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# Submission to the Committee on the Independent Commission Against Corruption:

# Inquiry into Reputational Damage on an individual being adversely named in the ICAC's Investigations

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

## EXECUTIVE SUMMARY

*An exoneration protocol should be available, on application to the Supreme Court, when any of the following circumstances are present:*

*a) There is an absence of a criminal conviction arising from a prosecution based upon the same or similar facts that led ICAC to make a finding of corrupt conduct.*

*b) The Director of Public Prosecutions, after considering material that formed the basis for a finding by ICAC of corrupt conduct, determines that this material is an inadequate basis for a prosecution.*

*c) Twelve months have elapsed from the date on which ICAC referred material to the Director of Public Prosecutions and no decision has been made about whether to commence a prosecution based upon that material.*

*d) When an adverse finding was made in circumstances in which ICAC exceeded its jurisdiction as outlined by the High Court in Independent Commission Against Corruption v Cunneen [2015] HCA 14.*

*e) When ICAC did not adhere to the rules of procedural fairness during an investigation that led to a finding of corruption.*

*f) When an individual has suffered reputational damage during an ICAC inquiry and no adverse finding has been made against that individual by ICAC.*

*An exoneration protocol is the preferred position as it would provide a remedy for innocent people whose reputations have already been tarnished and have been awaiting the introduction of a remedy that would enable them to remove the taint and clear their names.*

*Its introduction should be followed next year, when a broader review is expected, by consideration of another change aimed at preventing reputational damage to the innocent and the erosion of the presumption of innocence which are inevitable consequences of ICAC's current practices. This would require ICAC inquiries to be conducted in private.*

*If the committee chooses not to support an exoneration protocol for those innocent people whose reputations have been damaged in the past, it should bring forward the introduction of private hearings. This would at least eliminate the inevitability of damage to innocent people at future inquiries.*

**Part 1: The delusion of infallibility**

When the NSW parliament created the Independent Commission Against Corruption it wanted a powerful tool to weed out corruption in order to restore the state's reputation after a series of scandals. The goal was admirable. The result is not.

ICAC has become a parallel system of justice that has been stripped of the safeguards that are a feature of the courts. It is disingenuous to seek to minimise the scale of this design flaw by asserting that the commission is not a court, cannot make findings of law and cannot impose penalties. Such analysis elevates form over substance.

The commission imposes one of the most severe penalties that could ever be inflicted upon an innocent person: a public taint of corruption. This has destroyed the reputations of innocent people, ruined their careers, hobbled their businesses and left them without an adequate means of redress.

It is is simply beside the point that the commission uses a different standard to that used by the courts. The existing safeguards and remedies are not adequate to protect the reputation of an individual being adversely affected by an ICAC investigation.

The remedy proposed in this submission - an exoneration protocol - would not amount to an appeal from a forum that uses different rules and standards. It would be a discrete system of restorative justice that would be based on the presumption of innocence, not the rights and wrongs of decisions taken by ICAC.

The liberties of all Australians rest on the principle that everyone is free to engage in activity that does not amount to a breach of the law. Liability under the law and the imposition of penalties are the exclusive prerogative of independent courts, not standing royal commissions such as ICAC. In this regard, an exoneration protocol is a minimalist remedy: it does not seek to re-examine matters that have been fully considered by ICAC, the Director of Public Prosecutions or the courts. It would simply fill a gap in the law by providing a remedy to a wrong.

But while this remedy would be used by individuals, its availability would serve a public purpose: it would defend the presumption of innocence which is a fundamental plank of the rule of law.

The gap in the law was identified in 2017 by ICAC's former acting inspector, John Nicholson, in a report[1] that examined the commission's conduct in relation to businessman Charif Kazal and former public servant Andrew Kelly.

Nicholson, who is a former judge of the NSW District Court, found Kazal and Kelly had been "stigmatised and shamed" by ICAC but had been unable to test the merits of the agency's assertion that they were corrupt as neither was ever charged with any offence.[2]

"The legislation preserves the work of ICAC as though it is infallible," wrote Nicholson, who believed this could amount to a breach of Australia's obligations under Articles 11 and/or 12 of the Universal Declaration of Human Rights.[3]

[1] Report by the Office of the Inspector of the Independent Commission Against Corruption on complaints by Andrew Kelly, Charif Kazal and Jamie Brown, tabled in the NSW parliament, June 29, 2017.

[2] In Kazal's case, ICAC referred him to the DPP for possible prosecution, not for corruption but for the separate issue of whether he had given false testimony to ICAC.

