a deterrent and punishment for corruption.<sup>22</sup>

### Impact on businesses and shareholders

- 1.29 NuCoal Resources Limited (NuCoal) explained how reputational impact on a business can lead to significant financial losses to its shareholders as a result of an ICAC investigation.<sup>23</sup> NuCoal was not the subject of the ICAC investigation nor were any findings of corruption made against the company.<sup>24</sup>
- 1.30 NuCoal told the Committee about the lack of procedural fairness that was experienced by the company, including the failure of the ICAC to disclose exculpatory evidence in its proceedings.<sup>25</sup> The Committee notes that these concerns were addressed by the Supreme Court (Rothman J) in *NuCoal Resources Limited vs ICAC* [NSWSC 1400] and also in the Inspector's Special Report, *Report concerning a complaint by NuCoal Resources Limited about the conduct of ICAC in Operation Acacia*.<sup>26</sup>
- 1.31 As set out in Section 64(2)(c) in the ICAC Act, the Committee cannot reconsider the findings, recommendations, determinations or other decisions of the ICAC in relation to a particular investigation or complaint. However, the Committee is sympathetic to NuCoal's shareholders who faced significant financial losses following ICAC findings but were not involved in any corrupt findings.
- 1.32 Similarly, the Legislative Council Standing Committee on Law and Justice's inquiry on the *Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019*, recommended for the Government to address the outstanding matters in relation to NuCoal, including the issue of compensation for 'innocent

---

<sup>22</sup> [Submission 19](#), Office of the Director of Public Prosecutions (NSW), p 3.

<sup>23</sup> [Submission 30](#), NuCoal Resources Limited, p 6.

<sup>24</sup> For further details, see [Submission 30](#), NuCoal Resources Limited.

<sup>25</sup> [Submission 30](#), NuCoal Resources Limited, p 2. The ICAC investigation in relation to NuCoal's concerns are in: Independent Commission Against Corruption, [Investigation into the conduct of Ian Macdonald, John Maitland and others](#), Report, 2013; and [Operations Jasper and Acacia – Addressing outstanding questions](#), Report, 2013.

<sup>26</sup> The judgement dismissed their case and the Inspector found no evidence of abuse of power, impropriety and other forms of misconduct or maladministration. See: Supreme Court of New South Wales, [NuCoal Resources Limited v Independent Commission Against Corruption \[2015\] NSWSC 1400](#), Caselaw, NSW Government, webpage, viewed on 6 October 2021; Office of the Inspector of the Independent Commission Against Corruption, [Report concerning a complaint by NuCoal Resources Limited about the conduct of ICAC in Operation Acacia](#), Special Report 18/03, June 2018.



stakeholders'.<sup>27</sup> The Government's response reserves its position this matter.<sup>28</sup> Given the time that has passed since then, the Committee urges the NSW Government to respond to the Legislative Council's Law and Justice report as a matter of urgency.

### Financial impact

- 1.33 Some stakeholders told the Committee about their significant financial loss as a result of an ICAC investigation. Mr Greg Wyllie described their financial situation where their financial resources and earning capacity is 'diminished' and they are 'still out of pocket in relation to numerous legal expenses'.<sup>29</sup>
- 1.34 It was suggested that financial compensation to individuals should be considered when the ICAC has erred in conducting an investigation.<sup>30</sup>

## Impact of the 2016 ICAC reforms

### Finding 3

**The 2016 ICAC reforms have required that procedural fairness operates in the ICAC's investigations.**

### Finding 4

**There are ongoing adverse reputational impacts on individuals whose investigations occurred prior to the 2016 amendments to the ICAC Act.**

- 1.35 The impact of the 2016 reforms has required that procedural fairness operates in the ICAC's investigations. While the reforms also contributed to minimising unwarranted reputational damage, the ICAC should continue to ensure that its investigations are fair and have adequate safeguards.
- 1.36 The issues arising from investigations which were considered before the reforms are referred to as 'legacy issues'.
- 1.37 The Law Society acknowledged the impact on individual's reputations from these reforms. They noted that:
- The ICAC's investigations carry the risk of reputational damage to individuals, and that this may have been particularly true prior to the 2015 legislative amendments and adjustments to the operational approach of the ICAC.<sup>31</sup>
- 1.38 All submissions received in this inquiry, which dealt with concerns about reputational impact were from investigations prior to the 2016 reforms.<sup>32</sup> Many

---

<sup>27</sup> Standing Committee on Law and Justice, [Mining Amendment \(Compensation for Cancellation of Exploration Licence\) Bill 2019](#), Report 72, Parliament of New South Wales, October 2019, p [viii](#).

<sup>28</sup> [Government response](#), The Hon. Mark Speakman MP, Attorney General, 30 April 2020.

<sup>29</sup> [Submission 41](#), Mr Greg Wyllie, p [5](#).

<sup>30</sup> [Submission 29](#), Mr Nick Di Girolamo, p [17](#); [Submission 41](#), Mr Greg Wyllie, p [5](#).

<sup>31</sup> [Submission 39](#), The Law Society of NSW, p [2](#).

<sup>32</sup> See: Independent Commission Against Corruption, [History and development of the ICAC Act](#), webpage, viewed on 8 September 2021; [Submission 2](#), Mr Joseph Scimone, p [2](#); [Submission 3](#), Mr John Kinghorn, p [2](#); [Submission 5](#), Mr

inquiry participants alleged the lack of procedural fairness by the ICAC has led to ongoing reputational issues.<sup>33</sup>

- 1.39 In the Inspector of the ICAC's Special Report concerning an audit under section 57B(1)(d) into the ICAC's procedures for dealing with counsel assisting in investigations and inquiries, the Inspector highlighted that:
- Counsel assisting has a critically important role in ICAC investigations and public inquiries and, indeed, sets the tone of the process. When counsel assisting behaves unfairly, the process **and the findings of the [ICAC] will be undermined and be seen to be unfair, or there is, at least, a serious risk that that will be perceived to be the case** [emphasis added]. It is fundamental to both the just and effective performance of the [ICAC's] important public functions that it behaves fairly towards those who come before it and is perceived to have done so towards persons who may ultimately be the subject of adverse findings by it.<sup>34</sup>
- 1.40 The Committee was also concerned to hear allegations about previous ICAC Counsel Assisting cooperating with the media for headlines and conducting combative and emotionally charged public inquiries.
- 1.41 The Committee acknowledges the beneficial changes following the reforms in 2016, specifically the creation of the three commissioner model and a Chief Executive Officer position and also the appointment of the current commissioners. However, the Committee stresses that the reputation of the ICAC and how it functions should not be solely influenced by the characters or personalities of the ICAC's leadership group.
- 1.42 The Committee considers that some of these issues prior to the reforms may have been influenced by the culture within the ICAC, in particular the differing views between previous and current Commissioners on an individual's reputation. The Committee notes that in a media article following his tenure as Chief Commissioner, the Hon. David Ipp AO QC was quoted stating:

---

John Atkinson, p 7; [Submission 7](#), Mr John McGuigan, pp 5-7; [Submission 9](#), Mr Charif Kazal, p 3; [Submission 12](#), Name suppressed, p 1; [Submission 14](#), Mr Richard Poole, p 2; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 23](#), Dr Andrew Cornwell, p 2; [Submission 28](#), Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Chris Spence and Name suppressed, p 2; [Submission 29](#), Mr Nicholas Di Girolamo, p 2; [Submission 33](#), Mr Vic Tagg, p 1; [Submission 41](#), Mr Greg Wyllie, p 5.

<sup>33</sup> [Submission 2](#), Mr Joseph Scimone, p 1; [Submission 3](#), Mr John Kinghorn, p 2; [Submission 5](#), Mr John Atkinson, pp 10-11; [Submission 9](#), Mr Charif Kazal, p 4; [Submission 12](#), Name suppressed, pp 13; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 23](#), Dr Andrew Cornwell, p 2; [Submission 28](#), Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Christopher Spence and Name suppressed, pp 2-3; [Submission 29](#), Mr Nicholas Di Girolamo, pp 2-3; [Submission 30](#), NuCoal Resources Limited, pp 8-9; [Submission 41](#), Mr Greg Wyllie, pp 4-5.

<sup>34</sup> Office of the Inspector of the ICAC, [Report pursuant to sections 57B\(5\) and s77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B\(1\)\(d\) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act](#), Special Report 20/02, December 2019, p 2.

"But if you think about past inquiries," he adds, stressing that he is not commenting on current investigations, "I think my response is: just name one person whose reputation has been unfairly trashed."<sup>35</sup>

- 1.43 However, the current Commissioners and the Inspector have expressed the view that the potential for reputational impact is serious.<sup>36</sup> The Committee notes that these opposing views on the potential for reputational damage demonstrate how the operation of the ICAC can be influenced by those who are at the head of the organisation.

#### **Redress for legacy issues pre 2016 reforms**

- 1.44 The 'legacy issues' from before the 2016 reforms, were also noted by the Inspector during the public hearing. The Inspector told the Committee that:

[these issues] are legacy issues. Not one of the matters that was raised has occurred since 2017 when the current Commissioners were appointed and the current system was adopted ... Many of the people who put in submissions made complaints to me and I dealt with them.<sup>37</sup>

- 1.45 Issues regarding procedural fairness were addressed in this Committee's previous report (56<sup>th</sup> Parliament), *Review of the ICAC: Consideration of the Inspector's Report*. The recommendations from this report were reflected in the *Independent Commission Against Corruption Amendment Act 2016*.<sup>38</sup>
- 1.46 In addition, concerns raised with the ICAC's counsel assisting were addressed by the Inspector in a recent audit into the ICAC's procedures for dealing with and managing counsel assisting in investigations and public inquiries.<sup>39</sup> The Committee reiterates its support for the Inspector's audit and his findings in that report.<sup>40</sup>

---

<sup>35</sup> Michaela Whitbourn, [David Ipp: Life beyond the ICAC bench](#), Sydney Morning Herald, August 1, 2014, viewed on 6 October 2021.

<sup>36</sup> Committee on the Independent Commission Against Corruption, [Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC](#), Report 1/57, Parliament of New South Wales, November 2019, p 17.

<sup>37</sup> Mr Bruce McClintock, Inspector, Office of the Inspector of the Independent Commission Against Corruption, [Transcript of evidence](#), 18 September 2020, p 49 & p 52.

<sup>38</sup> Committee on the Independent Commission Against Corruption, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), Report 2/56, Parliament of New South Wales, October 2016.

<sup>39</sup> [Special Report 20/02](#), p 2.

<sup>40</sup> The Committee addressed the Inspector's audit into the ICAC's procedures for dealing with and managing counsel assisting in investigations and public inquiries. See: Committee on the Independent Commission Against Corruption, [Review of the 2018-2019 Annual Reports of the ICAC and the Inspector of the ICAC](#), Report 2/57, Parliament of New South Wales, August 2020, pp 25-26.

## Chapter Two – Current safeguards and remedies

### Existing safeguards and remedies

#### Finding 5

**There is currently a broad range of safeguards in place to minimise reputational impact on individuals being adversely named in the ICAC's investigations.**

#### The ICAC Act

- 2.1 The ICAC's powers and functions are set out in the ICAC Act. The ICAC Act outlines key safeguards which protect and minimise reputational impact on individuals.

#### *Public inquiries*

- 2.2 Section 31 of the ICAC Act enables the ICAC to conduct a public inquiry, while also outlining factors that must be considered when determining whether or not to hold such a public inquiry. These include whether there is any risk of undue prejudice to a person's reputation, as well as prejudice that might arise from not holding an inquiry.<sup>41</sup>
- 2.3 In addition, the ICAC Act makes it necessary for both the Chief Commissioner and at least one other Commissioner to authorise a public inquiry.<sup>42</sup>

#### *Private inquiries*

- 2.4 Another safeguard provided in the ICAC Act is the ability to hold part of a public inquiry in private, if the ICAC considers this to be in the public interest.<sup>43</sup>
- 2.5 The ICAC explained that this may happen when a witness raises new and untested allegations against another person. This allows private evidence to be taken to protect the reputation of the person who is the subject of the allegations. It also enables the ICAC to investigate the allegations without being prejudiced by public disclosure.<sup>44</sup>
- 2.6 In addition, the ICAC Act provides for hearing closing submissions in private.<sup>45</sup>

---

<sup>41</sup> [ICAC Act, s 31](#).

<sup>42</sup> [ICAC Act, s 6\(2\)](#).

<sup>43</sup> [ICAC Act, s 31\(1\)](#).

<sup>44</sup> [Submission 6](#), ICAC (NSW), p 9.

<sup>45</sup> [ICAC Act, s 31\(9\)\(10\)](#).

### *Procedural fairness*

- 2.7 As mentioned in Chapter 1, the 2016 reforms addressed allegations about the lack of procedural fairness to individuals. The Committee also notes that provisions within the ICAC Act now provide clearer safeguards, including that:
- The presiding officer must announce the general scope and purpose of the inquiry and that a person required to attend is entitled to know the nature of the allegation before they appear.<sup>46</sup>
  - The ICAC must give reasonable opportunity for a person to be legally represented. A legal representative can draw out evidence and also cross examine other witnesses who have provided adverse evidence against the person.<sup>47</sup>
  - The ICAC cannot authorise an adverse finding against a person without first giving the person reasonable opportunity to respond to the proposed adverse finding. The ICAC is also required to include a summary of that person's response in their report if the person requests the ICAC to do so.<sup>48</sup>

### **Operations of the ICAC**

#### *ICAC's operations manual*

- 2.8 The ICAC told the Committee that they have an Operations Manual which outlines the procedure for the conduct of public inquiries. This provides further information on the provisions in the ICAC Act and ensures that potential damage to reputation is one of the matters considered when deciding to conduct a public inquiry.
- 2.9 The Operations Manual helps the ICAC determine whether public exposure will: educate the public about serious corruption; encourage others to come forward with information relevant to the investigation; and encourage public agencies to engage in reform.<sup>49</sup>
- 2.10 Additionally, the Operations Manual prompts the ICAC to consider whether the allegations are already in the public domain and if the public inquiry would provide persons who are subject to allegations, including false accusations or innuendo, an opportunity to provide an account.<sup>50</sup>

#### *ICAC's media policy*

- 2.11 The role of the media has a significant impact on individuals' reputations and is an area of concern for the Committee.
- 2.12 The ICAC's media policy regulates how information is released and outlines that the ICAC will neither confirm nor deny that a particular complaint has been

---

<sup>46</sup> [ICAC Act, s 31](#).

<sup>47</sup> [ICAC Act, s 33](#); [Submission 6](#), ICAC (NSW), p [10](#).

<sup>48</sup> [ICAC Act, s 79a](#).

<sup>49</sup> [Submission 6](#), ICAC (NSW), p [8](#).

<sup>50</sup> [Submission 6](#), ICAC (NSW), p [8](#).

received. It also stipulates that no comment will be provided on any matter that is the subject of ongoing investigation or consideration.<sup>51</sup>

- 2.13 The ICAC's media policy is of interest to the Committee. This is explored in greater detail in Chapter 3.

#### *ICAC's Public Inquiry Procedural Guidelines*

- 2.14 The ICAC also has Public Inquiry Procedural Guidelines (the Guidelines), allowing for procedural fairness. The Guidelines enable an affected person to give exculpatory evidence to the ICAC, seek to cross-examine witnesses who might provide evidence that forms the basis of adverse findings, and respond to potential adverse findings.<sup>52</sup> The Committee understands that these Guidelines were introduced as part of the 2016 reforms.
- 2.15 The NSW Bar Association expressed the view that the Guidelines are the most important protection against unwarranted reputational damage to individuals, because they allow for a fair hearing before any adverse findings can be made. The Guidelines give a person an opportunity to persuade the ICAC not to make potentially adverse findings that might otherwise cause reputational damage.<sup>53</sup>

#### **Non-publication orders**

- 2.16 Non-publication orders also help to protect individuals' reputations. Section 112 of the ICAC Act allows the ICAC to give a direction that information not be published in any manner, if it believes it is necessary in the public interest. This direction can apply to:
- evidence given before the ICAC;
  - contents of a document given to the ICAC;
  - information that might enable a person who has given evidence to be located;
  - information that a person has or will give evidence; and
  - any written submission received by the ICAC.<sup>54</sup>
- 2.17 The ICAC uses the section 112 (non-publication) direction to prevent the publication of evidence (whether oral or documentary) that might identify a witness, where the information might cause reputational harm.<sup>55</sup>

---

<sup>51</sup> Independent Commission Against Corruption, [ICAC media policy](#), webpage, viewed on 9 September 2021.

<sup>52</sup> They are issued in accordance with the [ICAC Act, s 31b](#). See: Independent Commission Against Corruption, [Public Inquiry Procedural Guidelines](#), p 2 & p 4.

<sup>53</sup> [Submission 38](#), NSW Bar Association, p 5.

<sup>54</sup> [ICAC Act, s 112](#).

<sup>55</sup> [Submission 6](#), ICAC (NSW), p 10.

## Adequacy of existing safeguards and remedies

### Finding 6

**Some reputational impact is unavoidable if the ICAC is to be effective in its work to investigate, expose and prevent corruption.**

### Finding 7

**The Committee is concerned with unwarranted reputational damage from individuals named in investigations where adverse findings are not made.**

#### Reputational impact as a deterrent

- 2.18 As previously discussed, reputational impact acts as a deterrent to corruption. The Committee also received evidence from many stakeholders that a degree of reputational impact on individuals is unavoidable. This is due to the purpose of the ICAC, which is to investigate, expose and prevent corruption.<sup>56</sup>
- 2.19 Ms Donna Ward, Member, Inquests and Inquiries Committee, NSW Bar Association, explained that reputational damage is part of the function of the ICAC in order ‘to shine a light into dark places and to uncover corruption’. However, the focus on reputational impact should be on ‘unwarranted reputational damage’ for individuals who might feel that they were unfairly targeted or sustained reputational damage in a way that is unwarranted.<sup>57</sup>
- 2.20 Dr Bruce Baer Arnold, Canberra Law School, University of Canberra and Dr Brendon Murphy, Faculty of Law, Australian Catholic University submitted that the ICAC has not set out to cause reputational damage. They explained that:
- There have been no persuasive indications that someone’s reputation has been negligently or wilfully destroyed without cause through adverse naming by the [ICAC].... In the absence of such indications there is no reason to believe that ICAC’s approach to adverse naming is defective<sup>58</sup>
- 2.21 However, the Committee heard evidence that an individual who had no adverse finding made by the ICAC could also suffer from the impact of unwarranted reputational damage, including negative impacts on their family.<sup>59</sup>
- 2.22 Given the nature of the work that the ICAC does, the Committee accepts that some reputational damage is unavoidable, and warranted for those people who behave in a corrupt manner. However, the Committee remains concerned with unwarranted reputational damage from individuals named in investigations where adverse findings were not made. The Committee suggests that the ICAC should work harder to eliminate unwarranted reputational damage.

---

<sup>56</sup> Ms Donna Ward, Member, Inquests and Inquiries Committee, NSW Bar Association, [Transcript of evidence](#), 18 September 2020, p 4; [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, p 4; [Submission 19](#), Office of the Director of Public Prosecutions (NSW), p 3.

<sup>57</sup> Ms Donna Ward, [Transcript of evidence](#), p 4.

<sup>58</sup> [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, p 4.

<sup>59</sup> [Submission 16](#), Name Suppressed, p 1.

## Recommendation 2

**The ICAC prepare and publish with each report a table of persons involved in that inquiry, with the indication that the person was the subject of an adverse finding, a corruption finding or was a witness only.**

2.23 In addition, the Committee recommends that in each report the ICAC includes a table of persons involved in that inquiry, with the indication that the person was the subject of an adverse finding, a corruption finding or was a witness only. This would go some way to ensuring that those who find themselves involved in an ICAC inquiry but are not the subject of any adverse findings have one way to clearly and easily demonstrate this.

### Public inquiries

2.24 Concern regarding reputational impact on an individual adversely named in the ICAC's investigations is usually a result of a public inquiry or its subsequent published report.<sup>60</sup> The Committee received evidence from institutions and academia showing that public inquiries are a necessary aspect of the ICAC's work to investigate, expose, prevent and educate the public about corruption.

2.25 As previously outlined, the ICAC Act allows the ICAC to conduct a public inquiry after having considered certain factors. These are:

- the benefit of exposing corrupt conduct to the public;
- the seriousness of the allegation being investigated;
- any risk of undue prejudice to a person's reputation; and
- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.<sup>61</sup>

2.26 The 2015 Independent Panel Review of the jurisdiction of the ICAC by the current Inspector and the Hon. Murray Gleeson AC, stressed the importance of public inquiries. They expressed the view that:

Public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.<sup>62</sup>

2.27 This view was reiterated by the Inspector and other key stakeholders during this inquiry. They stated that public inquiries are crucial to investigate and expose corruption to public view, provide transparency, allow some public scrutiny into

---

<sup>60</sup> Mr Andrew Chalk, Chair, Public Law Committee, Law Society of NSW, [Transcript of evidence](#), 18 September 2020, p 2.

<sup>61</sup> [ICAC Act, s 31](#).

