



Committee on the Independent Commission Against Corruption

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



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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".

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The Committee's inquiry and discussion paper

1.1 On 8 May 2020 the Committee adopted an inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations with the following 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:

- 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.

1.2 The Committee is accepting submissions to the Inquiry until Friday 31 July 2020 via:

- the webpage of the Committee on the Independent Commission Against Corruption at www.parliament.nsw.gov.au, or
- icaccommittee@parliament.nsw.gov.au, or
- Committee on the Independent Commission Against Corruption, Parliament of New South Wales, 6 Macquarie Street, Sydney NSW 2000.

1.3 The Committee usually publishes the submissions it receives on its website and may refer to them in its report and other material. However, if you are concerned about your information being made public, you can ask the Committee to keep all or part of your submission confidential, or just your name confidential. Please make any requests of this kind when you lodge your submission.

1.4 The purpose of this discussion paper is to provide some background to the Committee's inquiry, which may assist individuals and organisations with preparing their submissions.

The Committee's interest in this issue

1.5 In November 2019, the Committee tabled a report in the NSW Parliament, [*Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC*](#).

1.6 In that report, the Committee found that:

- the reputational impact experienced by people named in investigations of the ICAC can be serious, and is not addressed fully by the available remedies, and

- an exoneration protocol is one possible remedy available to address the reputational impact of being named in the investigations of the ICAC.¹

- 1.7 The Committee is aware of examples of individuals concerned about reputational impact from being adversely named in the ICAC's investigations and the lack of suitable safeguards or remedies to address these circumstances.
- 1.8 In the Committee's recent report, the Committee recommended that it reviews the *Independent Commission Against Corruption Act 1988* (ICAC Act) in 2021 to determine whether it continues to be effective and appropriate.² The Committee anticipates that this will be a broad review into the operation of the ICAC and the Inspector of the ICAC and the efficacy of the legislation.
- 1.9 However, the Committee wants to pursue a separate inquiry into the specific issue of reputational impact on individuals being adversely named in the ICAC's investigations.
- 1.10 The Committee acknowledges that the issue of reputational impact and an exoneration protocol have been considered by it and others previously. However, the Committee considers that this is an important issue which calls for further review.

Consideration of an exoneration protocol to address reputational impact

- 1.11 This section will highlight some recent reports and other material that has considered the issue of an exoneration protocol to deal with reputational impact.

Report by the former Inspector of the ICAC, the Hon. David Levine AO RFD QC

- 1.12 On 12 May 2016, the former Inspector of the ICAC, the Hon. David Levine AO RFD QC released, *Report to the Premier: the Inspector's review of the ICAC*.
- 1.13 The former Inspector's report was prompted by the ICAC's investigation in Operation Hale. In December 2015, the Inspector made a special report to Parliament which was critical of the ICAC's conduct in that investigation.³
- 1.14 The Inspector's report to the Premier in 2016 was concerned with the ramifications flowing from Operation Hale in relation to the ICAC Act, the structure, processes and culture of the ICAC and its oversight, including the Inspector.⁴
- 1.15 The Inspector made sixteen recommendations for reform. Recommendation fifteen was that consideration should be given to introducing an exoneration protocol into legislation:

¹ ICAC Committee, [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, pp [16](#) and [17](#).

² ICAC Committee, [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 [1](#).

³ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, p [6](#).

⁴ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, p [6](#).

It should provide that in circumstances where there is an absence of a criminal conviction arising from any prosecution based upon the same or similar or cognate facts as warranted the making by the ICAC of a finding of corrupt conduct, the person against whom the finding was made may make an application to the Supreme Court for an expunging of the records of the ICAC or to have the findings set aside. The ICAC would of necessity be a party to such proceedings.⁵

1.16 The Inspector's report discusses several examples of persons who suggest they suffered reputational damage through the ICAC public inquiry process in circumstances where they were later not found guilty of a criminal offence or no charges were laid against them.⁶ The Inspector described the scenarios he outlines as 'examples of how an ICAC public inquiry can have a significant negative impact on a person's reputation, career and personal/family life.'⁷

1.17 The Inspector also spoke of the longer-term effects on individuals such as those mentioned in his report:

These people have no recourse to repair the impact of the ICAC public inquiry and it is likely that their names will always be associated negatively with an ICAC inquiry. The more so by reason of the perpetual archiving of public and social media.⁸

Report by the ICAC Committee

1.18 In October 2016, the ICAC Committee tabled a report in Parliament, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's reports*.