His associate, Andrew Kelly, had been referred for possible prosecution for misconduct in public office.

When the DPP's prosecutors examined the material that had been assembled by ICAC they wrote to the commission stating there was insufficient evidence to justify prosecuting either man for anything.

[3] Article 11 guarantees the presumption of innocence when people are charged with penal offences.

Article 12 says everyone has the right to be protected by law from arbitrary attacks upon their honour or reputation.

*"Any organisation manned by humans is far from infallible," he said.*[4]

In Nicholson's assessment, it offends the popular sense of a "fair go" if a label of corrupt conduct "can be placed incorrectly upon a person without any real chance of him or her having the label reviewed".

He recognised that Article 11 of the Universal Declaration, which protects the presumption of innocence, might be thought to confine the presumption to circumstances where a person is formally charged with a penal offence. But he believes it espouses values that are not foreign to Australian culture. The people of NSW, in common with most communities throughout the western world, instinctively value privacy, reputation and honour[5], Nicholson's report says.

*"My argument is that the presumption of innocence is an interest or right alive at all times although usually it may only come into play in the face of a formal charge. My argument is that right is battered whenever a finding of corrupt conduct is made, and more particularly when that label is applied to conduct that at best only amounts to disciplinary or termination type conduct. Numerous persons who have had that label stamped upon their forehead have been keen to clear their name so that their honour or good character (including the presumption) can be restored."*[6]

Article 12 of the Universal Declaration aims to prevent "arbitrary" attacks on honour and reputation and Nicholson believes this covers ICAC's findings of corruption.

[4] Report by the Office of the Inspector of the Independent Commission Against Corruption on complaints by Andrew Kelly, Charif Kazal and Jamie Brown, tabled in the NSW parliament, June 29, 2017, paragraph 348.

[5] Ibid, paragraph 263

[6] Ibid, paragraph 265.

*"The definition of 'arbitrary' is wide enough to include an ICAC finding of corrupt conduct that cannot be challenged."*[7]

The original mistake was creating an agency without ensuring its coercive power was balanced by respect for the presumption of innocence and the ability to test the merits of a flawed finding. The Nicholson report notes that even those convicted in a court of corrupt dealings, and indeed those who have had their appeals finalised, still have mechanisms for having their innocence restored to them should it be the case that they are able to mount a compelling case that they are in fact innocent of a crime.[8]

This design flaw has trapped ICAC in a moral hazard. It conducts its work safe in the knowledge that the law of NSW does not permit anyone to test the merits of its findings. To this extent, ICAC is not just an alternative system of justice, but an alternative that is presumed to be infallible.

An exoneration process is not simply about correcting the damage to individuals, but rebuilding ICAC's public standing. Any legal institution that has no reputation for justice has no reputation.

In times of international uncertainty, Australia's reputation for adhering to the rule of law would be reinforced by an exoneration protocol. ICAC's work is important, but if the country is seen as failing to adhere to the rule of law, it will erode a source of pride and certainty in an uncertain world. Australians have a legitimate expectation that they will be treated justly by the institutions created by parliament. The committee is urged to address that expectation.

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[7] Ibid, paragraph 266.

[8] Ibid, paragraph 349.

## Part 2: The presumption of innocence

In this country, everyone is innocent until proven otherwise in a court of law. That hard-won principle is fundamental to the rule of law and should be the central concept supporting a statutory reform package that includes the introduction of an exoneration protocol and changes to ICAC's procedures.

An exoneration protocol is a necessary step towards removing the moral hazard associated with the absence of merits review. However such a protocol, by definition, assumes there will be a continuing need for such a mechanism. The preferred outcome is to eventually reduce the need for the protocol by reducing ICAC's damage to the presumption of innocence.

That requires a second tranche of reforms.

Unless accompanied by systemic rights-respecting changes, an exoneration protocol would simply address the symptoms of a problem while the problem itself would remain unaddressed - harming the innocent and eroding the public standing of the institution.

This submission proposes a reform program that consists of two separate but closely related tranches of changes to the Independent Commission Against Corruption Act. The first stage involves the implementation of an exoneration protocol that would create a mechanism, overseen by the Supreme Court, for addressing reputational damage to innocent parties caused by procedures that have been used by ICAC.

A protocol of the type outlined in this submission is needed urgently to provide redress for innocent people who have been unjustly tainted and have no effective mechanism under NSW law that would enable them to clear their names and restore their reputations.

The proposed second stage of the reform plan[9] addresses the underlying causes of unjustified reputational damage and could be dealt with during the broader review of the operation of ICAC that the committee expects to undertake next year. It has been foreshadowed in order to show that an exoneration protocol, while necessary, needs to be accompanied by other changes in order for reform to be truly effective.