<sup>62</sup> The Hon Murray Gleeson AC & Mr Bruce McClintock SC, [Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption](#), Report, NSW Department of Premier and Cabinet, 30 July 2015, p 59. This same sentiment was shared by the NSW Council for Civil liberties: See: [Submission 34](#), NSW Council for Civil Liberties, pp 3-4.



the ICAC's operations and essential for public confidence in the ICAC and the Government in general.<sup>63</sup>

2.28 In addition, the ICAC explained that they may choose to conduct a public inquiry even when the evidence indicates there is no likelihood of corruption, to 'clear the air' of unfounded allegations that are in the public domain.<sup>64</sup>

2.29 Similarly, the Victorian Inspectorate summarised reputational impact and public examinations by saying:

Where a person has been the subject of public allegations or suspicion, a public examination may also present an opportunity for them to refute those claims and restore their reputation.<sup>65</sup>

2.30 The Committee is concerned, however, that while the ICAC's intention is to clarify certain matters by holding public inquiries, the current media environment, which is driven by a 24 hour news cycle and sensationalist headlines, focuses on public hearings instead of the outcome of an ICAC finding. This is particularly problematic when there can be some years between the first announcement of an inquiry and the final report.

2.31 The Committee understands the risk of unwarranted reputational damage that may result from public inquiries. It acknowledges the widespread expert opinion that public inquiries are necessary for ICAC to investigate, expose, prevent and educate the public about corruption.

## Reasons for the adequacy of current safeguards

### Finding 8

**Many stakeholders agree that the current safeguards for reputational impact are adequate and no changes are necessary.**

2.32 During this inquiry, the Committee received substantial evidence that the current safeguards mitigate reputational impact as much as possible, given the nature of the ICAC's work to expose corruption.<sup>66</sup>

2.33 Mr Andrew Chalk, Chair, Public Law Committee, Law Society of NSW told the Committee that:

The reforms—both legislative and procedural—made in the light of this Committee's 2016 report have gone a long way to satisfying earlier concerns, and that the level of controversy that this issue attracted previously has diminished significantly. There is a strong view that the current system is working well.<sup>67</sup>

---

<sup>63</sup> [Submission 27](#), The Centre for Public Integrity, p [1](#); [Submission 34](#), NSW Council for Civil Liberties, pp [3-4](#); Mr Andrew Chalk, [Transcript of evidence](#), p [8](#).

<sup>64</sup> [Submission 6](#), ICAC (NSW), p [9](#).

<sup>65</sup> [Submission 40](#), Victorian Inspectorate, p [4](#).

<sup>66</sup> [Submission 27](#), The Centre for Public Integrity, p [1](#); [Submission 11](#), Professor Nicholas Cowdery, p [3](#); [Submission 34](#), NSW Council for Civil Liberties, p [11](#).

<sup>67</sup> Mr Andrew Chalk, [Transcript of evidence](#), p [2](#).

- 2.34 The ICAC acknowledges that its investigations, particularly where they involve a public inquiry or a public report, can adversely impact on the reputation of those involved in the investigation. It also emphasised that existing safeguards, procedures and remedies are adequate to address the impact, for the following reasons:
- The ICAC only commences a public inquiry where there is relevant evidence to suggest that corrupt conduct has occurred or is occurring.<sup>68</sup>
  - Only a very small percentage of matters received by the ICAC are made the subject of a preliminary investigation. Not all preliminary investigations become full investigations and not all investigations involve a public inquiry. Many people may be the subject of allegations of corruption without the allegations ever being made public or, in many cases, without even knowing they have been the subject of an allegation.<sup>69</sup>
  - Compulsory examinations are conducted in private and are usually the subject of non-publication directions, preventing publication of the evidence and the identity of the person.<sup>70</sup>
  - The allegations under investigation and the general scope and purpose of the public inquiry are published on the ICAC's website.<sup>71</sup> This announcement clarifies the purpose of the investigation to the public.
  - At the conclusion of an investigation that has not involved a public inquiry, yet where the person involved or the public may be aware of the investigation, the ICAC is required to advise the individual of the outcome.<sup>72</sup>
- 2.35 The Committee notes that the ICAC has robust procedures in place to ensure procedural fairness, with appropriate safeguards to minimise or prevent undue harm to individual's reputations. However, the Committee considers that stringent monitoring of these procedures is necessary to ensure they are properly conducted and to strengthen their adequacy.

---

<sup>68</sup> [Submission 6](#), ICAC (NSW), p [9](#).

<sup>69</sup> [Submission 6](#), ICAC (NSW), p [6](#).

<sup>70</sup> [Submission 6](#), ICAC (NSW), p [9](#).

<sup>71</sup> [Submission 6](#), ICAC (NSW), p [9](#).

<sup>72</sup> [Submission 6](#), ICAC (NSW), p [6](#).

## Chapter Three – Potential improvements to safeguards and remedies

- 3.1 As outlined in Chapter 1, the 2016 reforms to the ICAC Act have had a positive impact on procedural fairness and minimised unwarranted reputational damage. Robust changes include the introduction of the three-commissioner model and the need for public inquiries to be authorised by the Chief Commissioner and at least one of the Commissioners.<sup>73</sup>
- 3.2 However, the Committee considers that despite the benefits provided by the 2016 reforms and the current robust operation of the ICAC, additional safeguards and remedies are still required to alleviate potential reputational damage.

### Increased use of private hearings

#### Recommendation 3

**The Committee conduct a review of the threshold for determining whether to hold public hearings in both legislation and practice by the ICAC compared to like bodies in other jurisdictions.**

- 3.3 Section 31(2) of the ICAC Act, allows the conduct of public hearings as part of the ICAC's investigations. Under the Act, the ICAC is required to balance the public interest in exposing corruption against the privacy of individuals and any undue prejudice to their reputations.<sup>74</sup>
- 3.4 Many stakeholders supported increased use of private hearings.<sup>75</sup> The Committee supports this view and recommends the ICAC make greater use of private hearings.

#### Support for private hearings

- 3.5 Many stakeholders called for all hearings to be held in private with a report being published only at the conclusion of an investigation, containing reasons for the finding be published.<sup>76</sup>
- 3.6 Mr John McGuigan, stated that ICAC inquiries should be private to prevent long-standing damage done to reputations as a result of the 'media circus' which occurs during ICAC inquiries.<sup>77</sup>

---

<sup>73</sup> Independent Commission Against Corruption, [History and development of the ICAC Act](#), webpage, viewed on 1 Oct 2020,

<sup>74</sup> [ICAC Act, s 31](#).

<sup>75</sup> See: [Submission 2](#), Mr Joseph Scimone, p 2; [Submission 3](#), Mr John Kinghorn, p 5; [Submission 7](#), Mr John McGuigan, p 7; [Submission 9](#), Mr Charif Kazal, p 5; [Submission 23](#), Dr Andrew Cornwell, p 7; [Submission 25](#), The Hon. John Nicholson SC, p 22.

<sup>76</sup> [Submission 3](#), Mr John Kinghorn, p 6; [Submission 29](#), Mr Nicholas Di Girolamo, p 5.

<sup>77</sup> [Submission 7](#), Mr John McGuigan, pp 7-8.

- 3.7 Mr Richard Poole also supported private hearings explaining that private hearings would ensure a referral to the ICAC does not:

Terminate a person's career or negatively affect their community standing unless, and until, sufficient evidence is gathered for a prosecution and in the normal course that prosecution proceeds.<sup>78</sup>

- 3.8 Mr John Kinghorn also called for all ICAC inquiries to be private, with the results of the investigation being published at the conclusion of the inquiry.<sup>79</sup>

- 3.9 The Rule of Law Institute added that moving to private investigations is the simplest way of easing the risk of reputational damage to those involved with ICAC inquiries.<sup>80</sup>

- 3.10 The Hon. John Nicholson also considered that an ICAC investigation can be conducted without the need for a public hearing.<sup>81</sup>

- 3.11 In 2016, the former Inspector of the ICAC, the late Hon. David Levine, in his review of the ICAC, expressed the view that the ICAC could expose corrupt conduct while protecting reputations through the use of all private proceedings. He wrote:

I have come to the view that the proceedings of the ICAC should be in private. That does not prevent the exposure of found corrupt conduct at the end of the investigation and the referral to prosecuting authorities. It will prevent the undeserved trashing of reputations and will still permit a proper focus and a fairly managed forensic process, without the distraction of the temptation for flamboyance or theatre.

The exposure of corrupt conduct after such proceedings will be in a more brilliant and clear light rather than in any part exposure emerging out of the darkness, the shadows into an occasional entr'acte.<sup>82</sup>

- 3.12 Mr Rod Jensen, Director, Legal Services, South Australia ICAC, which holds all hearings in private, observed that there are benefits to private hearings. He explained that if hearings are held in private, it provides the opportunity for an individual to 'come forward and to give a version that they might not necessarily give publicly.'<sup>83</sup>

---

<sup>78</sup> [Witness opening statement](#), Mr Richard Poole, p 2.

<sup>79</sup> [Submission 3](#), Mr John Kinghorn, p 5.

<sup>80</sup> [Submission 13](#), Rule of Law Institute of Australia, p 27.

<sup>81</sup> [Submission 25](#), The Hon. John Nicholson SC, p 22.

<sup>82</sup> The Hon. David Levine AO RFD QC, [Report to the Premier: The Inspector's Review of the ICAC](#), Report, Office of the Inspector of the Independent Commission Against Corruption, 12 May 2016, p 2.

<sup>83</sup> Mr Rod Jensen, Director, Legal Services, South Australian Independent Commissioner Against Corruption, [Transcript of evidence](#), 18 September 2020, p 33.

- 3.13 A number of stakeholders made strong submissions in favour of the ICAC's power to hold public hearings as an important, even an indispensable, aspect of its functions to tackle corruption and other misconduct.<sup>84</sup>
- 3.14 The NSW Law Society said that it:
- Agrees with the views of Transparency International Australia (in submissions made in respect of a national integrity commission) that "public hearings for the purpose of an investigation are, in proper situations, essential to the effective operation of an anti-corruption agency."<sup>85</sup>
- 3.15 The NSW Council for Civil Liberties stated that:
- The discretionary power to hold public inquiries – conducted under procedural fairness rules and consistent with public interest criteria – to be central to the effectiveness of, and public support for ICAC.<sup>86</sup>
- 3.16 The best argument in favour of ICAC being able to continue to conduct public hearings is to be found in Bruce McClintock SC's January 2005 report, *Independent review of the Independent Commission Against Corruption Act 1988 – Final Report*. The Inspector considered the Commission's power to hold public hearings and concluded:
- Public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.<sup>87</sup>
- 3.17 The Independent Panel of the Hon Murray Gleeson AC and Mr McClintock also commented on public inquiries in their July 2015 report, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*. The Independent Panel accepted that:
- Public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes.<sup>88</sup>

### Negative effects of media related to public hearings

- 3.18 The Committee considers that the media exposure that surrounds ICAC investigations has the real risk of disrupting the administration of a fair and just criminal trial, if an investigation gets to this stage. In the recent criminal

<sup>84</sup> [Submission 27](#), The Centre for Public Integrity, p 1; Mr Andrew Chalk, [Transcript of evidence](#), p 2; [Submission 34](#), NSW Council for Civil Liberties, pp 3-4.

<sup>85</sup> [Submission 39](#), Law Society of NSW, p 2.

<sup>86</sup> [Submission 34](#), NSW Council for Civil Liberties, pp 3-4.

<sup>87</sup> Bruce McClintock SC, [Independent review of the Independent Commission Against Corruption Act 1988 – Final Report](#), Report, NSW Government, 31 January 2005, paragraph 6.5.25, p 110.

<sup>88</sup> [Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption](#), paragraph 9.4.6, p 59.

proceedings of Edward Obeid, Moses Obeid and Ian Macdonald, Justice Elizabeth Fullerton delayed the trial by four months due to adverse pre-trial publicity caused by the ICAC inquiry, which had prejudiced their right to a fair trial.<sup>89</sup>

3.19 In December 2019, it was further decided that the joint trial would be convened before a judge without a jury.<sup>90</sup> The decision listed the substantial publicity including that related to the ICAC investigation. The decision mentioned:

A number of the critical facts in issue at their trial have already been publicly determined adversely to them in a previous ICAC inquiry known as Operation Jasper.<sup>91</sup>

3.20 The Committee is concerned that publicity surrounding public inquiries can deny individuals of the right to a fair jury trial and that there is a delay to justice for the people of NSW. However, as with the Obeid and Macdonald cases, the criminal justice system does have tools to address this.

### Information breaches related to public inquiries

3.21 The Committee is also concerned about recent incidents that have occurred during public inquiries where private information has been made available to the public. These incidents were discussed in the Committee's recent review of the ICAC's annual report.<sup>92</sup> They are:

- During Operation Keppel, a transcript of evidence was given in private and instructions were made that it 'shall not be published in any manner. However, it was mistakenly uploaded to the ICAC's website for 31 minutes and was downloaded 205 times during this period.<sup>93</sup>
- Also relating to Operation Keppel, a transcript of a conversation between Mr Maguire and the Japanese Consul was made public.<sup>94</sup> The Inspector described the case as 'giving rise to very serious issues, very serious issues indeed,' involving relations between Australia and a friendly government.<sup>95</sup>
- A technical issue led to an individual's LinkedIn profile being available on the ICAC's website. The LinkedIn profile had been provided to the ICAC as part of a complaint by another person.<sup>96</sup>

<sup>89</sup> Michaela Whitbourn, [Obeid, Macdonald trial delayed due to 'adverse pre-trial publicity'](#), The Sydney Morning Herald, 23 September 2019, viewed on 4 Oct 2021.

<sup>90</sup> [R v Macdonald; R v Edward Obeid; R v Moses Obeid](#) (No 9) [2019] NSWSC 1785.

<sup>91</sup> [R v Macdonald; R v Edward Obeid; R v Moses Obeid](#)

<sup>92</sup> Committee on the Independent Commission Against Corruption, [Review of the 2019-2020 annual reports of the ICAC and the Inspector of the ICAC](#), Report 3/57, Parliament of New South Wales, August 2021.

<sup>93</sup> Office of the Inspector of the Independent Commission Against Corruption, [Report pursuant to sections 57B\(5\) and 77A of the Independent Commission Against Corruption Act 1988 determining a complaint by Mr Arthur Moses SC on behalf of the Hon Gladys Berejiklian MP against the Commission](#), Special Report 2021/02, November 2020, p 5.

<sup>94</sup> Mr Bruce McClintock, Inspector, Office of the Inspector of the ICAC, [Transcript of evidence](#), 14 May 2021, p 20.

<sup>95</sup> Inspector, [Transcript of evidence](#), 14 May 2021, p 20 & p 23.

<sup>96</sup> [Review of the 2019-2020 annual reports of the ICAC and the Inspector of the ICAC](#), p 11.

### Consideration of the impact on private hearings

- 3.22 The Committee notes that increasing the use of private hearings in ICAC proceedings may impact negatively on the transparency of the ICAC process and public perceptions of government accountability. As described by Mr Chalk, from the Law Society of NSW:

I have ... seen [other] jurisdiction[s] ... where most of the work is done in private and people are forever wondering what exactly is going on there. What is happening? That public dimension is critical.<sup>97</sup>

- 3.23 Similarly, Dr Arnold, University of Canberra, added his concerns that private hearings will create public fear about the ICAC:

With a strong body...a body that is not a court, secrecy will foster fears that we have this very powerful body possibly going on a crusade, possibly misbehaving.<sup>98</sup>

- 3.24 Mr Lloyd Babb, NSW Director of Public Prosecutions, explained:

The ICAC could do part of their job. Part of their job is to investigate corrupt conduct... That could be done if they conducted the hearings in private. The other part of their job is to publicly expose and prevent future corrupt conduct... that part of their role would be hampered if the hearings were conducted in private. I think at least some people would be deterred from corrupt behaviour, knowing that they risk public exposure.<sup>99</sup>

- 3.25 The Committee notes that the use of private hearings are outlined in the ICAC Act and is pleased that the ICAC uses its discretion in conducting such hearings. Given the continuing public discussion around the use of both private and public hearings, the Committee is of the view that it should, subsequent to this report, conduct a review of the threshold for determining whether to hold public hearings in both legislation and practice by the ICAC compared to like bodies in other jurisdictions.

## Improve safeguards against media exposure and social media

### Recommendation 4

**That any review of the ICAC Act consider whether there should be provisions to cover breaches of the ICAC's media policy.**

- 3.26 The Committee calls for more stringent safeguards against media exposure to be reflected in the ICAC Act. Mr Eamonn Moran PSM QC, Inspector, Victorian Inspectorate, explained that allegations of corruption can attract substantial media attention. Such information can rapidly reach a wide audience and, thanks

<sup>97</sup> Mr Andrew Chalk, [Transcript of evidence](#), p 8.

<sup>98</sup> Dr Bruce Baer Arnold, Assistant Professor, Canberra Law School, University of Canberra, [Transcript of evidence](#), 18 September 2020, p 21.

<sup>99</sup> Mr Lloyd Babb, NSW Director of Public Prosecutions, [Transcript of evidence](#), 18 September 2020, p 13.

to digital media, remain publicly accessible forever, even if the findings are later discredited.<sup>100</sup>

- 3.27 As discussed earlier, several stakeholders highlighted the negative reputational impact resulting from media exposure.<sup>101</sup> Mr Greg Wyllie stated that as soon as the ICAC served his family with subpoenas and issued a press statement about their public hearings, the media were outside their homes. He described to the Committee that:

When one of my younger sons left for work at 7am the following morning, he ran back to tell us that there were photographers coming out of black vans and journalists camped along the front fence of our house.<sup>102</sup>

- 3.28 The ICAC has a media policy where it does not comment on any matter that is the subject of ongoing investigation or consideration. The Committee is concerned that there are some instances where information about investigations was allegedly 'leaked' or discussed in the media.<sup>103</sup> Amending the ICAC Act, could provide further safeguards regarding media exposure and the ICAC's investigations.
- 3.29 The Committee also outlined a suggested change regarding a media protocol below in the section, *Implement a publication direction protocol*.

### Increased use of suppression orders

- 3.30 Suppression orders are set out in the ICAC Act and are currently used by the ICAC.<sup>104</sup> Some submissions highlighted the increased use of suppression orders to protect the names and investigation outcomes for some individuals. The Committee notes this should be an area for further consideration by the ICAC.

### Suppress names or use pseudonyms

- 3.31 The Committee considers that the suppression of names during public hearings or when publishing evidence on the ICAC's website could be a useful tool in protecting the reputation of individuals. This could also include protecting the privacy of witnesses or individuals who are not persons of interests in an investigation.
- 3.32 The Law Society of NSW proposed that this remedy may be useful especially when the ICAC has not formed a strong view about an individual's conduct.

<sup>100</sup> [Submission 40](#), Victorian Inspectorate, p 2.

<sup>101</sup> [Submission 2](#), Mr Joseph Scimone, p 1; [Submission 3](#), Mr John Kinghorn, pp 3-4; [Submission 5](#), Mr John Atkinson, p 7 & [Transcript of evidence](#), p 3; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 29](#), Mr Nicholas Di Girolamo, p 21; Mr Nick Di Girolamo, [Transcript of evidence](#), 2 December 2020, p 25.

<sup>102</sup> [Submission 41](#), Mr Greg Wyllie, p 3.

<sup>103</sup> [Submission 2](#), Mr Joseph Scimone, p 1; [Submission 3](#), Mr John Kinghorn, p 2; [Submission 5](#), Mr John Atkinson, p 2; [Submission 7](#), Mr John McGuigan, p 5; [Submission 9](#), Mr Charif Kazal, p 5; [Submission 23](#), Dr Andrew Cornwell, p 7; [Submission 28](#), Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Chris Spence and Name suppressed, p 18; [Submission 29](#), Mr Nicholas Di Girolamo, p 25; [Submission 41](#), Mr Greg Wyllie, p 3; Miranda Devine, [Watchdog gone feral](#), Opinion, The Daily Telegraph, 18 December 2016, viewed 24 November 2021.

<sup>104</sup> [ICAC Act, s 112](#).



However, they noted that there are often extensive private examinations before the decision to hold a public hearing, to address the same issue.<sup>105</sup>

### Suppression of ICAC reports

- 3.33 The suppression of names of individuals and information in reports and transcripts could be effective in minimising reputational damage. It could also minimise reputational impact for those who have not had corrupt conduct findings against them and who have not been named in section 74A(2) statements.<sup>106</sup>
- 3.34 Dr Andrew Cornwell suggested that the suppression of sections of the ICAC final report and inquiry transcripts for individuals who have not been found to be corrupt or to have engaged in other blameworthy conduct would reduce reputational impact without completely changing the functions of the ICAC.<sup>107</sup>

### Implement a publication direction protocol

- 3.35 The Committee considers that a publication direction protocol would be a useful remedy in minimising adverse reputational impact. Such a direction could address issues which were raised during the inquiry such as:
- clarifying the terms of reference in an inquiry;
  - improving safeguards on media reporting; and
  - informing the public of the purposes of a public hearing.
- 3.36 The ICAC could implement a publication direction protocol at the beginning of each inquiry, expanding its requirement in the ICAC Act to announce the general scope and purpose of the inquiry.<sup>108</sup> This protocol could:
- i Outline the terms of reference of an inquiry specifying the nature of corrupt conduct and the offence(s) the ICAC is alleging. Having a terms of reference such as those used by a Royal Commission was a suggested solution.<sup>109</sup>
  - ii Outline the reasons why the ICAC has found it is in the public's interest to conduct a public inquiry, but also emphasise that the reputation of those involved should be respected during the inquiry process.
  - iii Provide guidelines for media reporting emphasising the nature of ICAC proceedings, the scope of a particular investigation and not drawing premature conclusions.

