



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/RHvk:1964005

28 August 2020

Mrs Tanya Davies MP
Chair
Joint Committee on the Independent Commission Against Corruption
Parliament House, Macquarie Street
Sydney NSW 2000

By email: icaccommittee@parliament.nsw.gov.au

Dear Mrs Davies,

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

The Law Society of NSW thanks you for the opportunity to provide a submission in respect of the issue of reputational impact on an individual being adversely named in the Independent Commission Against Corruption's (ICAC) investigations. Our comments are informed by the Public Law Committee of the Law Society.

General comments

The ICAC plays a key role in protecting the integrity of our public government institutions. Public confidence in the various integrity mechanisms available (of which the ICAC is but one) is particularly important in the context of low public trust in government. We understand that a study commissioned by the Museum for Australian Democracy and the Institute for Governance and Policy Analysis and conducted by the University of Canberra in 2016 found that only 5% of Australians "usually" trust government.¹

We acknowledge that the ICAC has broad powers, given that "corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain."² We note that the ICAC is an investigative body, and not a court of law. Its function is not to adjudicate between citizens and the state, nor between citizens.

In the Law Society's view, on balance, it appears that recent legislative and operational reforms have struck a better balance between the anti-corruption objectives of the ICAC, and risk of reputational damage to individuals involved in public inquiries. Current procedural fairness measures should continue to be afforded to witnesses involved in the ICAC's investigations.

¹ Mark Evans, Gary Stoker, Max Halupka, "Now for the big question: who do you trust to run the country?" *The Conversation*, 3 May 2016, <https://theconversation.com/now-for-the-big-question-who-do-you-trust-to-run-the-country-58723>.

² New South Wales, Parliamentary Debates, Legislative Assembly, 26 May 1988, (Nick Greiner, Premier).

Public hearings

The Law Society 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.”³ In the Law Society’s view, the capacity of ICAC to hold a public hearing can play an important deterrent role, and public hearings can also hold the ICAC to account in respect of the integrity of the investigation itself.⁴

Mitigating risk of reputational damage

We acknowledge 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 amendments⁵ and adjustments to the operational approach of the ICAC. In this regard, we make the following observations:

1. If there is to be a public hearing, one way of managing the risk to reputational damage would be the use of non-publication and name suppression orders as permitted by the current legislation,⁶ and the use of pseudonyms and redactions. The ICAC could consider making available more detailed guidance in respect of the question of exercising the discretion to make suppression and non-publication orders, without undermining the value of public hearings.
2. The *Independent Commission Against Corruption Act 1988* (ICAC Act) requires that the Chief Commissioner, and at least one other Commissioner, agree to a public hearing, otherwise (with a limited exception) hearings are to take place in private.⁷
3. In determining whether to hold a public inquiry, the ICAC must consider a number of factors, including the public interest, and any risk of undue prejudice to a person’s reputation, including prejudice that might arise from not holding an inquiry).⁸
4. While there may be instances where corrections of the record would be appropriate, the Law Society does not support a presumption that anyone found corrupt by ICAC (or through another civil forum) has the right to exoneration if a criminal prosecution is not successful.
5. There is merit in considering a mechanism to enable public acknowledgement where a person has suffered significant reputational damage due to an ICAC investigation, in circumstances where criminal proceedings are never instituted.
6. In our view, it is important to continue to ensure that procedural fairness is afforded to witnesses involved in the ICAC’s investigations and public hearings. In this regard, we

³ Transparency International Australia, Submission to Select Committee on a National Integrity Commission, 13 April 2017, 7.

⁴ Hannah Aulby, “Shining Light on Corruption: the power of open and transparent anti-corruption investigations”, *The Australia Institute*, June 2017, 5.
<https://www.tai.org.au/sites/default/files/Shining%20a%20light%20on%20corruption.pdf>.

⁵ The *Independent Commission Against Corruption Amendment (Validation) Act 2015* which commenced on assent on 6 May 2015 and, after the report of the Independent Panel, the *Independent Commission Against Corruption Amendment Act 2015* which commenced on assent on 28 September 2015.

⁶ See s 112, *Independent Commission Against Corruption Act 1988* (NSW) (“ICAC Act”), and *Standard Directions for Public Inquiries*, February 2018, [26].

⁷ Section 6(2), ICAC Act.

⁸ Section 31, ICAC Act.

note that in 2018, procedural guidelines pursuant to s 31B of the ICAC Act relating to the conduct of public inquiries to ICAC staff and counsel assisting the ICAC were tabled.

Thank you for the opportunity to make submissions. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R Harvey', with a stylized flourish at the end.

Richard Harvey
President