If both parts of the program are accepted, it is foreseeable that after the initial applications, the changes outlined in stage two would lead to few applications under the protocol.

It is necessary to make the point that all of the incidents that justify introducing an exoneration protocol took place before parliament made several recent changes to ICAC, including the shift to a three-commissioner model, after the commission was found by the High Court in 2015 to have exceeded its jurisdiction.[10]

The erosion of the presumption of innocence is most starkly apparent in the case of businessman Charif Kazal which formed the basis for the extensive report by John Nicholson that is cited above.

[9] See Part 5: Broader Reform.

[10] Independent Commission Against Corruption v Cunneen [2015] HCA 14.

Kazal was declared corrupt but was never prosecuted. It would be a mistake, however, to view this absence of prosecution as beneficial for Kazal. Because there is no merits review of ICAC's determinations, a criminal trial would have given him the opportunity to have the facts that led to the commission's finding subjected to scrutiny. Instead, he has been damned as corrupt and denied access to the one forum that could have determined conclusively whether he was in fact guilty of wrongdoing: a criminal trial.[11]

*"The consequence of that course, is that Charif Kazal will never have the opportunity to clear his name," says Nicholson's report on the affair.*

*"That finding [of corruption] having been made, however, leaves Charif Kazal with a stain upon his honour, reputation and his right to be considered as a person of good character with no means at law of being able to retrieve or recapture those qualities through recourse to the law or to have the findings of the Commission expunged from the records of ICAC and its publishings on the internet. It has impacted upon his presumption of innocence."*[12]

Nicholson's report shows that he believes it is futile to complain to the office of ICAC's independent inspector under provisions of the ICAC Act in an attempt to rectify an incorrect finding by ICAC.

[11] However the response of ICAC to the acquittal of Murray Kear after a criminal trial indicates that the commission considers itself, rather than the courts, to be the best judge of its own conduct. See the discussion of the Kear case in Part 3: The Exoneration Protocol.

[12] Report by the Office of the Inspector of the Independent Commission Against Corruption on complaints by Andrew Kelly, Charif Kazal and Jamie Brown, tabled in the NSW parliament, June 29, 2017. Paragraph 157.

*"The complaints mechanism offered by s.57B(1)(b) and (c) are an inadequate form of check and balance for an incorrect result arising from the exercise of extraordinary powers of the ICAC."*[13]

This committee recognised the shortcomings of the available remedies last year in its *Review of the 2017-2018 annual reports of the ICAC and the Inspector of the ICAC*.

*"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 to address the reputational impact of being named in the investigations of the ICAC."*[14] *[Emphasis added].*

Concern about unjustified damage to reputations pre-dates the imposition on ICAC of the three-commissioner model. But the commission still has the same coercive power that led to the infringement of Kazal's presumption of innocence. History has shown it is too risky to simply hope the problem will not re-emerge because of a change of personnel . Human rights should not be allowed to depend on the common sense and discretion of individuals - particularly when those individuals are not part of the independent judiciary and the merits of their decisions are beyond independent review.

The balance between the exercise of coercive power and respect for human rights needs to be entrenched in law, not left to fallible individuals. ICAC should literally be fool proof.

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[13] Ibid, paragraph 348.

[14] Committee on the Independent Commission Against Corruption; November, 2019, Review of the 2017-2018 Annual Reports of the ICAC and the Inspector of the ICAC, Finding 6, paragraph 2.1.

The changes that are suggested in this document are not proposed in response to any perceived shortcomings in the conduct of the current commissioners. They are directed at shortcomings in the law that have permitted the rights of innocent parties to be infringed in the past. These changes would be good for ICAC. They would remove the focus for much of the criticism that has dogged the commission over past events.

The first stage of the program - the exoneration protocol - would be available only to those who have been acquitted by a court or have never been charged over matters that have been investigated by ICAC. It would therefore be available only to those who are entitled to a presumption of innocence.

It would not be available to those found guilty by a court of an offence based on the same or similar facts that formed the basis for an adverse finding by ICAC.

**Part 3: The exoneration protocol**

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. This should be made clear in the statute giving it effect.

The protocol would not require the Supreme Court to reconsider whether there was insufficient evidence to support a guilty verdict. That issue would have already been resolved in the applicant's favour either by an acquittal or by a decision of the Director of Public Prosecutions that a prosecution was not justified. Innocence in the eyes of the law would be a precondition for seeking orders under the protocol. ICAC, while a party to proceedings under the protocol, would be prevented from re-opening debate on matters that have been resolved by the justice system.