<sup>105</sup> Mr Andrew Chalk, [Transcript of evidence](#), p 3.

<sup>106</sup> [ICAC Act, s 74A\(2\)](#) statements appear in the ICAC's reports and include recommendations that an affected person should be considered for prosecution for a criminal offence, a disciplinary action should be taken against the person or action should be taken against a public official -- such as dismissal.

<sup>107</sup> [Submission 23](#), Dr Andrew Cornwell, p 2.

<sup>108</sup> Under [s 31\(5\)](#) of the [ICAC Act](#), the person presiding must announce the general scope and purpose of the inquiry at a public inquiry.

<sup>109</sup> [Submission 25](#), The Hon. John Nicholson SC, p 20.

- iv Educate the public about the ICAC proceedings which differ from criminal proceedings, and that being called to attend an inquiry does not make that person corrupt.
- 3.37 The Committee considers that implementing a public directions protocol at the beginning of an inquiry would be beneficial for the ICAC to direct its investigations. The Committee also suggests that through the protocol, there would be value in additional educational strategies directed at the media and the public to better understand the allegations, gauge expectations and understand the nature of corrupt conduct and the work of the ICAC.

## Require mandatory findings on the ICAC website

### Recommendation 5

**That the ICAC updates the relevant investigation page on its website following a judicial proceeding.**

#### No corrupt findings made by the ICAC

- 3.38 Some inquiry participants suggested that the ICAC should make a public statement when individuals of interest, after the conclusion of an investigation, did not have corrupt or other adverse findings against them.<sup>110</sup>
- 3.39 The ICAC Chief Commissioner told the Committee that he would be open to considering implementing this suggestion. However, he highlighted that even with no corrupt findings, it could be that an individual may not want their name 'up in lights anymore on the ICAC website.' Therefore, agreement from an individual would need to be sought if this safeguard were to be implemented.<sup>111</sup>

#### Corrupt findings made by the ICAC

- 3.40 The publication of an investigation's information on the ICAC's website was raised as an area of concern for individuals.<sup>112</sup> The ICAC told the Committee that information concerning recommendations made by the ICAC is published on their website under each relevant investigation. The information includes recommendation(s), when briefs of evidence were provided to the relevant authority, and the outcomes of any considerations.<sup>113</sup>
- 3.41 The ICAC further clarified this process, stating that:

Where the DPP decides not to commence criminal proceedings or a person is acquitted or convicted of an offence arising from an ICAC investigation, including as a result of an appeal, that outcome is published on the ICAC website and also published in its annual reports.<sup>114</sup>

<sup>110</sup> [Submission 4](#), Speaker of the Legislative Assembly, p [2](#); [Submission 18](#), Accountability Round Table, p [5](#).

<sup>111</sup> Chief Commissioner, [Transcript of evidence](#), p [10](#).

<sup>112</sup> [Submission 3](#), Mr John Kinghorn, p [3](#); [Submission 9](#), Mr Charif Kazal, p [3](#); [Submission 12](#), Name Suppressed, p [2](#) & p [7](#).

<sup>113</sup> [Submission 6](#), ICAC (NSW), p [15](#).

<sup>114</sup> [Submission 6](#), ICAC (NSW), p [15](#).

- 3.42 However, the Committee heard evidence from Mr John Kinghorn whereby the NSW Supreme Court and NSW Court of Appeal overturned the ICAC's corruption finding and he was awarded costs in both cases. Mr Kinghorn stated that the Supreme Court decision was only reported in one 'small article' in a newspaper and was not reported on the ICAC website, which continued to report his corrupt finding. Mr Kinghorn elaborated that 'very few friends and business associates were aware that my ICAC 'corrupt' finding had been overturned.'<sup>115</sup>
- 3.43 The Committee considers that while the ICAC's practices are sufficient, in providing the outcome of its investigations on its website and annual reports, the ICAC should also update its website with the outcome of all judicial proceedings relevant to an ICAC investigation.

## Resources and funding

### Finding 9

**The Committee is concerned that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years.**

### 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 whether there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.**

- 3.44 Another issue raised in evidence concerns the reputational impact that is exacerbated by lengthy investigations. The Chief Commissioner acknowledged that the ICAC understands that people who are being investigated have a 'Damocles' sword hanging over their head' as they await the outcome of investigations.<sup>116</sup>
- 3.45 He explained that the length of investigations depends on two factors, namely complexity and resources. He said that with more resources, time frames could be reduced, but due to current limitations they could not operate more efficiently than at present.<sup>117</sup>
- 3.46 Ms Patricia McDonald SC, Commissioner, ICAC, added that corruption investigations often involve very complex financial accounting analysis and analytical work. If there were more resources available, such as forensic accountants and analysts, it would speed up the investigation process.<sup>118</sup>

<sup>115</sup> [Submission 3](#), Mr John Kinghorn, p 4.

<sup>116</sup> The Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, [Transcript of evidence](#), 18 September 2020, p 47.

<sup>117</sup> Chief Commissioner, [Transcript of evidence](#), p 47.

<sup>118</sup> Ms Patricia McDonald, Commissioner, Independent Commission Against Corruption, [Transcript of evidence](#), 18 September 2020, p 47.

- 3.47 The NSW Council for Civil Liberties supported an immediate increase to the ICAC budget to restore its effectiveness and capacity. The Council stated that reductions to the ICAC budget over recent years had seriously reduced its capacity and will reduce its effectiveness.<sup>119</sup>
- 3.48 The Committee acknowledges that funding and resources is an ongoing concern for the ICAC, especially with regard to an independent funding model.
- 3.49 Notwithstanding this, the Committee is concerned that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years. For example, the public hearings in *Operation Dasha* commenced in April 2018 and ended in May 2019. The report in that matter by the ICAC was published in March 2021, some twenty months later. The current inquiry by the ICAC into political donations in *Operation Aero* held hearings from August until December 2019. At the time of this report, nearly two years later, no report in *Aero* has yet been produced. The Committee acknowledges the ICAC has vital work to perform and its supportive of that. The Committee also acknowledges that these processes take a significant toll on all those involved and that all who are involved should know the outcome of inquiries in a reasonable timeframe.
- 3.50 The Committee notes that most, if not all, courts and tribunals now have time standards in place for finalising matters. They are generally developed by the relevant head of jurisdiction in consultation with court or tribunal members and are monitored by the head of jurisdiction.
- 3.51 Together with the inquiry proposed in 3.20, the Committee should conduct an inquiry into whether there should be time standards in place for the ICAC, what those should be, who should develop them, whether they should be legislated and whether there should be exceptions to those standards. That inquiry should also examine the practice of like bodies in other jurisdictions.

### Whistle-blower protection

- 3.52 The protection of witnesses and persons assisting the ICAC is set out in the ICAC Act. These include the ICAC making arrangements to protect the safety of these persons (from intimidation, harassment or liability) if they are summoned to attend or appear before a hearing or if they produce a document to the ICAC.<sup>120</sup>
- 3.53 However, as discussed in Chapter 1, the Committee understands that there are concerns about the reputational impact on witnesses and persons assisting the ICAC.<sup>121</sup>
- 3.54 The Committee continues to support the protection of people who make voluntary disclosures to the ICAC from criminal, civil and disciplinary liability for disclosing information. The Committee has previously found that ‘the current

<sup>119</sup> [Submission 34](#), The NSW Council for Civil Liberties, p 4.

<sup>120</sup> [ICAC Act, s 50](#) and [s 109](#) respectively.

<sup>121</sup> [Submission 12](#), Name suppressed, p 1.

protections for people who make disclosures to the ICAC are too narrow and unclear in their application'.<sup>122</sup>

- 3.55 Legislation to overhaul the public interests disclosure regime in NSW can alleviate these impacts on witnesses and ensure that people who make voluntary disclosures are protected. Without these protections, people may be hesitant to make voluntary disclosures of suspected corrupt activity to the ICAC and may face undue impacts. The Committee notes that the *Public Interests Disclosures (PID) Bill 2021* was introduced by the Hon Don Harwin MLC, into the NSW Legislative Council on 14 October 2021. The Committee notes that the PID Bill will pass NSW Parliament by the end of the year.

### Considerations from other jurisdictions

- 3.56 The Committee was interested in understanding how reputational impact is handled by anti-corruption bodies in other jurisdictions. The Committee heard from the Corruption and Crime Commission of Western Australia, Independent Commission Against Corruption South Australia (SA ICAC) and the Victorian Inspectorate, which provides oversight of other Victorian integrity, accountability and investigatory bodies and officers, including the Independent Broad-based Anti-corruption Commission (IBAC).

#### Different models

- 3.57 The Committee heard that there are significant functional and operational differences between anti-corruption bodies.

#### *Independent Commission Against Corruption South Australia*

- 3.58 Of the three jurisdictions who participated in this inquiry, the SA ICAC differs most from the NSW ICAC. Mr Rod Jensen, Director of Legal Services of the SA ICAC, explained that the NSW ICAC and the SA ICAC are distinct anti-corruption bodies, as the NSW ICAC 'is quite a different beast to what we are familiar with'.<sup>123</sup>
- 3.59 Mr Jensen explained that corruption, according to the *Independent Commissioner Against Corruption Act 2012* (SA) (the SA ICAC Act), is an allegation of a criminal offence.<sup>124</sup> This is a key difference from NSW, where the ICAC has a much broader jurisdiction.<sup>125</sup> Mr Jensen explained how the SA ICAC investigates alleged corruption in a similar way to a police investigation:

The [SA] ICAC is there to serve the investigative function...The agency is like the police, a law enforcement agency that investigates the allegation of corruption... At the conclusion of that investigation the Commissioner would make an assessment of

<sup>122</sup> Committee on the Independent Commission Against Corruption, [Protections for people who make voluntary disclosures to the Independent Commission Against Corruption](#), Report 4/56, Parliament of New South Wales, November 2017, p 1.

<sup>123</sup> Mr Rod Jensen, Director, Legal Services, South Australian Independent Commissioner Against Corruption, [Transcript of evidence](#), 18 September 2020, p 31.

<sup>124</sup> Mr Rod Jensen, [Transcript of evidence](#), p 31.

<sup>125</sup> See [ICAC Act, s 7](#) and [s 8](#).

the evidence that has been gathered. It would not be necessary to make a finding of corruption. What the Commissioner would be looking at is whether there is sufficient evidence to warrant the matter being referred to the DPP...

If the matter was referred to the DPP and the DPP then decided... not to prosecute the matter, then the Commissioner would give consideration to whether or not any issues of misconduct or maladministration arose which would be less than the corruption.<sup>126</sup>

- 3.60 The SA ICAC operates differently from the NSW as its functions set out in its Act differ from the NSW ICAC. The Committee notes that the SA ICAC does not have the additional functions that the NSW ICAC does, to expose and prevent corruption as well as educate the NSW community and public sector, in addition to investigating corruption.
- 3.61 Since the commencement of this inquiry, the Committee notes changes to the SA ICAC Act.<sup>127</sup> The key change is that the SA ICAC can only investigate allegations of corruption and not maladministration or misconduct. Other amendments include the establishment of an Inspector to oversight the ICAC, better protections for whistle-blowers, a requirement to advise when investigations have been concluded, and fairer reimbursement of costs and progress payments for victims.<sup>128</sup>

#### *Independent Broad-based Anti-corruption Commission (IBAC)*

- 3.62 The Victorian Inspectorate summarised that the IBAC has less powers than the NSW ICAC. The *Independent Broad-based Anti-corruption Commission Act 2011* (VIC) does not expressly assign IBAC a function to make findings or opinions. Without this power there may be occasions where the extent of IBAC's powers or the content of its procedural fairness obligations is a 'complex interpretive task.'<sup>129</sup>
- 3.63 Unlike the NSW ICAC, the Victorian IBAC must not recommend that a specified person be prosecuted for a criminal or disciplinary offence.<sup>130</sup>

#### *Corruption and Crime Commission Western Australia (CCC)*

- 3.64 Western Australia's CCC functions and operates more closely to the NSW ICAC compared to the South Australian and Victorian anti-corruption bodies.
- 3.65 Similar to the NSW ICAC, the CCC is not a prosecuting agency. The CCC's role is to make assessments, form opinions and can make recommendations relating to

<sup>126</sup> Mr Rod Jensen, [Transcript of evidence](#), p 31.

<sup>127</sup> Parliament of South Australia, [Independent Commissioner Against Corruption \(Investigation Powers\) No 2 Amendment Bill 2020](#), Notice paper, Bill no.1, House Assembly, 6 February 2020, pp 3-4, viewed on 5 October 2021.

<sup>128</sup> [Independent Commissioner Against Corruption \(Investigation Powers\) No 2 Amendment Bill 2020](#), pp 10-11, p 12-14.

<sup>129</sup> [Submission 40](#), Victorian Inspectorate, p 2.

<sup>130</sup> [Submission 40](#), Victorian Inspectorate, p 3.

organised crime, serious misconduct in the public sector and unexplained wealth and criminal benefits.<sup>131</sup>

### Private and/or public hearings

- 3.66 Another key difference of the SA ICAC is that investigations and examinations are undertaken in private, with no facility for public hearings in the SA ICAC Act or associated legislation.<sup>132</sup> The Committee notes that the difference in hearing styles is due to their investigative-only nature, without making findings or exposing corruption.
- 3.67 In the second reading speech for the SA ICAC Act, the Hon. Thomas Richard Kenyon explained the rationale for private hearings. He stated that:
- Investigations into corruption conducted by the ICAC will be conducted in private. This is because persons under investigation by the ICAC have not been charged with any criminal offence. ... To make an investigation undertaken by the ICAC into corruption public, would prematurely and unnecessarily prejudice the reputation of a person or person, who may or may not end up being charged with any offence.<sup>133</sup>
- 3.68 The Committee was interested to hear that during an IBAC public examination, a person can apply to have part of it held in private. However, the IBAC is not obligated to prevent damage being caused to a person's reputation by public examinations. IBAC may consider that the reputational damage that might be caused is a reasonable cost of putting credible evidence to witnesses.<sup>134</sup>
- 3.69 However, the IBAC can choose to take steps to limit the damage caused to a person's reputation by issuing suppression orders or conducting parts of the examination in private.<sup>135</sup> The Committee notes that this is similar to the approach of the NSW ICAC.
- 3.70 A key difference with the IBAC is a requirement to inform the Victorian Inspectorate of its intention to hold a public examination prior to announcing it publicly. A written report of the reasons must be given to the Inspector not less than 10 business days before the public examination is held.
- 3.71 The written report must set out grounds on which the IBAC considers there to be exceptional circumstances, namely: how it is in the public interest; that the public inquiry can be held without causing unreasonable damage to a person's reputation, safety or wellbeing; and that the conduct being investigated constitutes serious or systemic corrupt conduct or police personnel misconduct.<sup>136</sup>

---

<sup>131</sup> [Submission 20](#), Corruption and Crime Commission, p [1](#).

<sup>132</sup> [Submission 26](#), South Australian Independent Commission Against Corruption, p [2](#).

<sup>133</sup> South Australia, Legislative Assembly, [Parliamentary Debates](#), 2 May 2012 (the Hon. T.R. Kenyon, Minister for Employment, Higher Education and Skills, Minister for Science and Information Economy, Minister for Recreation and Sport, Independent Commission Against Corruption Bill, second reading).

<sup>134</sup> [Submission 40](#), Victorian Inspectorate, p [4](#).

<sup>135</sup> [Submission 40](#), Victorian Inspectorate, p [4](#).

<sup>136</sup> [Submission 40](#), Victorian Inspectorate, pp [3-4](#).

- 3.72 The CCC's is similar to the NSW ICAC in that they have the ability to have private or public examinations. However, Ms Endebruck-Brown, Director of Legal Services, CCC told the Committee that most of the CCC's examinations are conducted in private.<sup>137</sup>

### **Naming of individuals**

- 3.73 In Western Australia, the CCC indicated that when they table a report in Parliament, careful thought is given to whether individuals ought to be named. Unless there is public interest in naming a person, they will be either unnamed or anonymised.<sup>138</sup>
- 3.74 The IBAC, in many of its reports, has not named individuals about whom adverse comments or opinions are made.<sup>139</sup>

### **Reporting**

- 3.75 CCC reports use the word 'opinion' rather than 'finding' and the reports often point out that opinions are formed to a civil standard of proof.<sup>140</sup>
- 3.76 The SA ICAC does not provide reports as often as the other anti-corruption bodies. It must not prepare a report of findings or recommendations from a completed investigation, unless all criminal proceedings arising from that investigation are complete, or if satisfied no criminal proceedings will be commenced.<sup>141</sup>

### **Websites**

- 3.77 The Committee was interested to find that the SA ICAC website includes a list of current prosecutions before the court and a list of prosecutions that have concluded. This allows the community to understand and track matters.<sup>142</sup>
- 3.78 The Committee agrees that this is a helpful way of educating and informing the community in reporting the current and final outcomes of the ICAC's investigations that are referred to criminal proceedings.

### **Exoneration protocol**

- 3.79 None of the three jurisdictions uses an exoneration protocol.<sup>143</sup>

---

<sup>137</sup> Ms Wendy Endebruck-Brown, Director, Legal Services, Corruption and Crime Commission, [Transcript of evidence](#), 18 September 2020, p [32](#).

<sup>138</sup> [Submission 20](#), Corruption and Crime Commission, p [2](#).

<sup>139</sup> [Submission 40](#), Victorian Inspectorate, p [7](#).

<sup>140</sup> [Submission 20](#), Corruption and Crime Commission, p [2](#).

<sup>141</sup> [Submission 26](#), ICAC (SA), p [4](#).

<sup>142</sup> [Submission 26](#), ICAC (SA), p [4](#).

<sup>143</sup> [Submission 20](#), Corruption and Crime Commission, p [2](#); [Submission 26](#), ICAC (SA), p [2](#); [Submission 40](#), Victorian Inspectorate, pp [9-10](#).



## Chapter Four – Exoneration Protocol

### History of exoneration protocol and the ICAC

- 4.1 Calls for an exoneration protocol as part of ICAC proceedings have been investigated prior to this inquiry. In the context in which it was first raised:
- An exoneration protocol was considered necessary to accommodate a situation where a person found to have engaged in corrupt conduct was subsequently either not prosecuted or, if prosecuted, acquitted of any criminal offence relevant to the subject of the corrupt conduct finding.<sup>144</sup>
- 4.2 The idea of an exoneration protocol was first introduced by former Inspectors of the ICAC. In 2016, Inspector David Levine AO RFD QC proposed an exoneration protocol in his special report titled *Report to the Premier: the Inspector's review of the ICAC*.<sup>145</sup>
- 4.3 This Committee (56<sup>th</sup> Parliament) considered this report and whether there should be the option for a merits review of ICAC findings.<sup>146</sup> The Committee noted that the exoneration protocol as proposed by Inspector Levine was a form of merits review.
- 4.4 This Committee has previously recommended that there should be no exoneration protocol and no merits review of ICAC findings.<sup>147</sup> Part of the evidence considered was the 2015 Independent Panel Review of the ICAC's Jurisdiction, which dismissed the idea of introducing a merits review of ICAC findings. This was on the basis that the ICAC does not make judicial decisions but reports findings and opinions at the end of an investigation. The Independent Panel's report found that introducing a merits review process would confuse judicial and administrative functions and increase misunderstandings about the ICAC's role.<sup>148</sup>
- 4.5 In June 2017, the Hon. John Nicholson SC, recommended that 'parliamentary consideration be given to whether or not it is in the public interest that access to an exoneration protocol should be introduced into the provisions of the ICAC Act; and if so, in what circumstances and by what means could an "affected" person pursue exoneration'.<sup>149</sup>

---

<sup>144</sup> [Submission 6](#), ICAC (NSW), p 18.

<sup>145</sup> Office of the Inspector of the Independent Commission Against Corruption, [Report to the Premier: The Inspector's Review of the ICAC](#), Report, 12 May 2016, p 4.

<sup>146</sup> Merits review is where an appeal body reconsiders evidence before an original decision-maker to assess whether it was affected by a mistake of fact.

<sup>147</sup> [Consideration of the Inspector's Reports](#), pp 11-13.

<sup>148</sup> [Review of the Jurisdiction of the Independent Commission Against Corruption](#), p x.

<sup>149</sup> Office of the Inspector of the Independent Commission Against Corruption, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), Report, 29 June 2017, p vi.

4.6 The Hon. John Nicholson SC further emphasised the need for an exoneration protocol through his submission in this inquiry. He outlined that:

There is no infallibility in the law courts. Likewise there is no infallibility in investigative commissions including ICAC. Wrong decisions will be made – as has happened in the past. While court decisions are usually subject to review by a higher court, within the ICAC the gateway to remedying a decision lacking merit is akin to passing through the eye of the needle. It is very difficult for an aggrieved individual to obtain an opportunity to rehabilitate a reputation soiled through investigative error and presented to the public as though it had been scrutinized by a court.<sup>150</sup>

4.7 In this inquiry, the Committee heard a range of different proposals for exoneration protocols and considered each one in order to frame its recommendations.

## Current review process

### Judicial review

4.8 In certain circumstances, the ICAC's proceedings may be subject to an appeals process by way of a judicial review.<sup>151</sup> The Committee understands that where a judicial review finds that the ICAC has made a legal or procedural error, that particular finding may be declared void.<sup>152</sup>

4.9 The Supreme Court of NSW has limited jurisdiction to review findings made by the ICAC but may do so on the following grounds:

- there was a material error of law on the face of the record (which include the reasons given for the decision);
- the reasoning is not objectively reasonable and the decision could not 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;
- a finding 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.<sup>153</sup>

4.10 The NSW Bar Association reported that there have been instances where an individual was successful in challenging findings made by the ICAC or potential

---

<sup>150</sup> [Submission 25](#), The Hon. John Nicholson SC, p 4.