1.19 The Committee's report arose from the Committee's inquiries into two reports by former Inspector Levine:

- *Report pursuant to section 77A Independent Commission Against Corruption Act 1988 Operation Hale*, which made findings and recommendations about the ICAC's Operation Hale, and
- *Report to the Premier: the Inspector's review of the ICAC*, mentioned in the section above, which reviewed the ICAC more generally.

1.20 The Committee's report made a number of recommendations relating to the ICAC in areas including structure and governance, procedural fairness and the ICAC's dealings with the Director of Public Prosecutions (DPP). The Committee also recommended changes relating to the oversight framework.⁹

1.21 The Committee's report considered whether there should be the option for merits review of ICAC findings. Merits review is where an appeal body reconsiders evidence before an original decision-maker to assess whether it was

⁵ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, pp 4-5.

⁶ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, pp 17-20.

⁷ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, p 19.

⁸ Office of the Inspector of the ICAC, [Report to the Premier: the Inspector's review of the ICAC](#), 12 May 2016, p 20.

⁹ ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), report 2/56, Parliament of New South Wales, October 2016, pp xi-xiv.

affected by a mistake of fact. The Committee noted that the exoneration protocol as proposed by Inspector Levine was a form of merits review.¹⁰

1.22 The Committee recommended that there should be no exoneration protocol and no merits review of ICAC findings:

A majority of stakeholders who made submissions to the inquiry about the proposed exoneration protocol did not support it, and the Committee agrees that such a protocol would not be appropriate. A person who has been acquitted by a court of a criminal offence is not necessarily exonerated from a previous ICAC finding.¹¹

1.23 Some of the evidence highlighted by the Committee in recommending against an exoneration protocol or any other form of merits review included:

- The ICAC has a very different role from the DPP and the courts.
- The ICAC makes findings on a different standard of proof from criminal courts.
- The ICAC's findings are based on evidence that is not admissible in court, such as evidence given under coercion.
- Corrupt conduct, as defined in the ICAC Act, does not correspond with any particular crime.
- Findings of corrupt conduct may not lead to a prosecution because the time limit for commencing a prosecution may have expired.
- An exoneration protocol may lead to considerable expensive litigation and may detract from the ICAC's proper functioning.
- The ICAC publishes information about the prosecution briefs with the DPP, and the outcome of DPP advice and prosecutions. This leads to a public record of instances where people are found not guilty of charges or where the DPP decides there is insufficient evidence to prosecute.
- Other avenues are available to affected persons, such as complaining to the Inspector and judicial review (as distinct from a merits review process).
- In 2015, the Independent Panel review of the ICAC's jurisdiction dismissed the idea of introducing 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. They found that introducing a merits

¹⁰ ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), report 2/56, Parliament of New South Wales, October 2016, p 13; Hon Murray Gleeson AC and Mr Bruce McClintock SC, [Independent Panel – review of the jurisdiction of the ICAC](#), 30 July 2015, p 19.

¹¹ ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), report 2/56, Parliament of New South Wales, October 2016, p 11.

review process would confuse judicial and administrative functions and increase misunderstandings about the ICAC's role.¹²