The court would be asked to determine whether circumstances to be listed in statute are present and if they are, whether the applicant should be reasonably excused and provided with a remedy aimed at repairing damage to the presumption of innocence.

The protocol should be available when any of these circumstances are present:

a) There is an absence of a criminal conviction arising from a prosecution based upon the same or similar facts that led ICAC to make a finding of corrupt conduct.

b) The Director of Public Prosecutions, after considering material that formed the basis for a finding by ICAC of corrupt conduct, determines that this material is an inadequate basis for a prosecution.

c) Twelve months have elapsed from the date on which ICAC referred material to the Director of Public Prosecutions and no decision has been made about whether to commence a prosecution based upon that material.

d) When an adverse finding was made in circumstances in which ICAC exceeded its jurisdiction as outlined by the High Court in Independent Commission Against Corruption v Cunneen [2015] HCA 15.

e) When ICAC did not adhere to the rules of procedural fairness during an investigation that led to a finding of corruption.

f) When an individual has suffered reputational damage during an ICAC inquiry and no adverse finding has been made against that individual by ICAC.

The protocol is intended to provide a remedy for a wide range of innocent people who have suffered reputational damage despite the fact that their conduct has never been shown to be unlawful.

The procedure for obtaining orders under the protocol should, in most instances, be uncomplicated and should not be permitted to generate unreasonable legal costs or take excessive amounts of court time.

The question of whether the circumstances outlined in Points a), b) and c) would be a factual matter easily verifiable by ICAC.

The existence of the circumstances outlined in points d) and e) would need to be determined by the Supreme Court. This could be done as part of proceedings which, if successful, could include an application for orders under the protocol. While this would be an efficient use of court time, it might be preferable for these matters to be decided in separate proceedings followed by a discrete application under the protocol. This would eliminate the possibility that a contested hearing alleging jurisdictional error or an absence of procedural fairness could have the effect of turning an application under the protocol into an adversarial contest.

The committee should be aware that point d), when included in statute, would amount to a partial repeal of legislation that validated past actions by ICAC in which the commission exceeded its jurisdiction.[15]

The validation legislation, as its title suggests, had the effect of retrospectively transforming unlawful conduct by ICAC into lawful conduct. This denied access to justice

[15] Independent Commission Against Corruption Amendment (Validation) Act 2015.

for those adversely affected by the commission's unlawful conduct. They have been prevented from seeking declarations from the Supreme Court that actions by ICAC that were undertaken without a basis in law are a nullity.

The retrospective validation of unlawful actions was an over-reaction to the Cunneen case[16]. That decision, and parliament's response, leave no doubt that the commission did not understand the limits on its jurisdiction that are contained in the ICAC Act.[17] It meant parliament chose to protect this agency from the consequences of its jurisdictional over-reach while leaving the victims of this error without a remedy. Instead of allowing the courts to apply the normal law as declared by the High Court, parliament changed the rules to protect a statutory agency that misunderstood its own governing statute and made declarations that were beyond the powers granted to it by parliament.

As the object of the exoneration protocol is to provide a remedy for innocent parties who have had their reputations damaged by ICAC, the inclusion of point d) is is essential. Parliament should allow the normal law, as enunciated by the High Court, to operate. It should accept that ICAC, like the rest of the community, is subject the law.

The circumstances identified by Point f) is the only part of the protocol that would require the Supreme Court to make a detailed examination to determine whether circumstances exist that trigger the protocol.

The protocol will, of necessity, have an impact on ICAC. Suggestions on how to manage that impact are outlined in Part 5 of this submission.

[16] Independent Commission Against Corruption v Cunneen [2015] HCA 14.

[17] Independent Commission Against Corruption v Cunneen [2015] HCA 15.

If the suggestions in Part 5 are taken up, ICAC will no longer be capable of inflicting damage to the reputations of the innocent. But if the committee chooses not to accept those suggestions, the exoneration protocol, of itself, will provide an incentive for ICAC to investigate serious matters - those that are more likely to amount to criminal conduct - at the expense of minor transgressions. In public policy terms, this is a desirable outcome. It will encourage the commission to avoid imposing disproportionate penalties such as public shaming for minor matters.

The exoneration protocol is grounded in two principles: the first is that ICAC is an investigator, not an alternative system of justice. Its practice of destroying the reputations of innocent people is, in reality, the imposition penalties by a non-judicial body. This is improper.