<sup>151</sup> Judicial review is the determination by the courts to decide the validity of acts of the legislative and executive branches of government.

<sup>152</sup> [Submission 6](#), ICAC (NSW), p 16.

<sup>153</sup> [Duncan v ICAC](#) [2014] NSWSC 1018 (29 July 2014) [35] referred to in [Consideration of the Inspector's Reports](#), p 13.

findings that might be made by the ICAC, thereby restraining the ICAC from investigating an allegation.<sup>154</sup>

- 4.11 While this option is available to individuals who have ICAC findings made against them, various stakeholders emphasised that this option can be long and costly.<sup>155</sup>

### ***Independent Commission Against Corruption Amendment (Validation) Act 2015***

#### **Recommendation 7**

**That the *Independent Commission Against Corruption Amendment (Validation) Act 2015* be amended to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.**

- 4.12 Some inquiry participants raised concerns about the introduction of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act), as it impacts their ability to seek judicial review of ICAC findings. They also stressed that their reputations continue to be negatively impacted as a result of this legislation.<sup>156</sup> The Committee considers it would be appropriate to amend the Validation Act to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.
- 4.13 The Committee notes that most concerns regarding reputational harm and the ICAC's investigations relate to the period between 14 November 2009 to the 2016 reforms, as outlined in Chapter 1.
- 4.14 The amendment to the ICAC Act was introduced following the decision of the High Court in *ICAC v Cunneen* [2015] HCA 14. The Validation Act does not reverse the High Court decision, but validates action taken by the ICAC before 15 April 2015.<sup>157</sup>
- 4.15 The ICAC's position regarding the Validation Act is set out in its response to the Committee's questions following the public hearing, with reference to the High Court decision in *Cunneen*. In the response, the ICAC explained that they wanted the NSW Government to amend the ICAC Act, with retrospective force. The ICAC's major concern was that the High Court decision in *Cunneen* impacted a number of past investigations and two investigations that were current at the

---

<sup>154</sup> [Submission 38](#), NSW Bar Association, p 8.

<sup>155</sup> [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, pp 4-5; [Submission 38](#), NSW Bar Association, p 9; [Submission 41](#), Mr Greg Wyllie, p 5; Mr Richard Poole, [Transcript of evidence](#), p 15 & p 17; Mr Nicholas Di Girolamo, [Transcript of evidence](#), p 24.

<sup>156</sup> [Submission 5](#), Mr John Atkinson pp 8-9; [Submission 7](#), Mr John McGuigan, p 6; [Submission 9](#), Mr Charif Kazal, p 4; [Submission 14](#), Mr Richard Poole, pp 1-2; [Submission 23](#), Dr Andrew Cornwell, p 8.

<sup>157</sup> [Independent Commission Against Corruption Amendment \(Validation\) Act 2015 No 1](#)

time. A further concern was that the decision in *Cunneen* could restrict the conduct of future investigations.<sup>158</sup>

- 4.16 The Committee notes that some inquiry participants called for the Validation Act to be amended to enable their right to judicial review.<sup>159</sup> For example, the Committee heard from John Atkinson, John McGuigan and Richard Poole about their experience with the ICAC process and how the lack of appeal process has left them in 'no-man's-land'.<sup>160</sup>
- 4.17 The ICAC made corrupt findings against Travers Duncan, John Atkinson, John McGuigan and Richard Poole as part of Operation Jasper. The Committee received evidence that they were in the process of appealing their findings and the ICAC agreed to orders to set aside their corruption findings. Documents given to the Committee establish this clearly, together with the agreement by the three judges of the NSW Court of Appeal who were to hear the matter to make the required declarations. However, the Validation Act was enacted before the matter could be finalised in the NSW Court of Appeal.<sup>161</sup>
- 4.18 While it is out of the jurisdiction of this Committee to investigate individual matters, it is understood that there are potentially 128 persons who may be affected by the Validation Act.<sup>162</sup> However, only a handful of those persons proceeded to court to uphold their rights and it is only this small group about whom the Committee is able to make a firm finding that they have a legitimate grievance which should be remedied.
- 4.19 The existence of this litigation and its settlement by the ICAC was not disclosed to Members of the NSW Parliament when they debated and voted on the *Validation Act*. Had there been a relevant disclosure, this group of persons may well have been excluded from the operation of the *Validation Act* on the basis of the agreed settlement of their case against the ICAC.
- 4.20 Accordingly, as a matter of fairness, the Committee recommends that the necessary legislative changes be made to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.

---

<sup>158</sup> [Answers to Additional questions](#), Independent Commission Against Corruption, p 3.

<sup>159</sup> [Submission 5](#), Mr John Atkinson, pp 6-7; [Submission 7](#), Mr John McGuigan, p 7, [Submission 23](#), Dr Andrew Cornwell, p 8.

<sup>160</sup> Mr John Atkinson, [Transcript of evidence](#), p 2. See also: [Submission 5](#), Mr John Atkinson, pp 3-4; [Submission 7](#), Mr John McGuigan, pp 3-4; [Submission 14](#), Mr Richard Poole, p 2.

<sup>161</sup> [Submission 5](#), Mr John Atkinson, p 5 & p 16; [Submission 7](#), Mr John McGuigan, p 4 & p 10; [Submission 14](#), Mr Richard Poole, p 1 & p 5; [Answers to questions on notice](#), Independent Commission Against Corruption, p 3.

<sup>162</sup> [Answers to Additional questions](#), Independent Commission Against Corruption, p 6.

## The Inspector of the ICAC

### Finding 10

**The Committee supports and commends the Inspector of the ICAC's work in dealing with complaints of misconduct and maladministration by the ICAC and its officers.**

- 4.21 Another avenue for individual complainants is to approach the Inspector. While the Inspector does not have direct power to intervene in the complaint itself, he can carry out investigations into the circumstances surrounding a grievance against the ICAC.
- 4.22 The Inspector's functions include the ability to:
- investigate and assess complaints about the ICAC or its officers;
  - investigate any aspect of the ICAC's operations or any conduct of ICAC officers (except auditing of telephone intercepts which requires Federal Government legislative change to the *Telecommunications (Interception and Access) Act 1979* (Cth));
  - require ICAC officers to produce documents or attend before him to answer questions; and
  - recommend disciplinary action or criminal prosecution against ICAC officers.<sup>163</sup>
- 4.23 The Accountability Round Table emphasised that there are significant opportunities for redress through the Inspector's reports or recommendations. The Round Table noted that the ICAC Act provides that the Inspector may, on their own initiative, deal with complaints of abuse of power, impropriety or misconduct by the ICAC. The Round Table highlighted that the Inspector 'must be furnished with the financial means and practical means' to exercise his or her functions.<sup>164</sup>
- 4.24 The Committee supports the functions of the Inspector and commends his work. Last year, the Inspector audited the ICAC's procedures for dealing with counsel assisting in its investigations, the subject of many complaints in this inquiry's submissions.<sup>165</sup> The Inspector's audit demonstrates the effectiveness of his independent monitoring of compliance with the Act and dealing with complaints of misconduct and maladministration by the ICAC and its officers.<sup>166</sup>

---

<sup>163</sup> [ICAC Act, Part 5A](#).

<sup>164</sup> [ICAC Act, s 57B](#); [Submission 18](#), Accountability Round Table, p 5.

<sup>165</sup> [Submission 3](#), Mr John Kinghorn, p 2; [Submission 5](#), Mr John Atkinson, p 10; [Submission 7](#), Mr John McGuigan, p 6; [Submission 12](#), Name suppressed, p 5; [Submission 23](#), Dr Andrew Cornwell, p 2; [Submission 28](#), Girolamo Lawyers on behalf of Messrs Bart Bassett, Christopher Spence and Name suppressed, pp 2-3; [Submission 29](#), Mr Nick Di Girolamo pp 2-3.

<sup>166</sup> [ICAC Act, Part 5A](#).

## Recommendation 8

### **That the Committee review the Inspector of the ICAC's powers under the ICAC Act.**

- 4.25 While the Committee is satisfied with the Inspector's use of their current powers, it recommends a review of the Inspector's powers under the ICAC Act. The Inspector cannot conduct a merits review of the ICAC's findings but individuals may make a complaint under the functions outlined in paragraph 4.22.
- 4.26 The Committee considers that the statutory provisions regarding the Inspector's functions, as outlined in the ICAC Act, may not be sufficient in providing redress against reputational harm. The Committee heard examples where previous Inspectors have found that the conduct of the ICAC was an abuse of power or maladministration and the only options for redress for the affected individual was the publication of the Inspector's reports on their website.<sup>167</sup>
- 4.27 Mr Atkinson told the Committee that there were 'serious flaws in the complaints process [of the Inspector]'. In particular, he raised concerns about the difficulties in providing sufficient information related to the complaint to the Inspector.<sup>168</sup>

## An exoneration protocol

### **Finding 11**

#### **An exoneration protocol is misconceived and would be fundamentally inoperable.**

## Recommendation 9

### **That the Committee review the existing mechanism of judicial review.**

- 4.28 Some inquiry participants called for an exoneration protocol to be introduced as part of the ICAC's proceedings. This ranged from a simple statement of support, to more extensive suggestions and examples of a proposed protocol.<sup>169</sup>
- 4.29 Dr Bruce Baer Arnold, University of Canberra, and Dr Brendon Murphy, Australian Catholic University, suggested that an exoneration protocol could be useful in instances where ICAC has clearly been mistaken, has wrongly identified an individual, and acknowledges an error resulting in lowering the reputation of the individual. While noting that this would be unlikely due to the evidence-based nature of ICAC investigations, they did note that if it did occur, the ICAC could

---

<sup>167</sup> [Submission 9](#), Mr Charif Kazal, p 4; [Submission 12](#), Name suppressed, p 1.

<sup>168</sup> [Submission 5](#), Mr John Atkinson, p 10.

<sup>169</sup> [Submission 3](#), Mr John Kinghorn, p 5; [Submission 5](#), Mr John Atkinson, p 2; [Submission 7](#), Mr John McGuigan, p 2; [Submission 9](#), Mr Charif Kazal, p 5; [Submission 13](#), Rule of Law Institute of Australia, p 2; [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, p 5; [Submission 21](#), Mr Ivan Petch, p 1; [Submission 25](#), The Hon. John Nicholson SC, p 28; [Submission 28](#), Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Christopher Spence and Name suppressed, p 4; [Submission 29](#), Mr Nicholas Di Girolamo, pp 4-5.

issue a correction statement. Such a statement could be made by the ICAC but in a way that minimises its exposure to liability, for example through defamation.<sup>170</sup>

- 4.30 The Committee notes two proposals, one from the former Inspector, the Hon John Nicolson SC and the other from the Rule of Law Institute, which provided detailed consideration for an exoneration protocol.
- 4.31 The key elements in the Hon. John Nicholson SC's proposal, which expand on his 2017 special report recommendation, was for an exoneration protocol to be available if the ICAC's findings were unwarranted, or if the ICAC's finding were without merit. This could be achieved through changes to the ICAC Act.<sup>171</sup>
- 4.32 The Hon. John Nicholson SC considered that an exoneration protocol is needed because 'the finding of corrupt conduct is too strong and offensive a finding, for offences that merit discipline or some form of termination.' While an ICAC finding does not equate to a criminal finding, the damage to reputation is just as 'devastating'.<sup>172</sup>
- 4.33 Similarly, the Rule of Law's proposal included redress for individuals who have suffered reputational damage as a result of an ICAC investigation, or in the absence of a criminal conviction, or the DPP's advice determining insufficient evidence to prosecute. However, this proposal outlined that an exoneration protocol should be available on application to the Supreme Court, but not by way of an appeal or as a form of merits review.<sup>173</sup>
- 4.34 Chris Merritt, Vice President, Rule of Law, emphasised that the proposal for the exoneration protocol was intended to address the erosion of the presumption of innocence arising from the current procedures of the ICAC.<sup>174</sup>

#### **Reasons against the exoneration protocol**

- 4.35 Many submissions to the inquiry did not support the creation of an exoneration protocol. While some supported the current safeguards and remedies as being adequate, others were directly opposed to such a remedy.<sup>175</sup>
- 4.36 As previously indicated, there remain concerns about the reputational impact on a person where the ICAC has made findings of corrupt conduct but subsequent criminal proceedings have found the person not guilty. Some stakeholders have argued that an exoneration protocol would be used in this instance.

---

<sup>170</sup> [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, p [5](#).

<sup>171</sup> [Submission 25](#), The Hon. John Nicholson SC, pp [29-31](#).

<sup>172</sup> The Hon. John Nicholson SC, [Transcript of evidence](#), p [16](#).

<sup>173</sup> [Submission 13](#), Rule of Law Institute of Australia, pp [12-13](#).

<sup>174</sup> [Submission 13](#), Rule of Law Institute of Australia, pp [12-13](#).

<sup>175</sup> [Submission 6](#), ICAC (NSW), p [18](#); [Submission 8](#), Office of the Inspector of the Independent Commission Against Corruption, p [1](#); [Submission 11](#), Professor Nicholas Cowdery, p [2](#); [Submission 18](#), Accountability Round Table, p [7](#); [Submission 19](#), ODPP (NSW), p [1](#); [Submission 27](#), The Centre for Public Integrity, p [1](#); [Submission 34](#), NSW Council for Civil Liberties, p [7](#); Mr Andrew Chalk, [Transcript of evidence](#), p [2](#).

- 4.37 It is important to note that a person acquitted by a court of a criminal offence is not necessarily exonerated from a previous ICAC finding.<sup>176</sup> The ICAC has a very different role from the DPP and the Courts, and a like-for-like comparison is not directly applicable.
- 4.38 Many stakeholders outlined the key differences in an ICAC proceeding which differs greatly from the courts. These include:
- the ICAC applies different rules of evidence in its proceedings, so that the ICAC can obtain its evidence through compulsory examination which is necessarily not available in criminal proceedings. Witnesses can be compelled to give evidence against their interests and do not have the usual common law right to silence;
  - the standard of proof is based on a balance of probabilities, compared to a criminal proceeding where the standard of proof is based on a standard beyond reasonable doubt;
  - the definition of corruption does not apply to any particular cohort or individual crime.<sup>177</sup> It extends to a much wider spectrum of blameworthy behaviours which would reasonably be seen as misconduct justifying removal from office or other disciplinary measures.<sup>178</sup>
- 4.39 During the public hearing, the ICAC Inspector, Mr Bruce McClintock SC, reiterated the role of the ICAC 'is not to secure convictions ... But, rather, ICAC's role is to expose and prevent corruption on the part of public officials.'<sup>179</sup>
- 4.40 Many inquiry participants gave evidence that applying the criminal standard in ICAC proceedings would change the purpose of the ICAC. Mr Andrew Chalk, Law Society of NSW, stressed that imposing the criminal standard to ICAC proceedings would undermine the rationale for its establishment. He added that 'it would effectively destroy the value of the ICAC'.<sup>180</sup>
- 4.41 The Committee understands that the powers of the ICAC may impact on the rights of an individual differently from criminal proceedings. However, the Chief Commissioner explained that the ICAC's powers go to its purpose, which is to expose corruption and not necessarily to convict an individual. During the public hearing he explained that:

The [ICAC] uses its powers to extract information, overriding the citizen's right to silence—as the Act permits—and even overriding the privilege against self-incrimination, a very drastic derogation of citizens' common-law rights. But that has

---

<sup>176</sup> [Consideration of the Inspector's Reports](#), p 11; [Submission 8](#), Office of the Inspector of the Independent Commission Against Corruption, p 2.

<sup>177</sup> [Submission 38](#), The Bar Association, p 10; Mr Andrew Chalk, [Transcript of evidence](#), pp 5-6; Mr Lloyd Babb, [Transcript of evidence](#), p 10.

<sup>178</sup> See [ICAC Act, s 7](#) and [s 8](#).

<sup>179</sup> Inspector, [Transcript of evidence](#), 18 September 2020, p 48.

<sup>180</sup> Mr Andrew Chalk, [Transcript of evidence](#), p 5; Mr Lloyd Babb, [Transcript of evidence](#), p 10; Dr Bruce Baer Arnold, [Transcript of evidence](#), p 19; The Hon. David Harper AM, Accountability Round Table, [Transcript of evidence](#), p 37; Chief Commissioner, [Transcript of evidence](#), p 41; Inspector, [Transcript of evidence](#), 18 September 2020, p 48.



been balanced by the provisions of [the ICAC] Act ... which state that the evidence they give under objection in the [ICAC] cannot be used against them in a criminal trial ... The Parliament established the [ICAC] for that very purpose, knowing how difficult it is to prove, to uncover and expose corruption.<sup>181</sup>

- 4.42 The Chief Commissioner added that 'If somebody says, "I knew what I was doing was wrong" in a compulsory examination under objection, the Crown court cannot ...use that admission in a criminal trial.'<sup>182</sup>
- 4.43 Other submissions emphasised that the elements of the definition of corrupt conduct in the Act do not presume that all matters of corruption constitute criminal offences. Moreover, findings of corrupt conduct do not necessarily lead to prosecutions, not only because there may not be enough admissible evidence, but because the offence may be out of time.<sup>183</sup>
- 4.44 The Committee found this view to be widespread among experts and supports that a corrupt finding by the ICAC stands separate from any subsequent criminal finding made. The Committee agrees that a 'not guilty' finding by the criminal court or lack of evidence for prosecution by the DPP does not mean the ICAC's corrupt finding was erroneous.

*The reason there is no merits review*

- 4.45 Another factor to consider in a discussion of an exoneration protocol is that there is no right of appeal, nor any procedure for review of the merits of an ICAC finding, commonly referred to as 'merits review'.
- 4.46 In arguing against a merits review process, the Inspector reiterated his views that were previously expressed in the 2015 Independent Panel Review of the Jurisdiction of the ICAC. The Inspector emphasised that creating a merits review available for ICAC reports would require substantial changes to the Supreme Court's jurisdiction under the *Supreme Court Act 1970*. This would in turn, have consequences for other administrative bodies, or the creation of a new form of internal or external review. He adds that creating a merit review process would create confusion of judicial and administrative functions.<sup>184</sup>
- 4.47 The Committee acknowledges the Inspector's comments that if a merits review is considered, changes to the ICAC Act and other relevant legislation will be needed.
- 4.48 The Committee notes that a merits review process could provide redress for an individual following an ICAC investigation to regain their reputation and integrity or uphold an ICAC finding. However, the Committee agrees with the reasons of the Inspector and considers that a merits review process should not be examined as part of a review of the ICAC Act.

---

<sup>181</sup> Chief Commissioner, [Transcript of evidence](#), p 40.

<sup>182</sup> Chief Commissioner, [Transcript of evidence](#), p 40.

<sup>183</sup> [Submission 18](#), Accountability Round Table, p 5; [Submission 6](#), ICAC (NSW), p 21 & p 22; [Submission 17](#), Dr Bruce Baer Arnold & Dr Brendon Murphy, p 5; [Submission 19](#), ODPP (NSW), p 2; Mr Andrew Chalk, [Transcript of evidence](#), p 4.

<sup>184</sup> [Submission 8](#), Office of the Inspector of the ICAC, p 3.

- 4.49 However, the Committee is open to a consideration of whether the existing mechanism of judicial review could be codified in legislation, to make its existence clearer and better understood to the wider public. The Committee will determine the scope of this judicial review including but not limited to examining a merits review process, where the jurisdiction for conducting such reviews might be placed, the potential for codifying judicial review processes when the terms of reference for the judicial review are finalised.

## Alternatives to an Exoneration Protocol

- 4.50 A suggested alternative to an exoneration protocol is to allow for 'provisional' findings. In the Hon. John Nicholson SC's submission, he stressed Justice Priestly's findings when describing the ICAC Act:

The [ICAC] Act gave no power to the [ICAC] to change or even pronounce upon the rights of any citizen in any legal sense.... The example demonstrates that in one very real sense 'findings' by the [ICAC] of corrupt conduct should be regarded as conditional or provisional only. Yet it seems inevitable that such findings may gain general currency as final.<sup>185</sup>

- 4.51 In his view, the ICAC's findings should be conditional or provisional as this would lessen the reputational impact on individuals who are adversely named in an ICAC investigation. This would clarify that an ICAC finding is 'temporary or transitory' before an individual faces prosecution following a conviction for a specified offence. However, as many persons found by ICAC to be corrupt or to have engaged in other conduct warranting adverse findings are not charged with any criminal offence, this proposal would have limited value and the Committee does not support it.

- 4.52 Another alternative suggestion to an exoneration protocol was made by the Accountability Round Table.<sup>186</sup> While the Round Table stressed that the need for avoiding wrongful reputational damage, options for redress does not necessarily mean that an integrity commission, such as the ICAC, came to the wrong conclusion when conducting their investigations as set out in the Act. They emphasised that:

Redress is not warranted when, judged against those standards, a finding of corruption is soundly based. And, because there is no necessary incompatibility between a proper ICAC finding of corruption and a jury verdict of not guilty, this proposition remains true even were that finding to be followed by an unsuccessful criminal prosecution.