Report by the former Acting Inspector of the ICAC, John Nicholson SC

- 1.24 In June 2017, the former Acting Inspector of the ICAC, Mr John Nicholson SC, released Report pursuant to Sections 57B & 77A Independent Commission Against Corruption Act 1988: Operation "Vesta."
- 1.25 The Acting Inspector's report was in response to complaints by several persons arising out of the ICAC's Operation Vesta.¹³
- 1.26 The report did not find any maladministration, abuse of power or improper conduct by the ICAC in these instances. However, the report questioned whether 'there are effectiveness and appropriateness issues that need addressing as a consequence of provisions of the ICAC Act.'¹⁴
- 1.27 The report made five recommendations for reform. In particular, the Acting Inspector recommended that through hearings carried out by the ICAC Committee:
- 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.¹⁵
- 1.28 The Acting Inspector noted that the ICAC is not infallible and could therefore incorrectly label an affected person as having engaged in corrupt conduct. He suggested that mechanisms should be in place for an affected person to have such a label reviewed.
- 1.29 He also noted that complainants in this case could not test the corrupt findings made against them in a court of law:
- The consequence is that each has been stigmatised and shamed by a finding that has not been made, and cannot be tested in an environment that has rules of evidence and procedures established over the centuries to ensure a fair and impartial hearing to them and to their opponents. The aim of the social policy should be to ensure that those who are guilty, are so labelled not those who "could" be guilty.¹⁶
- 1.30 The Acting Inspector acknowledged that adverse consequences to affected persons are not directly imposed by the ICAC's order. Rather they are the direct,

¹² ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), report 2/56, Parliament of New South Wales, October 2016, pp [11-13](#).

¹³ Office of the Inspector of the ICAC, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), 29 June 2017, p [1](#).

¹⁴ Office of the Inspector of the ICAC, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), 29 June 2017, p [v](#).

¹⁵ Office of the Inspector of the ICAC, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), 29 June 2017, p [vi](#).

¹⁶ Office of the Inspector of the ICAC, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), 29 June 2017, p [87](#).

but possibly unintended consequences of a finding. The Inspector highlighted some of the adverse consequences arising from corrupt conduct findings:

Unpaid leave, summary dismissal, reputational damage through media reports, sustained unemployment, dislocation of children schooling, marital pressures and mental health issues have frequently been reported to the Office of the Inspector as arising from findings of corrupt conduct.¹⁷

Memorandum by the current Inspector, Mr Bruce McClintock SC

- 1.31 On 25 November 2019, the current Inspector, Mr Bruce McClintock SC, wrote to the ICAC Committee about matters arising out of his evidence before the Committee on 18 October 2019.¹⁸
- 1.32 In particular, the Inspector provided his views on the issues of reputational impact and an exoneration protocol, which the ICAC Committee highlighted in its recent review of the 2017-2018 annual reports of the ICAC and the Inspector.
- 1.33 The Inspector noted that the ICAC now publishes on its website details of court acquittals of persons against whom the ICAC made corrupt conduct findings and who had related criminal charges. The Inspector said 'there can be no objection to a requirement that the ICAC' do so.
- 1.34 The Inspector also highlighted that an acquittal of criminal charges does not mean the person has been exonerated from the corrupt findings made against them. He spoke about how the investigative powers of the ICAC are different to those of the criminal courts:
- The reason is that the ICAC is entitled to take account of evidence which is not admissible in criminal proceedings and commonly does so. For example, the privilege against self-incrimination does not apply in ICAC hearings and witnesses can be compelled to answer questions that may well have that effect. That evidence, however, is not admissible in criminal proceedings. Thus, it is quite possible that a person who admitted to the ICAC that he had engaged in corrupt conduct might still be acquitted because such evidence could not be used in the subsequent criminal proceedings. Such an acquittal could hardly be described as an exoneration.¹⁹
- 1.35 In addition, the Inspector expressed the view that an acquittal does not necessarily or probably mean that a finding of corrupt conduct was wrong.²⁰

¹⁷ Office of the Inspector of the ICAC, [Report Pursuant to Sections 57B and 77A Independent Commission Against Corruption Act 1988: Operation "Vesta"](#), 29 June 2017, p 88.

¹⁸ A copy of this Memorandum is published as Attachment Q to the Inspector's report, [Report pursuant to sections 57B\(5\) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B\(1\)\(d\) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act](#), December 2019.