The loss of reputation is a real penalty that can destroy a career. This was recognised by Margaret Cunneen SC in 2016. She warned that government agencies, because they are not courts and cannot convict and pass sentence, "have developed a means of punishment which in many cases is far worse".[18]

*"The media is co-opted into the role of punisher, and the role is embraced in some quarters with a relish that could easily be confused with malice . . . The justice that our community is permitting to be dispensed in the form of shaming the targets of these investigatory bodies is now far worse [than 20 years ago]. Well in advance of any charge being laid, often in cases where charges will never be laid, even in cases where the decision that no charge will be laid has already been made by the proper authorities, investigative bodies are justifying their existence by condemning the presumed innocent*

[18] Margaret Cunneen SC, Commonwealth Day address, 2016

*in the media. Today that means that the ill-informed and the vindictive go on the attack in the manner of a cyber lynch mob."*[19]

This is in line with the view of Phillip Boulten SC, a former president of the NSW Bar Association, who warned in 2015 that a parallel system of justice was now in competition with "the real criminal courts".[20]

ICAC is part of that competition. And while it might look like a court and can destroy reputations, it lacks the system of checks and appeals that help the courts correct any errors. The exoneration protocol - and any changes this might mean for ICAC - are the necessary consequences of the commission's intrusions on the role of the courts. The fault lies with the ICAC Act.

The exoneration protocol also rests on second principle: the presumption of innocence that applies to everyone and is fundamental to the rule of law and the justice system. At the moment, the ICAC Act permits the presumption to be side-stepped. If that continues, it will cease to have meaning as a fundamental right of citizenship and central pillar of the rule of law.

Permitting innocent people to be branded corrupt by ICAC when the justice system considers them to be innocent is a conflict that, in the eyes of the community, must cast doubt on the competence of ICAC, the courts or both. That conflict might be explicable by lawyers but it has led to confusion in the community - particularly parts of the media. Parliament needs to resolve that conflict and leave the community in no doubt that the presumption of innocence and the rule of law still prevail in NSW.

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[19] Ibid.

[20] Phillip Boulten SC, Jeff Shaw memorial lecture, 2015, as quoted by Margaret Cunneen SC, ibid.

Compared to the adversarial processes of the justice system, ICAC's inquisitorial procedures have less capacity to identify errors before decisions are taken. Compared to the courts, there is inadequate separation between the commission's function as an investigator and its function as a decision maker.

The great strength of the justice system is the institutional and functional separation between police who investigate, the Director of Public Prosecutions which independently assesses the material collected by investigators and runs prosecutions, and the judiciary which impartially presides over an adversarial contest between the defence and the prosecution - and is itself subject to multiple levels of appeal.

This separation establishes a healthy degree of tension as the separate bodies make their own, independent assessments. State power is distributed and is subject to review at multiple points. It is not concentrated as it is in ICAC which is an investigator and decision-maker.

The relative lack of rigour in ICAC's decision making was on show in the Murray Kear case. Kear was prosecuted and acquitted on a charge that was based on alleged conduct that was substantially the same as the allegation that formed the basis for ICAC's decision to declare him to be corrupt. ICAC had found Kear to be corrupt on a second matter that was never brought before the courts.

Magistrate Greg Grogin acquitted Kear[21] over the matter that did come before the courts and in a subsequent costs judgment he found that the proceedings had been launched without reasonable cause and had been conducted in an improper manner.

[21] DPP v Murray Kear, Downing Centre Local Court, March 16, 2016

The unreported costs judgment was handed down in the Downing Centre Local Court on May 25, 2016. The magistrate said:

*"I dismissed the charge against the applicant because the evidence in support of the applicant was, I find, overwhelming. This information was available to the investigators and the prosecutor when considering the course of the matter."*[22]

*"I find that the proceedings were initiated without a reasonable cause*[23]*,"* the costs judgement says.

It shows that ICAC had failed to provide relevant evidence to the DPP and had failed to investigate an aspect of the case that favoured Kear.

*"The failure to investigate this aspect of the case was a failure to investigate a relevant matter of which the prosecutor was or ought reasonably to have been aware and that this evidence did suggest that the applicant might not be guilty of the offence as charged. The prosecutor failed to provide the important records of interview of major witnesses to the Crown and these, I find, suggested that the applicant might not be guilty."*[24]

In 2016, when the late David Levine first suggested the creation of an exoneration protocol, the former independent inspector of ICAC outlined a scheme of relatively modest scope and similarly modest remedies. Since then, more issues have come to

[22] DPP v Murray Kear, Downing Centre Local Court, unreported, May 25, 2016, paragraph 26.

[23] Ibid, paragraph 28.