- 4.53 The Committee notes the Accountability Round Table's alternative solutions:
- i) Amending the ICAC Act to make provision for an acquitted accused to apply to the trial judge for a review of the relevant ICAC finding; and/or

---

<sup>185</sup> [Greiner v Independent Commission Against Corruption](#) 28 NSWLR 125, pp 180-181 cited in [Submission 25](#), The Hon. John Nicholson SC, p 28.

<sup>186</sup> [Submission 18](#), Accountability Round Table, pp 5-6.

- ii) Enlarging the grounds of review to give a right to a person named as corrupt to seek, from the trial judge following a verdict of “not guilty”, or through the Supreme Court as a ‘pre-trial’, review before any relevant criminal trial.
- 4.54 The Accountability Round Table suggests that having the same trial judge to determine the review would mean that they are more familiar with the evidence and understand the difference between the role of the ICAC and the function of the courts.<sup>187</sup>
- 4.55 They also emphasise that the grounds for review should be widened, unlike a judicial review. They add that allowing for giving a right of review for persons named corrupt would 'provide additional assurance that the ICAC 'will do its utmost to reach the correct conclusion in the first place'.<sup>188</sup>
- 4.56 For the reasons we have already set out above, that the outcome of a criminal proceeding is not a like-for-like comparison with an ICAC finding, the Committee also does not support this proposal.

---

<sup>187</sup> [Submission 18](#), Accountability Round Table, p [5](#).

<sup>188</sup> [Submission 18](#), Accountability Round Table, p [6](#).

## Appendix One – Terms of reference

That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:

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

## Appendix Two – Conduct of inquiry

In November 2019, the Committee tabled a report, *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC*.

On 8 May 2020 the Committee resolved to inquire into and report on the reputational impact on an individual being adversely named in the ICAC's investigations. The terms of reference for the inquiry are at [Appendix One](#).

The Committee published a [discussion paper](#) on its website to provide some background to the Committee's inquiry to assist individuals and organisations with preparing their submissions.

### **Call for submissions**

The Committee issued a media release on 8 May 2020 and wrote to key stakeholders inviting them to make a submission to the inquiry.

Submissions closed on 31 July 2020. A total of 41 submissions were received from anti-corruption bodies and inspectors of anti-corruption bodies from NSW and other jurisdictions, investigative bodies, academics, legal experts and individuals who may have suffered reputational impact.

A list of submissions is at [Appendix Three](#). Submission are available on the Committee [webpage](#).

The Committee held three public hearing in September and December 2020, and February 2021 at Parliament. Representatives of Government agencies, investigative and anti-corruption bodies, academics and legal experts appeared in person and via videoconference, and people who experienced reputational impact appeared in public and in camera.

A list of witnesses is at [Appendix Four](#). Transcripts of evidence taken at the hearings are available on the Committee's [webpage](#).

## Appendix Three – Submissions

1	Confidential
1a	Confidential
2	Mr Joseph Scimone
3	Mr John Kinghorn
4	Speaker of the NSW Legislative Assembly
5	Mr John Atkinson
6	NSW Independent Commission Against Corruption
7	Mr John McGuigan
8	Office of the Inspector of the Independent Commission Against Corruption
9	Mr Charif Kazal
10	Confidential
10a	Confidential
11	Mr Nick Cowdery
12	Name suppressed
13	Rule of Law Institute of Australia
14	Mr Richard Poole
15	Name suppressed
16	Name suppressed
17	Dr Bruce Baer Arnold
18	Accountability Round Table
19	Office of the Director of Public Prosecution (NSW)
20	Corruption and Crime Commission
21	Mr Ivan Petch
22	Confidential
23	Dr Andrew Cornwell
24	Confidential
25	The Hon. John Nicholson SC
26	SA Independent Commission Against Corruption
27	The Centre for Public Integrity
28	Di Girolamo Lawyers on behalf of Messrs Bart Bassett, Christopher Spence and Name suppressed
29	Di Girolamo Lawyers

30	NuCoal Resources Ltd
31	Confidential
32	Confidential
33	Mr Vic Tagg
34	NSW Council for Civil Liberties
35	Mr Alan Jones
36	Confidential
37	Confidential
38	NSW Bar Association
39	The Law Society of New South Wales
40	Victorian Inspectorate
41	Mr Greg Wyllie

## Appendix Four – Witnesses

Friday, 18 September 2020, Macquarie Room Parliament House, Sydney

<b>Witness and Position</b>	<b>Organisation</b>
Mr Andrew Chalk Chair of the Public Law Committee	Law Society of NSW
Ms Donna Ward Member of the Association's Inquests and Inquiries Committee	NSW Bar Association
Mr Lloyd Babb SC NSW Director of Public Prosecutions	Office of the Director of Public Prosecutions NSW
Dr Bruce Baer Arnold	Canberra Law School, University of Canberra
Mr Chris Merritt Vice President	Rule of Law Institute of Australia
Ms Sally Layson General Manager of Australia's Magna Carta Institute: Rule of Law Education	
Ms Wendy Endebruck-Brown Director Legal Services	Corruption and Crime Commission of Western Australia
The Hon David Harper AM	Accountability Round Table
The Hon Peter Hall QC Chief Commissioner	NSW Independent Commission Against Corruption
Ms Patricia McDonald SC Commissioner	
Mr Stephen Rushton SC Commissioner	
Mr Roy Waldon Solicitor to the Commission and Executive Director, Legal Division	
Mr Bruce McClintock SC Inspector of the Independent Commission Against Corruption	Office of the Inspector of the Independent Commission Against Corruption NSW



Wednesday, 2 December 2020, Jubilee Room Parliament House, Sydney

<b>Witness</b>
Mr John Atkinson
Mr John McGuigan
Mr Richard Poole
Mr Nicholas Di Girolamo

Thursday, 25 February 2021, Preston-Stanley Room, Parliament House, Sydney

<b>Witness</b>
Mr Greg Wyllie

## Appendix Five – Extracts from minutes

### **MINUTES OF MEETING 2**

11.34 am, Thursday 22 August 2019

Room 814-815

#### **Members present**

Mrs Tanya Davies MP (Chair), Mr Justin Clancy, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon Rod Roberts, Mr Dugald Saunders, The Hon Adam Searle

#### **Apologies**

Mr Mark Coure, The Hon Taylor Martin, Mrs Wendy Tuckerman

#### **Officers in attendance**

Clara Hawker, David Hale, Abegail Turingan, Ze Nan Ma

#### **1. Confirmation of minutes**

Resolved, on the motion of Mr Hoenig, seconded by Ms Mihailuk:  
That the minutes of meeting 1 held on 20 June 2019 be confirmed.

**2. \*\*\***

**3. \*\*\***

**4. \*\*\***

#### **5. Issues arising from previous Committee reports**

**5.1 \*\*\***

##### **5.2 Exoneration protocol**

The Chair updated the Committee on this matter and will update the Committee again at future meetings.

**\*\*\***

**5.3 \*\*\***

6. \*\*\*

7. \*\*\*

**8. Next meeting**

The Chair closed the meeting at 11.44 am. The next deliberative meeting will be the public hearing with the Inspector of the ICAC, to be held at 9.30 am on Friday 18 October 2019 in the McKell Room.

**MINUTES OF MEETING 3**

9.15 am Friday 18 October 2019

Macquarie Room, Parliament House

**Members present**

Mrs Tanya Davies (Chair), The Hon Taylor Martin (Deputy Chair), Mr Justin Clancy (by telephone), Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon Rod Roberts, Mr Dugald Saunders, The Hon Adam Searle, Mrs Wendy Tuckerman

**Officers present**

Ms Helen Minnican, Ms Clara Hawker, Mr David Hale, Mr Jessica Falvey, Ms Abegail Turingan, Mr Ze Nan Ma

The Chair opened the meeting at 9.15 am.

**1. Apologies**

Mr Mark Couré

**2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded Mr Roberts:

That the minutes of Meeting 2 held on Thursday 22 August 2019 be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

6. \*\*\*

7. \*\*\*

8. \*\*\*

9. \*\*\*

**10. Next Meeting**

The Committee adjourned at 10.46 am until 2.15 pm on Monday 21 October 2019 in the Preston Stanley Room, Parliament House, to be followed at 2.30 pm by the public hearing to review the 2017-18 annual report of the ICAC.

**MINUTES OF MEETING 4**

Monday 21 October 2019

Preston Stanley Room, Parliament House

**Members present**

Mrs Tanya Davies (Chair), The Hon Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Jamie Parker, Mr Dugald Saunders, The Hon Adam Searle, Mrs Wendy Tuckerman

**Officers present**

Ms Helen Minnican, Ms Clara Hawker, Mr David Hale, Ms Abegail Turingan, Mr Ze Nan Ma

The Chair opened the meeting at 2.16 pm.

**1. Apologies**

Mr Ron Hoenig, Ms Tania Mihailuk, The Hon Rod Roberts

**2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded Mr Saunders:

That the minutes of Meeting 3 held on Friday 18 October 2019 be confirmed.

3. \*\*\*

**4. Correspondence**

The Chair tabled a letter from the Presiding Officers dated 21 October 2019 seeking the Committee's comments on the issue of an exoneration protocol. The Chair invited members to provide comments in writing or at the next meeting of the Committee.

The correspondence was noted.

5. \*\*\*

6. \*\*\*

7. \*\*\*

**8. Next meeting**

The Committee adjourned at 4.30 pm until a date to be determined.

**MINUTES OF MEETING 5**

Tuesday 19 November 2019

Room 1254

**Members present**

Mrs Tanya Davies (Chair), The Hon Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, Mr Rod Roberts, Mr Dugald Saunders, Mrs Wendy Tuckerman.

**Officers present**

Ms Clara Hawker, Mr David Hale, Ms Abegail Turingan, Mr Ze Nan Ma, Ms Mohini Mehta.

The Chair opened the meeting at 1.32pm.

**1. Apologies**

Mr Mark Coure, The Hon Adam Searle.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Martin, seconded by Mrs Tuckerman:

That the minutes of meeting 4 held on Monday, 21 October 2019 be confirmed.

**3. Matters arising**

**3.1 Exoneration Protocol**

Resolved, on the motion of Ms Mihailuk, seconded by Mr Roberts:

That the Committee resolves in principle to inquire into an exoneration protocol, and that the secretariat prepares draft terms of reference and an inquiry plan to be circulated to the Committee for review out-of-session.

**3.2 \*\*\***

**3.3 \*\*\***

**3.4 \*\*\***

4. \*\*\*

5. \*\*\*

6. \*\*\*

**7. Next meeting**

The Committee adjourned at 2:13 pm until a date to be determined.

**MINUTES OF MEETING 6**

Friday 8 May 2020

1.34 pm

Room 814/815 and Webex

**Members present**

Mrs Tanya Davies (Chair) (via videoconference), The Hon Taylor Martin (Deputy Chair) (via videoconference), Mr Justin Clancy (via videoconference), Mr Ron Hoenig (via videoconference), Ms Tania Mihailuk (via videoconference), Mr Jamie Parker, Mr Rod Roberts, Mr Dugald Saunders (via videoconference), Mrs Wendy Tuckerman (via videoconference), Mr Mark Coure (via videoconference).

**Officers present**

Clara Hawker, Jessica Falvey, Madeleine Dowd, Abegail Turingan (via videoconference), Ze Nan Ma.

The Chair opened the meeting at 1.34 pm.

**1. Apologies**

The Hon. Adam Searle

Resolved, on the motion of Mr Coure, seconded by Mr Clancy:

That the apologies be accepted.

**2. Confirmation of minutes**

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Coure:

That the minutes of meeting 5, held on Tuesday 19 November 2019, be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

6. Inquiries

6.1 \*\*\*

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

The Committee discussed the proposed inquiry, and agreed to add the following stakeholders to the draft stakeholder list:

- Academics or legal practitioners with expertise in administrative law
- \*\*\*

Discussion ensued.

Resolved, on the motion of Mr Clancy, seconded by Mr Coure:

- That the Committee on the Independent Commission Against Corruption (ICAC) inquire into and report on the reputational impact on an individual being adversely named in the ICAC's investigations, with particular reference to:
  - whether the existing safeguards and remedies, and how they are being used, are adequate, and
  - whether additional safeguards and remedies are needed, and
  - whether an exoneration protocol should be developed to deal with reputational impact, and
  - relevant practices in other jurisdictions, and
  - any other related matters.
- That the Committee advertises the inquiry on the Committee's website and on the Parliament's social media accounts.
- That the Committee publishes the discussion paper and authorises the secretariat to make appropriate final editing and stylistic changes to the discussion paper, as required.
- That the Chair issues a media release announcing the inquiry.
- That the Committee calls for submissions to be received by close of business on Friday 31 July 2020 and invites stakeholders on the stakeholder list, \*\*\* to make a submission.
- That the Chair instructs the secretariat to seek the contact details of former Inspectors Levine and Nicholson, or pass on the invitation to make a submission, from relevant contacts including the current Inspector, relevant government departments and the Chief Judge of the District Court.
- That the Committee holds a public hearing or hearings on a date or dates to be determined, to hear evidence from selected witnesses.
- That the Chair responds to the letter from the Presiding Officers of 21 October 2019 to advise the Presiding Officers of the Committee's new inquiry.

7. \*\*\*

8. \*\*\*

**9. Next meeting**

The Committee adjourned at 2.14 pm until 9.30 am on Friday 15 May 2020 for the public hearing for the review of the 2018-2019 annual reports of the ICAC and the Inspector of the ICAC.

**MINUTES OF MEETING NO 8**

Wednesday 5 August 2020

1.31 pm

Room 814/815

**Members present**

Mrs Tanya Davies (Chair), The Hon. Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle, Mrs Wendy Tuckerman.

**Officers present**

Clara Hawker, Jessica Falvey, Madeleine Dowd, Abegail Turingan (via videoconference), Ze Nan Ma.

The Chair opened the meeting at 1.31 pm

**10. Apologies**

There were no apologies.

**11. Confirmation of minutes**

Resolved, on the motion of Mr Saunders, seconded by Mr Coure:

That the minutes of meeting no 7, held on Friday 15 May 2020, be confirmed.

**12. Outgoing Correspondence**

Resolved, on the motion of Ms Mihailuk, seconded by Mrs Tuckerman:

That the following outgoing correspondence since the last meeting be noted:

**12.1** Chair to the Presiding Officers of the NSW Parliament dated 15 May 2020 in response to a letter regarding an exoneration protocol.

**12.2** \*\*\*



**12.3** Chair to Mr Charif Kazal dated 18 May 2020 inviting Mr Kazal to make a submission to the ICAC Committee's inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations.

**12.4** \*\*\*

**13. Incoming correspondence**

Resolved, on the motion of Mr Coure, seconded by Mr Clancy:

That the following incoming correspondence since the last meeting be noted:

***Single items of correspondence***

**13.1** Mr Charif Kazal dated 11 May 2020 regarding an exoneration protocol.

**14.** \*\*\*

**15.** \*\*\*

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

**16.1 Submissions**

The Chair highlighted the submissions received so far for the inquiry.

Resolved, on the motion of Mr Parker, seconded by Ms Mihailuk:

That the Committee defers consideration of the submissions to the inquiry until a future Committee meeting in approximately two weeks.

Resolved on the motion of Mr Parker, seconded by Mr Saunders:

That the Committee accepts late submissions from the Public Law Committee of the Law Society of NSW, the NSW Bar Association, the Victorian Inspectorate, \*\*\*, \*\*\*, \*\*\*, \*\*\* and supplementary submissions from \*\*\* and \*\*\* and any other stakeholders identified by the Chair that would benefit the Committee's inquiry.

**16.2 Public hearings**

Resolved, on the motion of Mr Coure, seconded by Ms Mihailuk:

That the Committee holds public hearings for the inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations on Friday 18 September 2020 and on any other suitable dates to be confirmed by the Chair.

The Committee agreed that proposed witnesses would be discussed at the next Committee meeting.

**16.3 Administrative law briefing**

The Chair updated the Committee about the proposed administrative law briefing.

Discussion ensued.

17. \*\*\*

**18. Next meeting**

The Committee adjourned at 2.11 pm until a date to be determined.

**MINUTES OF MEETING NO 9**

Wednesday 19 August 2020

12.33 pm

Room 814/815 and via videoconference

**Members present**

Mrs Tanya Davies (Chair) (via videoconference), The Hon. Taylor Martin (Deputy Chair) (via videoconference), Mr Mark Coure, Mr Ron Hoenig (via videoconference), Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, The Hon. Adam Searle, Mrs Wendy Tuckerman (via videoconference).

**Officers present**

Leslie Gonye, Clara Hawker (via videoconference), Jessica Falvey, Madeleine Dowd, Abegail Turingan (via videoconference), Ze Nan Ma (via videoconference).

The Chair opened the meeting at 12.33 pm.

**1. Apologies**

Mr Justin Clancy, Mr Dugald Saunders.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded by Mr Hoenig:

That the minutes of meeting no 8, held on Wednesday 5 August 2020, be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

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

**6.1 Submissions**

The Committee considered submissions received for the inquiry, as previously circulated.

Discussion ensued.

Resolved, on the motion of Mr Searle, seconded by Ms Mihailuk, that:

The Committee publish the following submissions in full:

- Submission 2 – Mr Joseph Scimone
- Submission 4 – Speaker of the NSW Legislative Assembly
- Submission 6 – NSW Independent Commission Against Corruption
- Submission 8 – Office of the Inspector of the Independent Commission Against Corruption
- Submission 13 – Rule of Law Institute Australia
- Submission 17 – Dr Bruce Arnold and Dr Brendon Murphy
- Submission 18 – Accountability Round Table
- Submission 19 – Office of the Director of Public Prosecutions
- Submission 20 – Western Australian Crime and Corruption Commission
- Submission 21 – Mr Ivan Petch
- Submission 25 – Mr John Nicholson
- Submission 26 – South Australian Independent Commission Against Corruption
- Submission 27 – Centre for Public Integrity
- Submission 29 – Di Girolamo Lawyers
- Submission 30 – Nucoal Resources Limited
- Submission 34 – NSW Council for Civil Liberties
- Submission 35 – Mr Alan Jones
- Submission 38 – NSW Bar Association

Resolved, on the motion of Mr Coure, seconded by Mr Parker, that:

The Committee publish the following submission without attachments:

- Submission 11 – Mr Nick Cowdery AO QC

Resolved, on the motion of Coure, seconded by Mr Parker, that:

The Committee publish the following submissions without any attachments at this stage and write to the ICAC about whether they would object to correspondence from the Crown Solicitor's Office and the Court being published by the Committee:

- Submission 5 – Mr John Atkinson
- Submission 7 – Mr John McGuigan
- Submission 14 – Mr Richard Poole

Resolved, on the motion of Mr Searle, seconded by Mr Parker, that:

The Committee write to the authors of the following submissions to ask if they would like to withdraw their confidential submission or re-submit it with information that they would be willing to have published:

- Submission 3 – Mr John Kinghorn
- Submission 12 – \*\*\*
- Submission 15 – \*\*\*
- Submission 16 – \*\*\*
- Submission 22 – \*\*\*
- Submission 23 – Dr Andrew Cornwell

- Submission 28 – Messrs Bart Bassett, Christopher Spence and \*\*\*
- Submission 32 – \*\*\*

Resolved, on the motion of Mr Coure, seconded by Mrs Tuckerman, that:

The Committee write to the authors of the following submissions asking them to simplify their submissions so the Committee could consider making them public:

- Submission 9 – Mr Charif Kazal
- Submission 33 – Mr Vic Tagg

Resolved, on the motion of Mr Coure, seconded by Ms Tuckerman, that:

The Committee write to the author of the following submission asking him to simplify his submission \*\*\*

- Submissions 10 and 10a – \*\*\*

Resolved, on the motion of Ms Mihailuk, seconded by Mr Coure, that:

The Committee write to \*\*\*'s solicitor, when considering the following submissions \*\*\*

- Submission 24 – \*\*\*
- Submission 31 – \*\*\*

Resolved, on the motion of Ms Mihailuk, seconded by Mr Parker, that:

The Committee keep the following submissions confidential:

- Submission 1 – \*\*\*
- Submission 1a – \*\*\*
- Submission 36 – \*\*\*
- Submission 37 – \*\*\*

Resolved, on the motion of Mr Searle, seconded by Mr Coure, that:

The Committee not accept the following submission as it is outside the terms of reference for the inquiry:

\*\*\*

## 6.2 Public hearings

Resolved, on the motion of Ms Mihailuk, seconded by Mr Coure, that:

The Committee invites the following witnesses to appear at a public hearing for the inquiry and that any additional witnesses will be circulated to the Committee for consideration out of session:

- Independent Commission Against Corruption NSW
- Inspector of the Independent Commission Against Corruption NSW
- Corruption and Crime Commission WA
- South Australian Independent Commissioner Against Corruption
- Director of Public Prosecutions NSW
- Law Society of NSW (Public Law and Government Committee)
- NSW Bar Association
- Dr Bruce Arnold and Dr Brendon Murphy

- Former Acting Inspector John Nicholson
- Rule of Law Institute Australia
- Accountability Round Table.

### **6.3 Administrative law briefing**

The Chair provided the Committee with an update regarding the administrative law briefing.

### **7. Next meeting**

The Committee adjourned at 1.52 pm until a date to be determined.

## **MINUTES OF MEETING NO. 10**

Friday 18 September 2020

10.35 am

Macquarie Room and via teleconference

### **Members present**

Mrs Tanya Davies (Chair), The Hon Taylor Martin (Deputy Chair), Mr Justin Clancy (via teleconference), Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon Rod Roberts, Mr Dugald Saunders, The Hon Adam Searle, Mrs Wendy Tuckerman.