¹⁹ Office of the Inspector of the ICAC, [Report pursuant to sections 57B\(5\) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B\(1\)\(d\) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act](#), 19 December 2019, Attachment Q.

²⁰ Office of the Inspector of the ICAC, [Report pursuant to sections 57B\(5\) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B\(1\)\(d\) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act](#), 19 December 2019, Attachment Q.

Discussion questions

When preparing a submission to the inquiry, stakeholders could consider the following questions in line with the terms of reference:

- Is an exoneration protocol needed to deal with certain circumstances where individuals suffer reputational impact from being adversely named in the ICAC's investigations?
- If so:
 - In what circumstances would an exoneration protocol be useful?
 - Who should have access to an exoneration protocol?
 - What kinds of reputational impact may be relevant to consider?
 - How might an exoneration protocol work in practice?
 - Should an exoneration protocol apply retrospectively, to cover cases of reputational impact from the past?
- If not:
 - What are the reasons for not developing an exoneration protocol?

Other safeguards and remedies that deal with reputational impact

1.36 This section will provide a few examples of some of the existing safeguards and remedies that may assist with minimising the risk of reputational impact arising from being adversely named in investigations of the ICAC. Some of these were highlighted in the Committee's report on the *Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC*.²¹

1.37 The examples provided here are not intended to be a comprehensive list of all potential safeguards and remedies. The Committee is interested in hearing from stakeholders about the adequacy of any safeguards and remedies referred to here, along with others not mentioned in this discussion paper.

Considerations about reputational impact in the ICAC Act

1.38 The ICAC Act contains examples of where the ICAC is to consider the impact to an individual's reputation in carrying out its functions. For example, one of the matters the ICAC must consider in determining whether or not it is in the public interest to hold a public inquiry is 'any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry).'²²

The ICAC's procedural fairness guidelines and exculpatory evidence policy

1.39 The ICAC Committee's 2016 report, referred to earlier, made recommendations relating to how the ICAC incorporates procedural fairness into its public inquiries; how it deals with exculpatory evidence; and ensuring that the ICAC provides

²¹ ICAC Committee, [Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC](#).

²² [Independent Commission Against Corruption Act 1988 \(NSW\) s31\(2\)](#).

persons with reasonable opportunities to test evidence upon which an adverse finding is based.²³

- 1.40 That report led to amendments to the ICAC Act requiring the Commissioners to provide procedural guidelines relating to the conduct of members of the ICAC's staff and Counsel Assisting on procedural fairness and exculpatory evidence in the ICAC's inquiries.²⁴ The *Section 31B guidelines* are now on the ICAC's website.²⁵ Some examples of issues covered by the guidelines are described below. However, firstly, two key concepts are explained.
- 1.41 The concept of 'procedural fairness' has been described as acting fairly in administrative decision-making. It relates to the fairness of the decision-making procedure, rather than the fairness of the decision.²⁶
- 1.42 The ICAC's guidelines define 'exculpatory evidence' as 'credible, relevant and significant evidence that tends to establish that a person has not engaged in corrupt conduct that is the subject of the Commission's investigation'.²⁷
- 1.43 The guidelines note the ICAC's duty to disclose exculpatory evidence to an affected person with material that is adverse to that person and upon which the ICAC may rely.²⁸ The guidelines discuss various ways in which senior Commission staff (such as Commissioners, lawyers and investigators) are responsible for being aware of, managing and disclosing evidence that might exculpate affected persons.²⁹
- 1.44 Further, Counsel Assisting has a duty to ensure the substance of evidence adverse to the interests of an affected person is disclosed to them where Counsel Assisting intends to rely upon such evidence to propose an adverse finding against them.³⁰
- 1.45 The guidelines also provide mechanisms for procedural fairness. For example, if a person is required to appear before the ICAC at a public inquiry:
- The person will be given reasonable notice in order to seek legal representation and/or legal advice to prepare to participate in the public hearing.³¹
 - The person is entitled to be informed, before or at the time of their appearance, of the nature of the allegation or complaint being investigated

²³ ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports, October 2016](#), see for example, recommendations [14 to 19](#).