[24] Ibid, paragraph 30.

light and the case for broadening the scope of the protocol and its remedies has gained impetus.

The original Levine scheme is outlined in his *Report to the Premier: The Inspector's Review of the ICAC*, at paragraph 15.

*"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."*[25]

Levine cited in support several cases in which people had suffered damage to their reputations as a result of their involvement in the ICAC process but had ultimately been acquitted. They included Murray Kear - who Levine said had been exonerated.[26]

In a practical sense, Levine was undoubtedly correct. Because of the unusual reversed onus of proof associated with the Kear proceedings, he needed to prove his innocence - which he did. The facts that formed the basis of the court case were, in substance, the same as the facts that ICAC said amounted to corruption.

[25] Office of the Inspector of the Independent Commission Against Corruption, Report to the Premier: The Inspector's Review of the ICAC, 12 May, 2016, paragraph 15.

[26] Ibid, paragraph 49.

For those familiar with this affair, there was no doubt that Grogin's judgements meant Kear had been exonerated. But if that is the case, why is there a need for an exoneration protocol?

ICAC itself has answered that question. The commission has shown that it appears to consider its decision-making to be immune from criticism by the judiciary - even when a decision has been shown to have been based on a flawed investigation.

Soon after the report containing Levine's proposed exoneration protocol was made public, ICAC sent the NSW premier a response that says:

*"In the case of Mr Kear, the Inspector's concern is that Mr Kear suffered unwarranted reputational damage from the findings of corrupt conduct made against him because of his 'exoneration' in court . . . the court findings did not exonerate Mr Kear from the Commission's finding that he engaged in corrupt conduct."*[27] *[Emphasis added]*

ICAC's argument, which is outlined in that submission, goes into detail about the different standards of proof used by the courts and ICAC and how decisions of criminal courts do not amount to a review of ICAC's decisions.

The most worrying aspect of ICAC's response is that the commission felt it was appropriate to reject the magistrate's findings because the commission - which is not a court - preferred its own analysis over that of the magistrate.

[27] ICAC submission to the Premier of NSW on the ICAC Inspector's report on his Review of ICAC, May, 2016, Page 6.

According to the commission's response to Kear's complaint, the magistrate did not properly analyse key evidence, omitted consideration of relevant facts and made comments in his rulings that "are with great respect both incorrect and misconceived".

It is difficult to imagine any other statutory authority that would reject a court's findings because it believed the court's analysis was inferior to that of its own.

The Australian Lawyers' Alliance believed it would have been better for the administration of justice if the commission had taken a different approach. ALA criminal justice spokesman Greg Barns told The Australian:

*"It would have been preferable if rather than being combative in its response to the Local Court's judgement, for ICAC to acknowledge that the court took a particular view and while it disagreed with that view it would reflect on the court's findings in order to improve its operations."*[28]

There is one other aspect of the Kear case that adds to the case for statutory change. After the Grogin judgment, Kear lodged a complaint with ICAC's independent inspector, Bruce McClintock.

Based on the court's findings, Kear complained that ICAC did not disclose or lead as evidence in its public inquiry material in its possession that was exculpatory. Because of the failure to consider that exculpatory material he argued that both findings of corrupt conduct that had been made against him were wrongly made. He also complained that ICAC failed to provide the same exculpatory material to the DPP and said the prosecution should not have been commenced.

[28] ICAC is attempting to re-try me: Kear, The Australian, June 15, 2018.

McClintock, who is not a judicial officer, dismissed Kear's complaint and criticised the Grogin's decision. Peter Hall, who is ICAC's chief commissioner rejected Grogin's finding that ICAC's investigation had been conducted in an unreasonable and improper manner. Hall said:

*"The magistrate's criticism, it is contended, with respect was, contrary to the evidence before the Commission and the Local Court."*[29]

McClintock suggested Kear had been acquitted because the magistrate had failed to understand an aspect of the case:

*"I regret to say that the learned magistrate does not seem to have understood this relatively obvious point. If he had I doubt whether he would have acquitted Kear."*[30]

This Kear case and its aftermath have made several matters clear:

i) The commission seems to believe that the different rules and standards of proof that apply to ICAC mean it is justified in inflicting reputational damage on people who are not just presumed to be innocent, but, in the case of Murray Kear, have been proven to be innocent.

ii) The refusal of ICAC and its independent inspector to accept Grogin's findings about ICAC's investigation strengthens the case for subjecting ICAC to a more robust system of accountability.