### **Officers present**

Clara Hawker, Jessica Falvey, Madeleine Dowd, Frances Arguelles, Abegail Turingan, Ze Nan Ma.

The Chair opened the meeting at 10.35 am.

### **1. Apologies**

Mr Coure was an apology.

### **2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded by Mr Saunders:

That the minutes of meeting no. 9, held on Wednesday 19 August 2020, be confirmed.

### **3. Outgoing Correspondence**

Resolved, on the motion of Mr Parker, seconded by Mr Saunders:

That the Committee note the following outgoing correspondence since the last meeting:

- \*\*\*
- Chair to \*\*\* dated 26 August 2020 advising them that their submission is outside the terms of reference of the Committee's inquiry and has not been accepted by the Committee, but has been noted by the Committee as correspondence.

#### 4. Incoming Correspondence

Resolved, on the motion of Mr Parker, seconded by Mr Roberts:

That the Committee notes the incoming correspondence since the last meeting and sends the draft responses to the authors:

- \*\*\*
- \*\*\* to the Chair dated 22 August 2020 relating to issues raised in a submission \*\*\* to the ICAC Committee as part of the inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations.
- \*\*\*

The Committee noted the following late item of correspondence:

- Mr John Atkinson to the Chair dated 17 September 2020 about future public hearings for individuals affected by ICAC investigations.

Resolved, on the motion of Mr Parker, seconded by Mr Roberts:

That the Chair reply to Mr Atkinson on behalf of the Committee advising him that the Committee is planning to hear from a selection of affected individuals as part of the inquiry but no date has been set yet and the secretariat can update him when information is available.

#### 5. \*\*\*

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

##### 6.1 Submissions

Resolved, on the motion of Mr Martin, seconded by Mr Saunders:

That submissions 39 (The Law Society of NSW) and 40 (The Victorian Inspectorate) be received by the Committee and published in full.

##### 6.2 Standard resolutions for public hearing

Resolved, on the motion of Mr Searle, seconded by Mr Martin:

- That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 18 September 2020, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.
- That witnesses be requested to return answers to questions taken on notice and supplementary questions within 2 weeks of the date on which the questions are forwarded to the witnesses.

#### 7. General business

Mr Searle indicated that he would like to raise the following confidential documents attached to Mr Richard Poole's submission (no 14) with the ICAC witnesses:

- Correspondence from the Crown Solicitor's Office dated 23 April 2015
- Correspondence from the Court of Appeal dated 6 May 2015.

Discussion ensued.

The Committee agreed to Mr Searle raising these attachments to Mr Poole's submission with the ICAC witnesses.

## **8. Public hearing**

The Chair declared the public hearing open at 10.45 am and the witnesses and public were admitted.

Mr Clancy joined the hearing at 10.45 am.

The following witnesses were called:

- Mr Andrew Chalk, Chair of the Public Law Committee, Law Society of NSW, sworn and examined
- Ms Donna Ward, Member of the Association's Inquests and Inquiries Committee, NSW Bar Association, affirmed and examined.

Evidence concluded and the witnesses withdrew.

The following witness representing the Office of the Director of Public Prosecutions NSW was called:

- Mr Lloyd Babb SC, NSW Director of Public Prosecutions, sworn and examined.

Evidence concluded and the witness withdrew.

The following witness was called:

- Mr John Nicholson SC, former Acting Inspector of the Independent Commission Against Corruption, sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Saunders left the hearing at 12.34 pm.

The following witness representing the Canberra Law School, University of Canberra and who appeared via teleconference was called:

- Assistant Professor Bruce Baer Arnold, affirmed and examined.

Evidence concluded and the witnesses withdrew.

The following witnesses representing the Rule of Law Institute of Australia were called:

- Mr Chris Merritt, Vice President of Rule of Law Institute of Australia, sworn and examined
- Ms Sally Layson, General Manager of Australia's Magna Carta Institute: Rule of Law Education, sworn and examined.

Evidence concluded and the witnesses withdrew.

The following witnesses were called and appeared via teleconference:

- Ms Wendy Endebrock-Brown, Director, Legal Services, Corruption and Crime Commission of Western Australia, affirmed and examined
- Mr Rod Jensen, Director, Legal Services, South Australian Independent Commissioner Against Corruption, affirmed and examined.

Evidence concluded and the witnesses withdrew.

The following witness representing the Accountability Round Table was called and appeared via teleconference:

- Mr David Harper, sworn and examined.

Mr Hoenig left the hearing at 3.15 pm.

The following witnesses representing the NSW Independent Commission Against Corruption were called:

- The Hon Peter Hall QC, Chief Commissioner, sworn and examined
- Ms Patricia McDonald SC, Commissioner, sworn and examined
- Mr Stephen Rushton SC, Commissioner, sworn and examined
- Mr Roy Waldon, Executive Director, Legal Division and Solicitor to the Commission, affirmed and examined.

Evidence concluded and the witnesses withdrew.

The following witness representing the Office of the Inspector of the Independent Commission Against Corruption was called:

- Mr Bruce McClintock SC, Inspector of the Independent Commission Against Corruption, affirmed and examined.

Evidence concluded and the witness withdrew.

The Chair closed the public hearing at 5.25 pm and the public withdrew.

#### **9. Post-hearing deliberative meeting**

The post-hearing deliberative meeting commenced at 5.25 pm.

Resolved, on the motion of Mr Parker, seconded by Mr Searle:

That the corrected transcript of public evidence given today be authorised for publication and uploaded on the Committee's website.

#### **10. Next meeting**

The Committee adjourned at 5.28 pm until a date to be determined.

### **MINUTES OF MEETING NO 11**

Wednesday 21 October 2020

1.33 pm

Macquarie Room



### **Members present**

Mrs Tanya Davies (Chair), The Hon. Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle, Mrs Wendy Tuckerman.

### **Officers present**

Clara Hawker, Jessica Falvey, Frances Arguelles, Abegail Turingan (via teleconference), Ze Nan Ma.

The Chair opened the meeting at 1.33 pm.

### **11. Apologies**

There were no apologies.

### **12. Minutes**

#### **12.1 Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded by Ms Mihailuk:

That the minutes of meeting no 10, held on Friday 18 September 2020, be confirmed.

#### **12.2 Attachment A – Mr Parker's correspondence referenced in Submission 12**

Mr Parker referred to his letter to the former Chair of the Committee on the Independent Commission Against Corruption, dated 16 January 2018, that was referenced in Submission 12.

Discussion ensued.

The Committee noted this letter, and \*\*\*.

Mr Hoenig joined the meeting at 1.40 pm.

### **13. Outgoing Correspondence**

The Committee noted the following correspondence:

**13.1 \*\*\***

**13.2 \*\*\***

**13.3 \*\*\***

**13.4 \*\*\***

**13.5 \*\*\***

**13.6\*\*\***

**13.7\*\*\***

**13.8\*\*\***

**13.9\*\*\***

**13.10** Chair to Mr John Atkinson dated 24 September 2020 responding to his correspondence about individuals involved in the ICAC's investigations appearing as witnesses at a public hearing

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

##### **14.1 Reconsidering submissions**

The Committee considered the submissions it had not yet categorised.

Discussion ensued.

Resolved, on the motion of Mr Martin, seconded by Mr Saunders:

- That the annexures to submissions 5, 7 and 14 be published in part.
- That submissions 9 and 33 be published in part.
- That revised submission 23 be published in part.
- That revised submissions 12, 15 and 16 be published in part with the names of the authors suppressed.
- That revised submission 28 be published in part with one of the author's names suppressed.
- That submissions 10, 10a, 22, 24, 31 and 32 remain confidential.

Resolved, on the motion of Mr Clancy, seconded by Ms Mihailuk:

That revised submission 3 be published in part, redacting references to \*\*\*'s name.

#### **15. Public hearing and witnesses**

The Committee considered witnesses to invite to the next hearing and options for taking evidence.

Discussion ensued.

Resolved, on the motion of Mr Searle, seconded by Ms Mihailuk:

That the secretariat contact the following individuals, involved in ICAC investigations who made a submission to the inquiry, to find out whether they would be interested in giving evidence at a hearing and doing so in public:

\*\*\*

- Mr John Kinghorn

- Mr John Atkinson
- Mr John McGuigan
- Mr Charif Kazal
- \*\*\*
- \*\*\*
- Mr Richard Poole
- Mr Ivan Petch
- \*\*\*
- \*\*\*
- \*\*\*
- \*\*\*
- \*\*\*
- Mr Nick Di Girolamo
- \*\*\*
- \*\*\*

The Committee discussed canvassing a new hearing date and holding another meeting in a couple of weeks to consider witnesses to invite to the hearing.

#### **16. Possible mental health support for witnesses attending the hearing**

The Committee deferred consideration of mental health support for witnesses until a future Committee meeting.

##### **16.1 \*\*\***

##### **16.2 Response to question taken on notice from the NSW DPP**

The Committee considered the response from the NSW DPP, Mr Lloyd Babb SC, to the Committee's question taken on notice.

Resolved, on the motion of Mr Parker, seconded by Mr Searle:

That the Committee authorises publication of the response from Mr Lloyd Babb SC, NSW DPP, to a question taken on notice at the hearing and that the response be published on the Committee's website.

##### **16.3 Request from Rule of Law Institute to make a supplementary submission**

The Committee considered a request from the Rule of Law Institute to make a supplementary submission.

Discussion ensued.

Resolved, on the motion of Mr Martin, seconded by Ms Mihailuk:

That the Committee declines the request from the Rule of Law institute to make a supplementary submission to the Committee's inquiry as the Committee does not want to receive any more submissions.

17. \*\*\*

**18. Next meeting**

The Committee adjourned at 2.15 pm until a date to be determined.

**MINUTES OF MEETING NO 12**

Wednesday 4 November 2020

11.00 am to 12:15 pm

Room 1254 and Webex

**Members present**

Mrs Tanya Davies (Chair) (via video conference), The Hon. Taylor Martin (Deputy Chair) (via video conference), Mr Justin Clancy (via video conference), Mr Ron Hoenig (via video conference), Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders (via video conference), The Hon. Adam Searle, Mrs Wendy Tuckerman (via video conference).

**Officers present**

Helen Minnican, Clara Hawker, Jessica Falvey, Frances Arguelles, Abegail Turingan, Ze Nan Ma.

The Chair opened the meeting at 11.00 am.

**19. Apologies**

Mr Mark Couré

**20. Confirmation of minutes**

Resolved, on the motion of Mr Martin, seconded by Mr Clancy:

That the minutes of meeting no 11, held on Wednesday 21 October 2020, be confirmed.

21. \*\*\*

22. \*\*\*

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

**23.1 Response to supplementary questions from the ICAC**

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That the Committee authorises publication of the response from the ICAC to supplementary questions following the hearing, with contact details of the author and recipients in the letter from the Crown Solicitor's Office dated 23 April 2015 redacted, and that the response be published on the Committee's website.

### **23.2 Public hearing and witnesses**

The Chair invited the Clerk of the Legislative Assembly to speak to the Committee about procedural matters and statutory obligations in relation to hearing from witnesses. The Clerk advised the Committee that she is obtaining legal advice in relation to matters relevant to the Committee's hearing.

The Committee considered issues of whether to take evidence in public or in camera.

Discussion ensued.

The Committee decided to take evidence in public but to give witnesses the option of declining to appear before the Committee if they were not comfortable doing so in public.

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That \*\*\* would not be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Ms Mihaulik:

That Mr Kinghorn would not be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Mr Clancy:

That Mr Atkinson would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That Mr McGuigan would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That Mr Kazal would not be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Parker, seconded by Mr Searle:

That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Parker, seconded by Mr Searle:

That Mr Poole would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Mr Roberts:

That Mr Petch would not be invited to give evidence at the public hearing.

The Committee decided that \*\*\* would not be invited to give evidence at the public hearing.

Resolved, on the motion of the Chair, seconded by Mr Searle:

That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of the Chair, seconded by Mr Parker:

That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of the Chair, seconded by Mr Parker:  
That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of the Chair, seconded by Mr Parker:  
That \*\*\* would not be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Parker, seconded by Mr Clancy:  
That Mr Di Girolamo would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Searle, seconded by Mr Clancy:  
That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Parker, seconded by Mr Saunders:  
That \*\*\* would be invited to give evidence at the public hearing.

Resolved, on the motion of Mr Parker, seconded by Ms Mihailuk:  
That the Committee holds a public hearing for the inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations on 2 December 2020.

### **23.3 Possible mental health support for witnesses attending the hearing**

The Committee deferred consideration of mental health support for witnesses until legal advice from the Crown Solicitor's Office is received.

**24. \*\*\***

**25. \*\*\***

**26. \*\*\***

**27. \*\*\***

### **28. Next meeting**

The Committee adjourned at 12.15 pm until a date to be determined.

## **MINUTES OF MEETING NO 13**

Wednesday 18 November 2020

1.30 pm

Macquarie Room

### **Members present**

Mrs Tanya Davies (Chair), The Hon. Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle, Mrs Wendy Tuckerman.

### **Officers present**

Clara Hawker, Jessica Falvey, Frances Arguelles, Abigail Turingan, Ze Nan Ma.

The Chair opened the meeting at 1.31 pm.

#### **1. Apologies**

There were no apologies.

#### **2. Confirmation of minutes**

Resolved, on the motion of Mr Martin, seconded by Mr Clancy:

That the draft minutes of meeting no. 12, held on Wednesday 4 November 2020, be confirmed.

Mr Coure gave notice of his rescission motion in relation to item 5.2 in the minutes of meeting no 12.

#### **3. \*\*\***

#### **4. Incoming correspondence**

The Committee noted the following items of incoming correspondence:

##### **4.1 \*\*\***

##### **4.2 \*\*\***

**4.3 \*\*\*** dated 4 November 2020 requesting to appear before the Committee to present his experience as an individual adversely named in an ICAC investigation.

##### **4.4 \*\*\***

**4.5** Mr Charif Kazal dated 9 November 2020 regarding a supplementary submission in relation to the current inquiry.

Resolved, on the motion of Mr Clancy, seconded by Mr Coure:

- That the Committee sends the proposed responses to \*\*\* and Mr Kazal.
- \*\*\*

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

**5.1 Possible mental health support for witnesses attending the hearing**

Resolved, on the motion of Mr Coure, seconded by Ms Tuckerman, that:

The Chair, on behalf of the Committee, seek the Speaker's approval for the expenditure involved in provided access for witness support from AccessEAP, costed according to the maximum number of individuals appearing before the Committee.

**5.2 Consideration of Clerk's advice in relation to whether to invite \*\*\* to the hearing**

Resolve, on the motion of Mrs Tuckerman, seconded by Mr Saunders that:

The Committee defer consideration of the Clerk's advice in relation to inviting \*\*\* to the hearing until the next meeting.

**6. \*\*\***

**7. \*\*\***

**8. Next meeting**

The Committee adjourned at 2.05 pm until a date to be determined.

**MINUTES OF MEETING NO 14**

Wednesday 2 December 2020

9.30 am

Jubilee Room

**Members present**

Mrs Tanya Davies (Chair), The Hon. Taylor Martin (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Ron Hoenig, Ms Tania Mihailuk, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle, Mrs Wendy Tuckerman.

**Officers present**

Clara Hawker, Jessica Falvey, Frances Arguelles, Abegail Turingan, Ze Nan Ma.

The Chair opened the meeting at 9.30 am.

**1. Apologies**

There were no apologies.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Martin, seconded by Mr Saunders:

That the draft minutes of meeting no. 13, held on Wednesday 18 November 2020, be confirmed.



### 3. Outgoing correspondence

The Committee noted the following items of outgoing correspondence:

#### 3.1 \*\*\*

3.2 Chair to \*\*\* dated 19 November 2020 about \*\*\* request to meet with the Committee in relation to his previous experience as an individual adversely named in an ICAC investigation.

3.3 Chair to Mr Charif Kazal dated 19 November 2020 regarding a supplementary submission to the current inquiry.

### 4. \*\*\*

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

#### 5.1 Consideration of Mr Coure's motion to rescind a Committee resolution

At the Committee meeting on 18 November 2020, Mr Coure gave notice of a motion to rescind a Committee resolution from the meeting of 4 November 2020.

The Committee considered the following written motions from Mr Coure previously circulated on 27 November 2020.

*I move that the following resolutions of the ICAC Committee meeting on November 4 2020, be rescinded:*

*Resolved, on the motion of Mr Searle, seconded by Mr Parker:*

*That \*\*\* would not be invited to give evidence at the public hearing.*

*Resolved, on the motion of Mr Parker, seconded by Mr Searle:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Searle:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Parker:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Parker:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of Mr Searle, seconded by Mr Clancy:*

*That \*\*\* would be invited to give evidence at the public hearing.*

I move that the following resolutions be considered at the meeting on 2 December 2020:

*That \*\*\* would be invited to give evidence in camera.*

*That \*\*\* would be invited to give evidence in camera.*

*That \*\*\* would be invited to give evidence in camera.*

*That \*\*\* would be invited to give evidence in camera.*

*That \*\*\* would be invited to give evidence in camera.*

*That \*\*\* would be invited to give evidence in camera.*

Discussion ensued.

Mr Searle raised a point of order that Mr Coure had not provided seven days' written notice of his motion.

The Chair ruled against Mr Searle's point of order.

Mr Coure moved, and Mr Martin seconded, that the following resolutions of the ICAC Committee meeting on November 4 2020, be rescinded:

*Resolved, on the motion of Mr Searle, seconded by Mr Parker:*

*That \*\*\* would not be invited to give evidence at the public hearing.*

*Resolved, on the motion of Mr Parker, seconded by Mr Searle:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Searle:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Parker:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of the Chair, seconded by Mr Parker:*

*That \*\*\* would be invited to give evidence at the public hearing.*

*Resolved, on the motion of Mr Searle, seconded by Mr Clancy:*

*That \*\*\* would be invited to give evidence at the public hearing.*

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.

Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

Mr Coure moved, and Mr Saunders seconded the following:  
That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Saunders, Mrs Tuckerman.  
Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Roberts, Mr Searle.

Question resolved in the affirmative.

That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.  
Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.  
Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.

Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.

Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

That \*\*\* would be invited to give evidence in camera.

Question put.

The Committee divided.

Ayes: Mrs Davies, Mr Martin, Mr Coure, Mr Clancy, Mr Roberts, Mr Saunders, Mrs Tuckerman.

Noes: Mr Hoenig, Ms Mihailuk, Mr Parker, Mr Searle.

Question resolved in the affirmative.

## **5.2 Update on mental health protocol and expenditure**

The Chair updated the Committee on the mental health protocol and any mental health support expenditure incurred by the Committee.

## **5.3 Standard resolutions for public hearing**

Resolved, on the motion of Ms Mihailuk, seconded by Mr Searle:

- That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 2 December 2020, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.
- That witnesses be requested to return answers to questions taken on notice and supplementary questions within 2 weeks of the date on which the questions are forwarded to the witnesses.

#### **5.4 Consideration of opening statements by witnesses**

The Committee considered the written opening statements provided by witnesses.

Discussion ensued.

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Coure:

That the Committee receive the written opening statements of the witnesses.

#### **6. Public hearing**

The Chair declared the public hearing open at 10:30 am and the witnesses and public were admitted.

Mr John Atkinson was sworn and examined.

Evidence concluded and the witness withdrew.

Mr John McGuigan was affirmed and examined.

Evidence concluded and the witness withdrew.

Mr Richard Poole was sworn and examined.

Evidence concluded and the witness withdrew.

Mr Nicholas Di Girolamo was sworn and examined.

Mr Searle sought to ask the witness questions about the separate submission the witness had prepared on behalf of his clients.

The Committee decided to discuss the issue in a deliberative meeting.

The witness and public withdrew.

The Committee commenced the deliberative meeting.

Discussion ensued.

The public hearing re-commenced and the witness and public were re-admitted.

The Chair advised Mr Di Girolamo that Mr Searle would like to continue his questioning about the submission Mr Di Girolamo made on behalf of his clients.

Mr Di Girolamo's evidence continued.

Evidence concluded and the witness withdrew.

The Chair closed the public hearing at 12.57 pm and the public withdrew.

## **7. Post-hearing deliberative meeting**

### **7.1 Consideration of Clerk's advice in relation to whether to invite \*\*\* to the hearing**

The Committee considered the Clerk's advice in relation to whether to invite \*\*\* to the hearing.

Discussion ensued.

Resolved, on the motion of Mr Searle, seconded by Mr Coure:

That \*\*\* would not be invited to give evidence at the hearing.

### **7.2 Consideration of correspondence from \*\*\***

The Committee considered \*\*\*'s correspondence of 20 November 2020.

Discussion ensued.

Resolved, on the motion of Mr Coure, seconded by Mr Parker

That the Committee maintain the additional redactions made to \*\*\*'s submission when it was made public.

### **7.3 Mr Greg Wyllie's submission**

The Committee considered the technological issue which led to the late receipt of Mr Greg Wyllie's submission.

Discussion ensued.

Resolved, on the motion of Mr Coure, seconded by Mr Parker:

That the Committee accept Mr Wyllie's submission to the inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations.

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That the Committee publish Mr Wyllie's submission in full.

Mr Hoenig suggested inviting Mr Wyllie to give evidence in public.

Discussion ensued.

Resolved, on the motion of Mr Hoenig, seconded by Mr Coure:

That the Committee invite Mr Wyllie to give evidence in public at a hearing.