²⁴ [Independent Commission Against Corruption Act 1988 \(NSW\) s31B](#).

²⁵ [Independent Commission Against Corruption Act 1988 \(NSW\) s31B](#); Independent Commission Against Corruption, [Public inquiry procedural guidelines](#).

²⁶ Australian Law Reform Commission, [Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Chapter 14: Procedural Fairness](#), ALRC Report 129.

²⁷ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p2.

²⁸ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p4.

²⁹ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), pp 2-4.

³⁰ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p4.

³¹ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p5.

and the general scope of the inquiry.³² The nature of the allegations and the general scope and purpose of the inquiry will be set out in each summons served to the witness requiring attendance to the public inquiry.³³

- 1.46 The presiding Commissioner may adjourn the evidence of a witness if they are satisfied it is appropriate to do so, to enable the witness to have sufficient time to prepare before giving evidence, or to provide further evidence, when considering evidence which they previously did not have knowledge of, before the public hearing. The presiding Commissioner may also allow a person to cross-examine the credibility of a witness, if it is of sufficient relevance to the investigation.³⁴
- 1.47 The rules of procedural fairness do not require the ICAC to provide a witness with access to any evidence before the witness is examined. However, the Commission may provide access to the relevant documents to the witness before the public hearing, where the access will not prejudice the investigation.³⁵
- 1.48 Further, the procedural fairness guidelines provide for a process if there are any further potential adverse findings that are identified during the drafting of an investigation report that weren't identified in Counsel Assisting's submission. In such cases, the ICAC will notify relevant persons of the potential adverse findings and provide them with an opportunity to make a submission.³⁶

Ensuring the ICAC's staff follow procedures and policies

- 1.49 The ICAC ensures its staff and officers follow a number of policies and procedures.³⁷ The *Section 31B guidelines*, referred to above, would be one example of a relevant procedure or policy.

The ICAC's discretion not to make a corrupt conduct finding against a person and/or not to publish adverse mention of an individual in the relevant circumstances

- 1.50 The ICAC has the discretion not to make a corrupt conduct finding against a person and/or not to publish adverse mention of an individual, on the basis of an investigation.³⁸
- 1.51 The Chief Commissioner of the ICAC, the Hon. Peter Hall QC, provided the Committee with an example of where this discretion has been exercised:

Many years ago now I recall when I was an Assistant Commissioner at ICAC, there was a case in which a ministerial adviser is said to have leant on a woman who worked somewhere in public administration. She was leant on to falsify a report which detrimentally affected the then Director General of the particular department in question. She was placed in a position—the proverbial position between a rock

³² [Independent Commission Against Corruption Act 1988 \(NSW\) s30\(3\); s31\(6\)](#).

³³ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p6.

³⁴ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), pp5-6.

³⁵ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p5.

³⁶ Independent Commission Against Corruption, [Public inquiry procedural guidelines](#), p7.

³⁷ Mr Roy Waldon, Executive Director, Legal Division and Solicitor to the Commission, Independent Commission Against Corruption, [Transcript of evidence](#), 21 October 2019, p [11](#).

³⁸ [Independent Commission Against Corruption Act 1988 \(NSW\) s13\(2A\)](#); The Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, [Transcript of evidence](#), 21 October 2019, p [11](#).

and a hard place. From what I could determine she had been an outstanding public servant.

I decided that I would not make a corrupt conduct finding against her even though she actually did the deed in terms of falsifying the information. She had been to hell and back through this public inquiry—shamed in public almost. I thought it was not appropriate in that case that a corrupt conduct finding be made.³⁹

The ICAC's discretion to publish a statement on the ICAC's website that it found no evidence of corrupt conduct against a particular person

1.52 The Chief Commissioner of the ICAC noted that the ICAC would be open to considering publishing a statement on their website which states that there was no evidence of corrupt conduct against a particular person of interest who was subject to an investigation.⁴⁰

The Inspector's audit and complaint handling functions under the ICAC Act

1.53 The Inspector of the ICAC has some jurisdiction to deal with complaints or concerns arising from the ICAC's investigations.