[29] Letter from Peter Hall, Chief ICAC Commissioner, to Bruce McClintock, Inspector of ICAC, March 6, 2018, paragraph 148, reproduced in the Inspector's report on a complaint by Murray Kear, June 6, 2018.

[30] Office of the Inspector of the Independent Commission Against Corruption, report on a complaint lodged by Murray Kear, June 6, 2018, paragraph 51.

The Kear case shows that a finding by a court is an inadequate method of holding ICAC to account, even in the face of a flawed investigation. The other systems of accountability are also inadequate. Judicial review is limited to errors of law, parliament's ICAC oversight committee is not permitted to reconsider ICAC's decisions,[31] and McClintock's report on the Kear complaint, like Nicholson's report on the Kazal matter, confirms the limited role of his own statutory office:

*"I have no power to consider, in isolation, whether a finding of corrupt conduct was correctly made."*[32]

An exoneration protocol, backed by orders from the Supreme Court, would fill part of this accountability gap. But while that would address the injury inflicted on individuals, it would not provide a mechanism for identifying and correcting the causes of the apparent bias that emerged in the Kear case. This remaining accountability gap needs to be filled. Every institution exercising state power needs to be subject to effective review in order to weed out errors and provide an incentive for best practice. This suggests that the option of a system of merits review, while rejected in earlier times, needs to be reconsidered at the committee's broader review next year.

The great significance of Levine's proposal is that over time, the mere existence of the exoneration protocol could be expected to encourage more rigorous fact-finding by ICAC's investigators, more rigorous oversight of their conduct and a greater focus on serious matters.

[31] Section 64(2)(c) Independent Commission Against Corruption Act

[32] Office of the Inspector of the Independent Commission Against Corruption, report on a complaint lodged by Murray Kear, June 6, 2018, paragraph 29.

If, however, the committee is not inclined to support the creation of an exoneration protocol, there are other ways of addressing the inevitable reputational damage that ICAC inflicts on those entitled to the presumption of innocence.

The simplest alternative would be to require the commission to undertake its work with the same respect for the presumption of in innocence that is a central component of police work. That would mean all investigations would be conducted in private. This is examined in Part 5.

**Part 4: Remedies**

The remedies available under the protocol should seek to restore, to the greatest extent possible, the applicant's presumption of innocence. They should include any of the following:

a) An order requiring ICAC to expunge certain records held by the commission, remove material from its website and delete material in its control, as considered appropriate by the Supreme Court.

b) An order requiring ICAC to set aside findings and disavow certain reports, press releases and other documents that are held by others, as considered appropriate by the Supreme Court.

c) An order requiring ICAC to provide a letter of comfort to the applicant stating that the applicant took part in inquiries conducted by the commission and may have suffered reputational damage. The letter should state that the applicant has been granted remedial orders against ICAC under the exoneration protocol. The letter should state

that the applicant is guilty of no offence and his or her presumption of innocence remains undisturbed and should be respected.

d) An order requiring ICAC to display a statement on its website, and in its annual report, based on the letter of comfort, after the Supreme Court has approved the wording of that statement.

e) Orders requiring ICAC to issue a press release and post a public notice in NSW and national newspapers based on the statement approved by the Supreme Court.

f) Such other orders that the Supreme Court considers necessary to help restore the reputation of those seeking orders under the protocol.

g) A successful application under the protocol should be accompanied by a costs order requiring ICAC to pay the applicant's costs.

**Part 5: Broader reform**

Unless accompanied by broader prospective change, the protocol will merely address the symptom of a problem that will continue to damage innocent people.

This requires statutory change to ensure all inquiries take place in private - just as police inquiries take place in private. It would be illogical for the police to invite the media into interview rooms during criminal investigations on the pretext that this would educate the community about crime.

Yet one of the main justifications for ICAC's public investigations is that they educate the community about corruption. This is misguided and should be abandoned. Moving to private investigations is the simplest way of easing the risk of reputational damage to those involved with ICAC inquiries.

Once enacted, this change could be expected to reduce the number of people seeking an order under the exoneration protocol. This would save court time and be the most cost-effective way of addressing the issues that have triggered the push for an exoneration protocol.

It should be emphasised, however, that the protocol would be available to those who have already suffered reputational harm. Private hearings would address the issue prospectively.

The move to private inquiries would also eliminate a statutory inconsistency within the ICAC Act that could be giving commission officials the impression that they are required to make firm decisions about the question of corruption before anyone is asked a question at a public inquiry.

The Independent Commission Against Corruption Act states[33] that the commission's public proceedings are inquiries that are being held for the purpose of an investigation. That presupposes that the commission should not have made firm decisions about the existence of corruption - or those responsible - before hearing what witnesses say at a public inquiry and completing its investigation.