#### **7.4 \*\*\***

#### **7.5 Matters arising from consideration of Mr Coure's motion**

Ms Mihailuk raised some matters arising from consideration of Mr Coure's motion in relation to procedural fairness to other affected parties.

Discussion ensued.

Resolved, on the motion of Ms Mihailuk, seconded by Mr Searle:

That the in camera transcripts be given to the Independent Commission Against Corruption and Inspector of the ICAC confidentially to respond to adverse or factually incorrect statements that might warrant a response.

Resolved, on the motion of Ms Mihailuk, seconded by Mr Coure:

That any parts of the in camera transcripts which contain adverse statements about individuals be given to those individuals, including legal officers, for a right of reply.

#### **7.6 Publication orders**

The Committee considered whether to publish the transcript of evidence.

Discussion ensued.

Resolved, on the motion of Ms Mihailuk, seconded by Mr Coure:

That the corrected transcript of public evidence given today be authorised for publication and uploaded on the Committee's website with \*\*\*'s name redacted from the transcript.

The Committee decided that Members would be given more time to review the written opening statements of witnesses that had been received by the Committee and that the matter would be put on the agenda for a future meeting to decide whether or not to publish them.

### **8. Next meeting**

The Committee adjourned at 1:24 pm until a date to be determined.

### **MINUTES MEETING NO. 15**

Thursday 25 February 2021

9.30 am

Preston Stanley Room and Webex

**Members present**

Mrs Tanya Davies (Chair), Ms Wendy Tuckerman (Deputy Chair, via Webex), Mr Justin Clancy (via Webex), Mr Mark Coure, Mr Ron Hoenig, The Hon. Trevor Khan, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders (via Webex).

**Officers present**

Jonathan Elliot (from 4.30pm), Clara Hawker, Stephanie Mulvey, Frances Arguelles, Abegail Turingan, Ze Nan Ma, Derya Sekmen (part).

The Chair opened the meeting at 9.30 am.

**1. Apologies**

Ms Tania Mihailuk, and the Hon. Adam Searle MLC until 2.00 pm.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Saunders, seconded by Mr Roberts: That the draft minutes of meeting no. 14, held on Wednesday 2 December 2020, be confirmed.

**3. Change of membership**

The Committee noted the following extracts from the Legislative Council Minutes No. 74 – Tuesday 16 February 2021:

*60 – Ministerial Statement – Parliamentary Secretary*

*Mr Harwin made a ministerial statement relating to the appointment of Mr Martin as Parliamentary Secretary for the Hunter and Cost of Living.*

Pursuant to section 66(1)(b) of the *Independent Commission Against Corruption Act 1988*, Mr Martin ceased to hold office as a member of the Committee upon his appointment as a parliamentary secretary.

The Committee also noted the following extract from Legislative Council Minutes No. 75 – Wednesday 17 February 2021 appointing Mr Khan in place of Mr Martin:

*44 – Committee on the Independent Commission Against Corruption – Membership*

*Mr Tudehope moved, by leave and without notice: That Mr Martin be discharged from the Committee on the Independent Commission Against Corruption and Mr Khan be appointed as a member of the Committee. Question put and passed.*



#### **4. Election of Deputy Chair**

Resolved, on the motion of Mr Coure, seconded by Mr Saunders: That Ms Tuckerman be elected Deputy Chair of the Committee.

#### **5. Hearing – Inquiry into reputational impact on an individual being adversely named in the ICAC's investigations**

##### **5.1 \*\*\*'s attendance**

Committee noted \*\*\*'s confidential email advising that he is not willing to appear at the hearing for mental health reasons.

##### **5.2 Standard resolutions for public hearing**

Resolved, on the motion of Mr Parker, seconded by Mr Clancy:

- That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 25 February 2021, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.
- That witnesses be requested to return answers to questions taken on notice and supplementary questions within 2 weeks of the date on which the questions are forwarded to the witnesses.

##### **5.3 Consideration of opening statements by in camera witnesses**

Resolved, on the motion of Mr Clancy, seconded by Mr Coure: That the Committee receive the written opening statements of \*\*\* and \*\*\*.

##### **5.4 Public hearing**

The Chair declared the public hearing open at 9.45 am.

The witness was admitted.

After welcoming the witness the Chair made a short opening statement.

Mr Greg Wyllie was sworn and examined.

Mr Wyllie made a brief opening statement.

Evidence concluded and the witness withdrew.

The Chair closed the public hearing at 10.30 am.

#### **6. In camera hearing**

The Chair declared the in camera hearing open at 10:45 am and the witness was admitted.

\*\*\* was sworn and examined.

The Chair noted that \*\*\* had already submitted a written opening statement which the Committee had received.

Evidence concluded and the witness withdrew.

\*\*\* was sworn and examined.

The Chair noted that \*\*\* had already submitted a written opening statement which the Committee had received.

Evidence concluded and the witness withdrew.

\*\*\* was sworn and examined.

\*\*\* made a short opening statement.

Evidence concluded and the witness withdrew.

The hearing adjourned at 1.00 pm and resumed at 2.02 pm.

The Hon. Adam Searle MLC joined the hearing at 2.02 pm.

\*\*\* was sworn and examined.

\*\*\* first sought to confirm if his in camera transcript would be published or shared with a third party.

The witness withdrew and the hearing was adjourned while the Committee discussed the issue in private.

The Committee re-commenced the deliberative at 2.03 pm.

Discussion ensued and the Committee noted that pursuant to s 70 of the ICAC Act, where evidence is taken in private at the request of the witness, and if the Committee wanted to publish or disclosure that evidence in whole or in part, the Committee would first require the witness' consent in writing.

The hearing re-commenced at 2.05 pm and the witness was readmitted.

The Chair advised \*\*\* that as the Committee was taking evidence in camera at his request the Committee would first need his consent before publishing or disclosing his evidence.

The Committee then commenced questioning the witness.

Evidence concluded and the witness withdrew.

\*\*\* was sworn and examined.

\*\*\* first sought to confirm if his in camera transcript would be published or shared with a third party.

The Chair referenced her earlier advice to \*\*\* in which she had confirmed that where evidence was taken by the Committee in private at the request of the witness, the Committee could not disclose or publish that evidence in whole or in part without having the consent of the witness in writing.

\*\*\* made a short opening statement. The Committee then commenced questioning the witness.

Evidence concluded and the witness withdrew.

The hearing was adjourned at 3.38 pm and resumed at 3.46 pm.

\*\*\* was sworn and examined.

\*\*\* made a short opening statement.

Evidence concluded and the witness withdrew

The Chair closed the in camera hearing at 4.35 pm.

### **Post-hearing deliberative meeting**

#### **7. Publication orders**

##### **7.1 Public hearing**

Resolved, on the motion of Mr Parker, seconded by Mr Coure: That the corrected transcript of public evidence given today be authorised for publication and uploaded on the Committee's website

##### **7.2 In camera hearing**

The Committee discussed their previous resolutions on 2 December 2020:

- That the in camera transcripts be given to the Independent Commission Against Corruption and Inspector of the ICAC confidentially to respond to adverse or factually incorrect statements that might warrant a response.
- That any parts of the in camera transcripts which contain adverse statements about individuals be given to those individuals, including legal officers, for a right of reply.

The Committee agreed to consider the matter at a later meeting when the transcript of the in camera evidence became available.

8. \*\*\*

**9. Incoming Correspondence**

The Committee noted the following correspondence:

9.1 \*\*\*

9.2 Mr Richard Poole dated 18 December 2020 providing additional evidence of ongoing reputational impacts as a result of being adversely named in an ICAC investigation.

9.3 \*\*\*

9.4 \*\*\*

9.5 \*\*\*

9.6 Confidential email from \*\*\* dated 15 February 2021 advising that he no longer wished to give evidence on 25 February 2021, due to mental health concerns.

\*\*\*

10. \*\*\*

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

**11.1 Answers to questions on notice – public hearing 2 December 2020**

Resolved, on the motion of Mr Parker, seconded by Mr Coure: That the Committee:

- authorises publication of the response from Mr Nick Di Girolamo to questions taken on notice at the hearing, with \*\*\*'s name redacted, and that the response be published in part on the Committee's website.
- accepts the answers to questions taken on notice at the hearing from Mr Atkinson and that the answers be kept confidential.

**11.2 Opening Statements – public hearing 2 December 2020**

Resolved, on the motion of Mr Parker, seconded by Mr Roberts: That the Committee publishes the written opening statements of Mr Nick Di Girolamo, Mr Richard Poole, Mr McGuigan and Mr Atkinson in full on the Committee's website.

12. \*\*\*

13. \*\*\*

14. \*\*\*

**15. Next meeting**

The Committee adjourned at 4:50 pm until a date to be determined.

**MINUTES OF MEETING NO. 16**

Tuesday 20 April 2021 1.00 pm – 2.00 pm

Room 1254 and WebEx

**Members present**

Mrs Tanya Davies (Chair), Ms Wendy Tuckerman (Deputy Chair, via WebEx), Mr Justin Clancy (via WebEx), Mr Ron Hoenig (via WebEx), Mr Mark Coure (via WebEx), Ms Tania Mihailuk (via WebEx), Mr Jamie Parker, the Hon. Adam Searle, the Hon. Rod Roberts.

**Officers present**

Clara Hawker (via Webex), Elaine Schofield, Stephanie Mulvey, Frances Arguelles, Abegail Turingan, Derya Sekmen.

The Chair opened the meeting at 1.03 pm.

**1. Apologies**

The Hon. Trevor Khan and Mr Dugald Saunders.

Mr Ron Hoenig attended the meeting at 1.05 pm.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded by Mr Coure: That the draft minutes of meeting no. 15, held on Thursday 25 February 2021, be confirmed.

3. \*\*\*

4. \*\*\*

5. \*\*\*

6. \*\*\*

7. \*\*\*

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

### **8.1 Update on post-hearing support – Attachment C2**

Resolved, on the motion of Mr Clancy, seconded by Mr Coure:

That the Committee sends the proposed letter to the Speaker providing an update of the total cost of the service and thanking him for his support.

### **8.2 Answers to questions taken on notice – in camera hearing on 25 Feb 2021**

Resolved, on the motion of Mr Parker, seconded by Mrs Tuckerman:

That the Committee accepts the answers to questions taken on notice at the hearing from \*\*\* and \*\*\* and that the answers be kept confidential.

### **8.3 Request from \*\*\* for copy of in camera transcript**

Resolved, on the motion of Mr Searle, seconded by Mr Parker:

That the Committee sends the draft response to \*\*\*.

### **8.4 In camera transcripts**

The Committee discussed the resolutions of 2 December 2020 regarding in camera transcripts.

In relation to the resolution regarding:

- That the in camera transcripts be given to the Independent Commission Against Corruption and Inspector of the ICAC confidentially to respond to adverse or factually incorrect statements that might warrant a response.

Resolved, on the motion of Mr Parker, seconded by Mr Searle:

That the Committee writes to each witness to seek their written consent to send the entire transcript of their in camera evidence to the ICAC and the Inspector.

In relation to the resolution regarding:

- That any parts of the in camera transcripts which contain adverse statements about individuals be given to those individuals, including legal officers, for a right of reply.

Resolved, on the motion of Mr Parker, seconded by Mrs Tuckerman, that:

- the Chair and secretariat identify which parts of the in camera transcripts contain adverse statements about individuals;
- the Committee writes to each witness seeking their written consent to send only those parts to the relevant individuals for a right of reply.

**9. \*\*\***

**10. \*\*\***

**11. \*\*\***

**12. Next meeting**

The Chair updated the Committee about the 3 May meeting for a report recommendation workshop which will focus on the discussion about the approach in the reputational impact inquiry.

The Committee adjourned at 1.48 pm.

**MINUTES OF MEETING NO. 17**

Friday 14 May 2021 12.30pm – 4.30pm

Jubilee Room and WebEx

**Members present**

Mrs Tanya Davies (Chair), Ms Wendy Tuckerman (Deputy Chair, via WebEx, from 1:15 pm), Mr Justin Clancy, Mr Ron Hoenig (via WebEx, from 3.00 pm), the Hon. Trevor Khan (via WebEx), Ms Tania Mihailuk (from 12:50pm to 3pm), Mr Jamie Parker, Mr Dugald Saunders (via WebEx) and the Hon. Adam Searle (until 3.00 pm).

**Officers present**

Clara Hawker, Stephanie Mulvey, Bjarne Nordin, Frances Arguelles, Derya Sekmen, Ilana Chaffey (part).

The Chair opened the meeting at 12.38 pm.

**1. Apologies**

Apologies were received from Mark Coure and the Hon. Rod Roberts.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Parker, seconded by Mr Khan: that the draft minutes of meeting no. 16, held on Tuesday 20 April 2021, be confirmed.

**3. Outgoing Correspondence**

The Committee noted the following items of outgoing correspondence:

**3.1 \*\*\***

**3.2 \*\*\***

**3.3 \*\*\***

**3.4 \*\*\***

3.5 \*\*\*

3.6 Chair to the Speaker dated 21 April 2021 providing him with an update about the Committee's mental health support provided to its witnesses and thanking him for his support.

3.7 \*\*\*

3.8 Chair to \*\*\* dated 21 April 2021 regarding his request for a transcript.

3.9 \*\*\*

4. \*\*\*

5. \*\*\*

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

6.1 \*\*\*

6.2 **Update regarding mental health support to witnesses**

The Chair provided an update about mental health support provided to witnesses.

7. \*\*\*

8. \*\*\*

9. \*\*\*

10. \*\*\*

11. **Next meeting**

The Committee adjourned at 4.10 pm until a date to be determined.

## **MINUTES OF MEETING NO. 18**

Monday 9 August 2021

10.02 am

WebEx

### **Members present**

Mrs Tanya Davies (Chair), Mrs Wendy Tuckerman (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Mr Ron Hoening, The Hon. Trevor Khan Ms Tania Mihailuk (from 10.08am), Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle.



**Officers present**

Clara Hawker, Frances Arguelles, Bjarne Nordin, Amy Pond, Inez Ryan, Abegail Turingan, Derya Sekmen.

The Chair opened the meeting at 10.02 am.

**1. Apologies**

There were no apologies.

**2. Recording of proceedings**

Resolved, on the motion of Mr Searle, seconded by Mrs Tuckerman:

That the committee record the meeting for the purposes of the secretariat preparing the minutes and that the recording be deleted when the minutes are settled.

**3. Confirmation of minutes**

Resolved, on the motion of Mr Hoenig, seconded by Mr Saunders:

That the minutes of meeting no. 17, Friday 14 May 2021, be confirmed.

4. \*\*\*

5. \*\*\*

6. \*\*\*

7. \*\*\*

8. \*\*\*

**9. Reputational impact on an individual being adversely named in the ICAC's investigations**

The Chair provided an update including that the inquiry should be finalised by the end of the year.

10. \*\*\*

**11. Next meeting**

The Committee adjourned at 11.12 am until a date to be determined.

**UNCONFIRMED MINUTES OF MEETING NO. 19**

Monday, 15 November 2021

10:00 am

Room 814/815 and WebEx

**Members present**

Mrs Tanya Davies (Chair), The Hon. Trevor Khan, Mr Jamie Parker, The Hon. Rod Roberts, Mr Dugald Saunders, The Hon. Adam Searle;  
Via WebEx: Mrs Wendy Tuckerman (Deputy Chair), Mr Justin Clancy, Mr Mark Coure, Ms Tania Mihailuk, Mr Ron Hoenig.

**Officers present**

Clara Hawker, Leon Last, Frances Arguelles, Amy Pond, Rima Dabliz, Abegail Turingan.

The Chair opened the meeting at 10:00am.

**1. Apologies**

There were no apologies.

**2. Recording of proceedings**

Resolved, on the motion of Mr Searle, seconded by Mr Saunders:

That the committee record the meeting for the purposes of the Secretariat preparing the minutes and that the recording be deleted once the minutes are settled.

**3. Confirmation of minutes**

Resolved, on the motion of Mr Clancy, seconded by Mrs Tuckerman:

That the minutes of meeting no. 18, held on Monday 9 August 2021, be confirmed.

4. \*\*\*

5. \*\*\*

6. \*\*\*

7. \*\*\*

8. \*\*\*

9. \*\*\*

10. \*\*\*

**11. Reputational impact on an individual being adversely named in the ICAC's investigations**

**11.1 In camera hearing resolutions**

The Chair provided an update.

Discussion ensued.

Resolved, on the motion of Mr Roberts, seconded by Mr Searle:

That the Committee notes that the in camera material from the hearing on 15 February 2021 was not used in the final report and that it was not necessary to provide any material to other parties.

## **11.2 Consideration of report – Inquiry into the Reputational impact on an individual being adversely named in an ICAC investigation**

Mr Hoenig joined the meeting at 10.33 am.

The Chair's draft report for the Inquiry into the Reputational impact on an individual being adversely named in an ICAC investigation, which had been previously circulated, was taken as being read.

Resolved, on the motion of Mr Parker, seconded by Mr Khan:  
That the Committee consider the report chapter by chapter.

### **The Committee considered Chapter One.**

Resolved, on the motion of Mr Searle, that paragraph 1.17 be amended by omitting the sentences 'While some participants told the Committee about the immediate financial effects following an ICAC inquiry, Mr Joseph Scimone explained that since the conclusion of his involvement in an ICAC inquiry in 2008, he has been unable to find full-time employment. He elaborated that: Subsequent to the ICAC Inquiry, I undertook a law degree .... I have degrees in Civil Engineering, Business Management and Law yet I have been unable to find full-time employment since the 2008 Inquiry due to the burden of the ICAC.'

Resolved, on the motion of Mr Searle, that paragraph 1.18 be amended by omitting the words 'bank accounts having been closed'.

Resolved, on the motion of Mr Searle, that the paragraph in the table "Examples of reputational impact" be omitted which reads: 'My extensive business and political network evaporated ... The mental anguish and distress were excruciating ... Observing the impact on my children, family, and friends was torturous.'

Resolved, on the motion of Mr Searle, that paragraph 1.21 be omitted which reads: 'Reputational impact also touches those who are not the subject of an ICAC investigation. The Committee heard evidence about the impact on whistle-blowers and that any mention of their name during an ICAC investigation had affected their privacy and reputation.'

Resolved, on the motion of Mr Searle, that paragraph 1.28 be amended by:

- omitting the words 'are immediately' and inserting instead the following words 'may be placed.'
- omitting the words 'are under a cloud of assumed guilt' and inserting instead the following words 'may be assumed to be guilty'.

Resolved, on the motion of Mr Searle, that paragraph 1.29 be omitted which reads 'Dr Andrew Cornwell also noted that 'the media will clearly always take a keen interest in allegations against a high-profile individual' before a finding has been made. Mr Nick Di Girolamo added that his experience during his ICAC investigation was a 'period of intense media interest ... [where] media reports named individuals ... prior to any formal announcement from the ICAC.'

Resolved, on the motion of Mr Searle, that paragraph 1.30 be amended by omitting the words which read:

- 'The reputational damage is done at the announcement of an inquiry where the presumption of innocence immediately evaporates.'
- 'to ensure that only those who have been proven to have acted corruptly at the conclusion of the investigation are known and identified.'

Resolved, on the motion of the Chair, that paragraph 1.30 be amended by omitting the words 'during the investigation process' and inserting the words 'from the commencement of the investigation process'.

Resolved, on the motion of Mr Searle, that the paragraph 1.31 be amended by:

- Omitting the word 'however'.
- Omitting the sentence which reads 'However, the nature of this exposure has changed and the Committee notes that this may go beyond the initial intent of the ICAC.'

Resolved, on the motion of Mr Searle, that paragraph 1.34 be amended by omitting the word 'with' and inserting instead the word 'to.'

Resolved, on the motion of Mr Searle, that paragraph 1.35 be amended by inserting the sentence at the end of the paragraph which reads: 'Given the time that has passed since then, the Committee urges the NSW Government to respond to the Legislative Council Law and Justice report as a matter of urgency.'

Resolved, on the motion of Mr Searle, that paragraph 1.37 be amended by omitting the sentence: 'Mr Nick Di Girolamo suggested that this would make the ICAC more 'accountable' and 'ensure [the ICAC's] integrity'.

Resolved, on the motion of Mr Searle, that paragraph 1.39 be amended by omitting the sentence which reads: 'However, the Committee continues to be concerned about the impact on individuals who went through the ICAC process before these reforms were implemented and were not afforded the protection included in these reforms. From the evidence received, there are clear issues regarding individuals' experiences before and after the 2016 ICAC Act reforms.'

Resolved, on the motion of Mr Searle, that paragraph 1.41 be amended by omitting the words 'Mr Nick Di Girolamo described the years prior to the reforms as 'tumultuous', while'.

Resolved, on the motion of Mr Searle, that paragraph 1.42 be omitted which reads: 'These allegations include failing to accept exculpatory documents as part of the inquiry; concerns about the behaviour of counsel assisting during investigations; the lack of legal representation and general lack of information from the ICAC about the proceedings of the inquiry.'

Resolved, on the motion of Mr Searle, that paragraph 1.44 be amended to omit the sentence which reads: 'This resulted in increased negative reputational impact, where individuals felt they 'were unnecessarily treated unfairly, improperly, belittled, publicly humiliated, and suffered irreparable reputational damage.'