1.54 The principal functions of the Inspector are:

- to audit the operations of the ICAC to monitor compliance with the law,
- to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or its officers
- to deal with (by reports and recommendations) conduct amounting to maladministration by the ICAC or its officers, and
- to assess the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities.⁴¹

1.55 The Inspector can exercise the above functions on his own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the ICAC Committee or any public authority or official.⁴²

Judicial review

1.56 The Supreme Court of NSW has some jurisdiction to review findings made by the ICAC on the following grounds:

³⁹ The Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, [Transcript of evidence](#), 21 October 2019, pp [10-11](#).

⁴⁰ The Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption, [Transcript of evidence](#), 21 October 2019, p [10](#).

⁴¹ [Independent Commission Against Corruption Act 1988 \(NSW\) s57B](#).

⁴² [Independent Commission Against Corruption Act 1988 \(NSW\) s57B \(2\)](#).

- 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
- a material denial of natural justice.⁴³

Discussion questions

When preparing a submission to the inquiry, stakeholders could consider the following questions in line with the terms of reference:

- Are existing safeguards and remedies available to the ICAC and the Inspector of the ICAC adequate to minimise the risk of reputational impact from being adversely named in the ICAC's investigations?
- Are there any improvements that could be made to existing remedies and safeguards? If so, how could these be implemented?
- Are there any additional safeguards and remedies that could be considered? If so, how could these be implemented?

Relevant practices in other jurisdictions

1.57 The Committee is interested in hearing about the practices of other jurisdictions when considering safeguards and remedies and the possible development of an exoneration protocol. This includes examining what anti-corruption bodies exist in other jurisdictions, practices that may be relevant to NSW, and if there are any exoneration processes currently operating.

Anti-corruption bodies in Australia

1.58 All Australian States and Territories have an anti-corruption body with similar functions to the NSW ICAC. These are:

- Queensland – Crime and Corruption Commission⁴⁴
- Western Australia – Corruption and Crime Commission⁴⁵

⁴³ *Duncan v ICAC [2014]* NSWSC 1018 (29 July 2014) [35] referred to in ICAC Committee, [Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports](#), report 2/56, Parliament of New South Wales, October 2016, p 13.

⁴⁴ [Queensland Crime and Corruption Commission](#), accessed 18 February 2020.

⁴⁵ [Western Australian Corruption and Crime Commission](#), accessed 18 February 2020.

- Victoria – Independent Broad-based Anti-corruption Commission⁴⁶
- South Australia – Independent Commissioner Against Corruption and Office for Public Integrity⁴⁷
- Tasmania – Integrity Commission⁴⁸
- Australian Capital Territory – Integrity Commission⁴⁹
- Northern Territory – Office of the Independent Commissioner Against Corruption.⁵⁰

1.59 All State and Territory anti-corruption bodies are oversighted by parliamentary committees.⁵¹ Other oversight mechanisms are also in place such as Inspectors in Western Australia, Victoria, the Australian Capital Territory and the Northern Territory and a Reviewer in South Australia.⁵²

1.60 There is no similar body at the federal level. However, the issue of establishing a federal ICAC has been subject to ongoing and extensive debate. Similar entities also exist in international jurisdictions such as in Hong Kong and Singapore.⁵³

Exoneration in other jurisdictions

1.61 An exoneration protocol of the kind described by former Inspectors Levine and Nicholson does not appear to be in operation in any Australian states or territories at present. However, section 204 of the *Integrity Commission Act 2018* in the Australian Capital Territory provides that the ACT Integrity Commission must make 'reputational repair protocols' about how the Commission is to deal with damage to a person's reputation where:

- (a) the commission publishes in an investigation report, special report or commission annual report –
 - (i) a finding or opinion that a person has engaged in, is engaging in, or is about to engage in, corrupt conduct; or
 - (ii) a comment or opinion which is adverse to a person; and
- (b) any of the following happens:

⁴⁶ [Victorian Independent Broad Based Anti-Corruption Commission](#), accessed 18 February 2020.