Resolved, on the motion of Mr Searle, that Recommendation 2 and paragraphs 1.51-1.54 be omitted which read:

- Recommendation 2: That the Government establish a temporary expert panel of lawyers (current or retired with minimum requirement of SC) who are available to be on a rotating appointment to conduct a merits review of the 'legacy issues' from before the 2016 reforms. The Government will provide funding for this merits review.
- The Committee recommends establishing a temporary expert panel of lawyers to address the ongoing reputational impact on individuals who were not provided the benefits of the 2016 reforms. This expert panel of lawyers will be available for a merits review of cases for 12 months following the Government's response to this report. The Government will provide funding for this merits review of legacy ICAC issues.
- This period of time saw individual reputations damaged as well as a negative impact on the ICAC's own reputation where public confidence in its operations diminished.
- The expert panel of lawyers will be independent from the ICAC and available to conduct a merits review of these legacy issues upon receipt of an application from an affected individual or entity. The aim of the panel is to allow a merits review process and would provide a resolution for these legacy issues. If the expert lawyer's findings differ from the original ICAC finding, the ICAC must expunge any reports and findings that were contrary to the merit review, prominently publish an acknowledgement of the ICAC's errors and offer an unqualified apology. If the expert lawyer finds ICAC's original findings should stand, this determination should also be prominently published on the ICAC's website.
- As part of the review process, a statement of the expert lawyer's findings would also need to be published on the ICAC's website to clarify the previous finding. The expert lawyer could also make other directions, such as the payment of compensation, as they deem fair and reasonable. The expert lawyer will apply rules of procedural fairness and exculpatory evidence provisions that are now outlined in the ICAC Act to determine a final outcome.

Resolved, on the motion of Mr Searle, seconded by Mr Roberts:  
That chapter one as amended stand part of the report.

**The Committee considered Chapter Two.**

Resolved, on the motion of Mr Searle, that Finding 7 be amended by:

- Inserting the word 'adverse' following the word 'where.'
- Omitting the word 'substantiated' and inserting the word 'made.'

Resolved, on the motion of Mr Searle, that paragraph 2.22 be amended by:

- Inserting the word 'adverse' following the word 'where.'
- Omitting the word 'substantiated' and inserting the word 'made.'
- Omitting the words 'ensure eliminating' and inserting instead the words 'work harder to eliminate.'

Resolved, on the motion of Mr Searle, that a new paragraph be inserted following paragraph 2.22 to read: 'In addition, the Committee recommends that in each report the ICAC includes a table of persons involved in that inquiry, with the indication that the person was the subject of an adverse finding, a corruption finding or was a witness only. This would go some way to ensuring that those who find themselves involved in an ICAC inquiry but are not the subject of any adverse findings have one way to clearly and easily demonstrate this.'

Resolved, on the motion of Mr Searle, that a new recommendation be inserted before paragraph 2.23 to read: 'The ICAC prepare and publish with each report a table of persons involved in that inquiry, with the indication that the person was the subject of an adverse finding, a corruption finding or was a witness only.'

Resolved, on the motion of Mr Khan, seconded by Mr Parker:  
That chapter two as amended stand part of the report.

**The Committee considered Chapter Three.**

Resolved, on the motion of Mr Searle, that Recommendation 3 be omitted which reads, 'That the ICAC Act be amended to only permit private hearings with public announcements of findings to be made at the conclusion of inquiries.' and a new recommendation be inserted to read: 'The Committee conduct a review of the threshold for determining whether to hold public hearings in both legislation and practice by the ICAC compared to like bodies in other jurisdictions.'

Resolved, on the motion of Mr Searle, that paragraph 3.4 be omitted which reads: 'In practice, however, the moment an individual is named in an ICAC inquiry (regardless of the seriousness of finding) the reputational damage is complete and restoration of reputation is unreachable. There is a need for the ICAC to be bound to conduct their inquiries in

private until all evidence is disclosed, cross-examined and tested and a final determination by ICAC.'

Resolved, on the motion of Mr Searle, that paragraph 3.5 be omitted which reads: 'Many stakeholders supported increased or full use of private hearings. The Committee supports these views and recommends changes to the ICAC Act regarding the use of public hearings.' and insert instead, 'Many stakeholders supported increased use of private hearings. The Committee supports this view and recommends the ICAC make greater use of private hearings.'

Resolved, on the motion of Mr Searle, that paragraph 3.6 be omitted which reads: 'The Committee finds that holding private hearings would allow for procedural fairness without the media sensationalising investigations and damaging reputations. The reputational damage is instant and can be permanent in this digital age, once a person is named in an inquiry and occurs well before the ICAC has submitted their report to Parliament.'

Resolved, on the motion of Mr Searle, that paragraph 3.10 be amended to omit the sentence which reads: 'Similarly, Mr Joseph Scimone argued that the report and findings should only be made public if criminal charges are laid.'

Resolved, on the motion of Mr Searle, that the following paragraph(s) be inserted following paragraph 3.13:

- A number of stakeholders made strong submissions in favour of the ICAC's power to hold public hearings as an important, even an indispensable, aspect of its functions to tackle corruption and other misconduct.
- The NSW Law Society said that it agrees with the views of Transparency International Australia (in submissions made in respect of a national integrity commission) that "public hearings for the purpose of an investigation are, in proper situations, essential to the effective operation of an anti-corruption agency."
- The NSW Council for Civil Liberties stated that the discretionary power to hold public inquiries – conducted under procedural fairness rules and consistent with public interest criteria – to be central to the effectiveness of, and public support for ICAC.
- The best argument in favour of ICAC being able to continue to conduct public hearings is to be found in Bruce McClintock SC's January 2005 report, Independent review of the Independent Commission Against Corruption Act 1988 – Final Report. The Inspector considered the Commission's power to hold public hearings and concluded: public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.
- The Independent Panel of the Hon Murray Gleeson AC and Mr McClintock also commented on public inquiries in their July 2015 report, Independent Panel – Review

of the Jurisdiction of the Independent Commission Against Corruption. The Independent Panel accepted that: public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes.

Resolved, on the motion of Mr Searle, that paragraph 3.17 be amended by:

- omitting the sentence which reads 'Through private inquiries, the ICAC can still perform their detailed investigations and provide a brief to the Department of Public Persecution (DPP) for assessment' and
- inserting instead the sentence 'However, as with the Obeid and Macdonald cases, the criminal justice system does have tools to address this.'

Resolved, on the motion of Mr Searle, that paragraph 3.19 be omitted which reads: 'The Committee considers that conducting all inquiries privately will prevent such incidents from occurring in the future because no information will be made public until an inquiry has been finalised.'

Resolved, on the motion of Mr Searle, that paragraph 3.23 be amended by:

- omitting the sentence which reads 'However, on balance, the Committee considers that holding all hearings in private is a key safeguard against unwarranted reputational impact and recommends this amendment to the ICAC Act. At the conclusion of an inquiry, when corrupt findings have been substantiated, the relevant documents and final report can be made public. The public announcement can be made in the presence of key stakeholders and media.'
- and inserting the sentence which reads 'Given the continuing public discussion around the use of both private and public hearings, the Committee is of the view that it should, subsequent to this report, conduct a review of the threshold for determining whether to hold public hearings in both legislation and practice by the ICAC compared to like bodies in other jurisdictions.'

Resolved, on the motion of Mr Searle, that paragraph 3.25 be amended to omit the sentence which reads 'Mr Nick Di Girolamo told the Committee that the problem with [the] media ... is you are wounded before you get there [the ICAC public hearing].'

Resolved, on the motion of Mr Searle, that paragraph 3.27 be omitted which reads: 'The Committee is particularly interested in Mr Di Girolamo's recommendation which calls for: 'Amending the ICAC Act to require the Inspector to investigate 'media leaks' in the instances when an individual is named in the media prior to formal announcement of an ICAC investigation.'

Resolved, on the motion of Mr Searle, that paragraph 3.34 be amended by inserting the words 'or to have engaged in other blameworthy conduct' following the word 'corrupt.'



Resolved, on the motion of Mr Searle, that paragraph 3.38 be amended by inserting the words 'or other adverse,' following the word 'corrupt.'

Resolved, on the motion of Mr Clancy, that a finding be inserted after the heading 'Resources and funding' to read: 'The Committee is concerned that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years'.

Resolved, on the motion of Mr Searle, that a new recommendation be inserted before paragraph 3.44 to read: 'The Committee conduct an inquiry into 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 whether there should be exceptions to those standards. In conducting this inquiry, the Committee should examine the practice of like bodies in other jurisdictions.'

Resolved, on the motion of Mr Searle, that 3 new paragraphs be inserted following paragraph 3.47 to read:

- Notwithstanding this, the Committee is concerned that the passage of time between any final hearing and the delivery of a report in a matter by the ICAC can take a number of years. For example, the public hearings in Operation Dasha commenced in April 2018 and ended in May 2019. The report in that matter by the ICAC was published in March 2021, some twenty months later. The current inquiry by the ICAC into political donations in Operation Aero held hearings from August until December 2019. At the time of this report, nearly two years later, no report in Aero has yet been produced. The Committee acknowledges the ICAC has vital work to perform and its supportive of that. The Committee also acknowledges that these processes take a significant toll on all those involved and that all who are involved should know the outcome of inquiries in a reasonable timeframe.
- The Committee notes that most, if not all, courts and tribunals now have time standards in place for finalising matters. They are generally developed by the relevant head of jurisdiction in consultation with court or tribunal members and are monitored by the head of jurisdiction.
- Together with the inquiry proposed in 3.21, the Committee should conduct an inquiry into whether there should be time standards in place for the ICAC, what those should be, who should develop them, whether they should be legislated and whether there should be exceptions to those standards. That inquiry should also examine the practice of like bodies in other jurisdictions.

Resolved, on the motion of Mr Searle, that paragraph 3.52 be amended by:

- omitting the words 'The passing of a Public Interest Disclosure Bill' and inserting instead the words 'Legislation to overhaul the public interests disclosure regime in NSW.'
- inserting the words 'into the NSW Legislative Council' following the words 'Hon Don Harwin MLC.'

- Inserting the sentence 'The Committee expects the Public Interest Disclosure Bill 2021 to pass the NSW Parliament this year.' Following the words '14 October 2021.'

Resolved, on the motion of Mr Searle, that paragraph 3.56 be amended by:  
inserting the sentence which reads 'This is a key difference from NSW, where the ICAC has a much broader jurisdiction.' after the first sentence, with the footnote 'See sections 7 and 8 of the ICAC Act 1988 (NSW).'

Omitting the word 'he' and inserting instead the words 'Mr Jensen.'

Resolved, on the motion of Mr Searle, seconded by Mr Roberts:  
That chapter three as amended stand part of the report.

#### **The Committee considered Chapter Four.**

Resolved, on the motion of Mr Searle, that Recommendation 6 be amended to omit 'commence from 14 November 2009' and insert instead the words 'put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.'

Resolved, on the motion of Mr Searle, that paragraph 4.12 be amended by:

- omitting the paragraph which reads: 'Some inquiry participants raised concerns about the introduction of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act), as it impacts their ability to seek a right of appeal. They also stressed that their reputations continue to be negatively impacted as a result of this legislation. The Committee considers that amending the Validation Act to have effect from 14 November 2009 will allow ICAC cases from this time until the 2016 reforms to be afforded the right for a review.'
- and inserting instead the paragraph to read: 'Some inquiry participants raised concerns about the introduction of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act), as it impacts their ability to seek judicial review of ICAC findings. They also stressed that their reputations continue to be negatively impacted as a result of this legislation. The Committee considers it would be appropriate to amend the Validation Act to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.'

Resolved, on the motion of Mr Searle, that paragraph 4.13 be amended by omitting the sentence which reads: 'The selection of this date will enable the legacy issues prior to the 2016 reforms to be afforded the same framework of procedural fairness in addition to the changes to the ICAC Act in 2016.'

Resolved, on the motion of Mr Searle, that paragraph 4.16 be amended by omitting the word 'appeal' and instead insert the words 'judicial review'.

Resolved, on the motion of Mr Searle, that paragraph 4.17 be amended by:

- omitting the paragraph which reads: 'The ICAC made corrupt findings against John Atkinson, John McGuigan and Richard Poole as part of Operation Jasper. The Committee was told that they were in the process of appealing their findings and the ICAC agreed to orders that made their corruption findings a nullity. However, the Validation Act was passed before their matters could be finalised.'
- and inserting the paragraph to read: 'The ICAC made corrupt findings against Travers Duncan, John Atkinson, John McGuigan and Richard Poole as part of Operation Jasper. The Committee received evidence that they were in the process of appealing their findings and the ICAC agreed to orders to set aside their corruption findings. Documents given to the Committee establish this clearly, together with the agreement by the three judges of the NSW Court of Appeal who were to hear the matter to make the required declarations. However, the Validation Act was enacted before the matter could be finalised in the NSW Court of Appeal.'

Resolved, on the motion of Mr Searle, that paragraph 4.18 be amended by inserting the sentence, 'However, only a handful of those persons proceeded to court to uphold their rights and it is only this small group about whom the Committee is able to make a firm finding that they have a legitimate grievance which should be remedied.' at the end of the paragraph.

Resolved, on the motion of Mr Searle, that new paragraphs be inserted after paragraph 4.18 to read:

- The existence of this litigation and its settlement by the ICAC was not disclosed to Members of the NSW Parliament when they debated and voted on the *Validation Act*. Had there been a relevant disclosure, this group of persons may well have been excluded from the operation of the *Validation Act* on the basis of the agreed settlement of their case against the ICAC.
- Accordingly, as a matter of fairness, the Committee recommends that the necessary legislative changes be made to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.

Resolved, on the motion of Mr Searle, that Finding 10 be omitted which reads: An exoneration protocol would be fundamentally inoperable under the current ICAC Act.' and instead insert 'An exoneration protocol is misconceived and would be fundamentally inoperable.'

Resolved, on the motion of Mr Searle, that Recommendation 7 be omitted which reads: 'That a merits review appeals process be considered as part of a review of the ICAC Act.'

Resolved, on the motion of Mr Khan, that a new recommendation and the following paragraph be inserted before paragraph 4.23 to read: That the Committee conduct a review into the existing mechanism of judicial review.

- The Committee will determine the scope of this judicial review including but not limited to examining a merits review process, where the jurisdiction for conducting such reviews might be placed, the potential for codifying judicial review processes when the terms of reference for the judicial review are finalised.

Resolved, on the motion of Mr Khan, that a new recommendation and the following paragraphs be inserted to read: That the Committee review the powers of the Inspector of the ICAC under the ICAC Act.

- While the Committee is satisfied with the Inspector's use of their current powers, it recommends a review of the Inspector's powers under the ICAC Act. The Inspector cannot conduct a merits review of the ICAC's findings but individuals may make a complaint under the functions outlined in paragraph 4.21.
- The Committee considers that the statutory provisions regarding the Inspector's functions, as outlined in the ICAC Act, may not be sufficient in providing redress against reputational harm. The Committee heard examples where previous Inspectors have found that the conduct of the ICAC was an abuse of power or maladministration and the only options for redress for the affected individual was the publication of the Inspector's reports on their website.
- Mr Atkinson told the Committee that there were 'serious flaws in the complaints process [of the Inspector]'. In particular, he raised concerns about the difficulties in providing sufficient information related to the complaint to the Inspector.

Resolved, on the motion of Mr Searle, that paragraph 4.33 be amended by inserting the sentence to read, 'It extends to a much wider spectrum of blameworthy behaviours which would reasonably be seen as misconduct justifying removal from office or other disciplinary measures.' after the words 'individual crime' and a footnote be added to read, 'See sections 7, 8 of the *Independent Commission Against Corruption Act 1988 (NSW)*'.

Resolved, on the motion of Mr Searle, that paragraph 4.43 be amended by:

- omitting the paragraph which reads: 'The Committee notes that a merits review process can provide redress for an individual following an ICAC investigation to regain their reputation and integrity or uphold an ICAC finding. A merits review process could also allow for financial compensation for the affected individual. This will encourage ICAC to ensure its evidence is irrefutable and provide another counterbalance to the broad powers entrusted to the ICAC. The Committee considers that a merits review process should be examined as part of a review of the ICAC Act.'
- and inserting instead a paragraph to read: 'The Committee notes that a merits review process could provide redress for an individual following an ICAC investigation to regain their reputation and integrity or uphold an ICAC finding. However, the

Committee agrees with the reasons of the Inspector and considers that a merits review process should not be examined as part of a review of the ICAC Act.'

Resolved, on the motion of Mr Searle, that a new paragraph be inserted after paragraph 4.43 to read: 'However, the Committee is open to a consideration of whether the existing mechanism of judicial review could be codified in legislation, to make its existence clearer and better understood to the wider public.'

Resolved, on the motion of Mr Searle, that Recommendation 8 be omitted which reads: 'To amend the ICAC Act to provide for "provisional" corrupt findings where corrupt findings are evidenced.'

Resolved, on the motion of Mr Searle, that paragraph 4.45 be amended by inserting the sentence to read, 'However, as many persons found by ICAC to be corrupt or to have engaged in other conduct warranting adverse findings are not charged with any criminal offence, this proposal would have limited value and the Committee does not support it.' after the word 'offence.'

Resolved, on the motion of Mr Searle, that Recommendation 9 be omitted which reads: 'To amend the ICAC Act to make provision for an acquitted accused to apply to the trial judge for a review of the relevant ICAC finding.'

Resolved, on the motion of Mr Searle, that a new paragraph be inserted after paragraph 4.49 to read: 'For the reasons we have already set out above, that the outcome of a criminal proceeding is not a like-for-like comparison with an ICAC finding, the Committee also does not support this proposal.'

Resolved, on the motion of Mr Saunders, seconded by Ms Tuckerman:  
That chapter four as amended stand part of the report.

#### **The Committee considered the Summary.**

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'This inquiry confirmed' is amended by omitting the words, 'reputational impact is not addressed fully by the available remedies and'.

Resolved, on the motion of Mr Searle, that the paragraph in the summary be omitted which reads: 'Prior to these reforms, there were allegations of lack of procedural fairness from ICAC proceedings which resulted in individuals facing unwarranted reputational harm. This period also saw the ICAC's own reputation negatively affected. As a solution, the Committee recommends that the Government establish a temporary expert panel of lawyers to conduct a merits review of these issues prior to the 2016 reforms.'

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'Further, the Committee' be amended by:

- omitting the word 'substantiated' and inserting instead the words 'ultimately made against those persons'.
- Omitting the sentence which reads: The Committee is concerned that while the ICAC's intention is to clarify certain matters by holding public inquiries, the current media environment focuses on public hearings instead of the outcome of an ICAC finding.

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'A concerning aspect' be amended by:

omitting the words 'are immediately' and insert instead the words 'can be placed.'

- Omitting the words from the end of the paragraph which read 'to ensure that only those who have been proven to have acted corruptly at the conclusion of the investigation are identified.'

Resolved, on the motion of Mr Searle, that the paragraph in the summary be omitted which reads: 'To alleviate this, one of the Committee's key recommendations is to amend the ICAC Act to only permit private hearings with public announcements of findings to be made at the conclusion of inquiries. This recommendation protects the reputation of individuals who are under investigation until a finding is made.'

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'The issue of' be amended by:

- omitting the words 'right of appeal' and insert instead 'judicial review'
- omitting the sentences which read, 'This heightens the issues for individuals who were not protected prior to the 2016 reforms. Therefore, the Committee recommends for the Validation Act to be amended to commence from 14 November 2009.'
- and inserting at the end of the paragraph the following sentences 'This was a public policy decision taken by the NSW Parliament in the wake of the Cunneen decision to ensure the ICAC retained the powers and functions deemed necessary for its task. However, there were a small group of persons who had legal rights prior to the enactment of the Validation Act as a result of the Cunneen decision and had gone to court to have findings against them set aside. Their case was settled with the ICAC and orders were to be entered by the NSW Court of Appeal. These legal rights were retrospectively extinguished by the Validation Act. The Parliament was not informed of this matter during the debate and vote on the Validation Act. The Committee is of the view this limited cohort of persons should have those legal rights reinstated by legislation.'

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'Finally, the Committee' be amended by omitting the words 'under the current Act' and inserting instead the words 'and misconceived.'

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'It was argued' be amended by inserting the sentences, 'Many persons found to have been corrupt 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.' at the end of the paragraph.

Resolved, on the motion of Mr Searle, that the paragraph in the summary starting with 'Another factor to' be amended by omitting the sentence which reads: The Committee has recommended that a merits review appeal process is considered as part of a review of the ICAC Act.

Resolved, on the motion of Mr Searle, that the paragraph be omitted which reads: As an alternative to an exoneration protocol, the Committee also makes two recommendations. Firstly, to amend the ICAC Act to provide for "provisional" corrupt findings where corrupt findings are evidenced. Secondly, to make a provision in the ICAC Act for an acquitted accused to apply to the trial judge for a review of the relevant ICAC finding.

The Committee agreed that the Chair, in consultation with the secretariat will add sentences to the summary to reflect the additional recommendations to the report.

Resolved, on the motion of Mr Searle, seconded by Mr Clancy:  
That the Summary as amended stand part of the report and that the Chair is authorised to make additional consequential amendments to the Summary reflecting the amendments.

Resolved, on the motion of Mr Khan, seconded by Ms Tuckerman:

- That the Committee adopts the draft report as amended, and that it be signed by the Chair and presented to the House.
- That the Committee authorises the secretariat to make appropriate final editing and stylistic changes, as required.
- That once tabled, the report be published on the Committee's website.

**12. \*\*\***

**13. Next meeting**

The Committee adjourned at 12.30 pm until a date to be determined.