⁴⁷ [South Australian Independent Commissioner Against Corruption](#), accessed 18 February 2020.

⁴⁸ [Tasmanian Integrity Commission](#), accessed 18 February 2020.

⁴⁹ [ACT Integrity Commission](#), accessed 18 February 2020.

⁵⁰ [NT Office of the Independent Commissioner Against Corruption](#), accessed 18 February 2020.

⁵¹ See parliamentary committees in [Queensland](#); [Western Australia](#); [Victoria](#); [South Australia](#); [Tasmania](#); [Australian Capital Territory](#); [Northern Territory](#), accessed 6 March 2020.

⁵² See for example the [Parliamentary Inspector of Corruption and Crime Commission of Western Australia](#); [Victorian Inspectorate](#); [Inspector of the ACT Integrity Commission](#); [Inspector of the Independent Commissioner Against Corruption Northern Territory](#); [The Reviewer of the Independent Commissioner Against Corruption of South Australia](#), accessed 6 March 2020.

⁵³ See for example, [Hong Kong Independent Commission Against Corruption](#), accessed 27 February 2020; Singapore's [Corrupt Practices Investigation Bureau](#), accessed 27 February 2020.

- (i) the matter is referred to a prosecutorial body but the person is not prosecuted for an offence arising out of the investigation;
- (ii) the matter is referred to a prosecutorial body, the person is prosecuted for an offence arising out of the investigation and –
 - (A) the prosecution is discontinued or dismissed; or
 - (B) the person is found not guilty of the offence; or
 - (C) the person is convicted of the offence but the conviction is quashed, nullified or set aside; or
 - (D) the person is otherwise cleared of wrongdoing;
- (iii) the person is the subject of termination action arising out of the investigation and the person is cleared of wrongdoing.

1.62 It does not appear that the reputational repair protocols have been developed to date. However, the provision requiring reputational repair protocols to be developed follows a recommendation for an exoneration protocol by the Australian Capital Territory's Select Committee on an Independent Integrity Commission. The Inquiry into an Independent Integrity Commission reported in 2017, and made the following recommendation:

Recommendation 40

The Committee recommends that an ACT Anti-Corruption and Integrity Commission institute an Exoneration Protocol that can be accessed in circumstances where an individual is subsequently exonerated or cleared of any personal corruption—after a finding of corruption. The Protocol amongst other things should include:

- (a) a mechanism for public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person's reputation has been attacked publicly; and
- (b) the development of guidelines to govern such a process.⁵⁴

1.63 That report refers to the various reports written in NSW regarding the ICAC, and the potential development of an exoneration protocol. Additionally, the report notes that citizens or individuals who have been under investigation have a legitimate expectation that there be various accountability measures in place. This may include the provision of a complaint avenue, or an exoneration protocol.⁵⁵ In the 2018 ACT Government response to this report, this recommendation was noted.⁵⁶

⁵⁴ Select Committee on an Independent Integrity Commission, [Report: Inquiry into an Independent Integrity Commission](#), ACT Legislative Assembly, October 2017, pp xx-xxi.

⁵⁵ Select Committee on an Independent Integrity Commission, [Report: Inquiry into an Independent Integrity Commission](#), ACT Legislative Assembly, October 2017.

⁵⁶ ACT Government, [Government Response to Select Committee's Report](#), 2018.

- 1.64 The Committee notes that the reports of Inspectors Levine and Nicholson, which recommended consideration of an exoneration protocol, did not refer to any specific models in other jurisdictions that their proposals were modelled on.

Discussion questions

When preparing a submission to the inquiry, stakeholders could consider the following questions in line with the terms of reference:

- Are there any other examples of similar anti-corruption, investigatory or administrative bodies that have relevant practices dealing with issues relating to reputational impact?
- Has an exoneration protocol or similar process been considered in a relevant context in other jurisdictions?
- What processes do other jurisdictions have in place which might limit reputational damage in the first instance?