[33] Section 31(1), Independent Commission Against Corruption Act.

Yet the same statute says that when the commission is deciding whether to hold proceedings in public it should consider "the benefit of exposing to the public, and making it aware, of corrupt conduct".[34]

That provision could be read as an instruction to the commission to conduct "show trials": to make up its mind before convening public proceedings and to require those it already considers corrupt to give testimony in public in order to provide support for the commission's conclusions.

The contrary view, which favours public proceedings, was expressed in 2014 by former ICAC Commissioner David Ipp and was cited by an apparently sceptical David Levine in his 2016 report to the premier. It quotes Ipp as saying:

*"The whole raison d'etre of ICAC is the exposure of corruption . . . the idea of exposing corruption behind closed doors in oxymoronic."*[35]

Ipp, according to Levine, was disturbed by calls for private hearings because he considered the use of public exposure to be one of the commission's "most important weapons".[36]

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[34] Independent Commission Against Corruption Act, s.31(2)(a).

[35] Former ICAC Commissioner David Ipp as reported in The Sydney Morning Herald, August 2, 2014 and cited in the Report to the Premier: The Inspector's Review of the ICAC, by the Office of the Inspector of the Independent Commission Against Corruption, May 12, 2016, page 28, paragraph 78.

[36] Former ICAC Commissioner David Ipp as reported in The Sydney Morning Herald, August 2, 2014 and cited in the Report to the Premier: The Inspector's Review of the ICAC, by the Office of the Inspector of the Independent Commission Against Corruption, May 12, 2016, page 29, paragraph 79.

The remarks cited by Levine come close to confirming that under Ipp, the commission had considered it legitimate to use public hearings during incomplete investigations to "expose" conduct and individuals it already believed were corrupt.

This approach seems consistent with statements made in 2014 by another former ICAC Commissioner, Megan Latham. She likened the treatment of witnesses at ICAC's hearings to "pulling the wings off butterflies".[37]

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[37] Office of the Inspector of the Independent Commission Against Corruption, annual report 2014-2015, page 24, 25.

Latham's remarks were reproduced in David Levine's annual report of the Inspector of ICAC. According to that report, Latham told a workshop convened by the NSW Bar Association on February 25, 2014:

"On a concluding note, can I say that if you get tired of adversarial litigation, inquisitorial litigation is fantastic. You are not confined by the rules of evidence. You have a free kick. You can go where you want to go, and it's a lot of fun."

In response to a question about cross-examination, Latham said:

"Well you actually know where you're heading [emphasis added]

"The thing about the role of counsel assisting at ICAC is that you're actually part of a team and there's been a long inquiry and you've actually worked out what you want to get out of the witness. So it's basically by the time you get there it's just, you know, like pulling wings off butterflies.

"It's much more difficult for counsel who are representing the relevant witness and there is very, very limited role for those counsel in terms of their representation of the witnesses. . ."

This suggests that it is illusory to consider ICAC's public proceedings as being part of an investigation. If the commission is capable of identifying conduct that it needs to "expose" and to identify individuals who should be treated like butterflies deserving of mutilation, these proceeding cannot be said to be based on the requirement to conduct public investigations that is outlined in s.31(1) of the ICAC Act.

If these sessions are not part of an investigation and wrongdoers can be identified without these sessions, taxpayers would be justified in asking why they are paying for this organisation to pursue publicity that serves no forensic purpose.

Levine wrote that his own view was that "it does not necessarily follow that corruption will not be exposed at the conclusion of private hearings. Nor in my view does it follow that every public hearing is likely to induce people to come forward and give evidence".[38]

He noted there were growing differences in the powers of state anti-corruption bodies, not least in relation to the conduct of public proceedings. But he said:

*"I am however comfortable to express my preference for non-public hearings at the end of which - in other words at the end of the whole investigation, if no corrupt conduct is found - nobody is hurt. Equally, if at the end, serious corrupt conduct is found . . . it publicly can be exposed in relation to specified individuals and identified conduct."*[39]

[38] Office of the Inspector of the Independent Commission Against Corruption, Report to the Premier: The Inspector's Review of the ICAC, May 12, 2016, paragraph 80.

[39] Ibid, paragraph 82.

While Levine's suggested procedure would certainly reduce the prospect of unjustified harm, the fact remains that any public statement by ICAC denouncing particular individuals as corrupt amounts to the imposition of a penalty. That function should be the exclusive preserve of the courts.

Bret Walker SC summed up the concern in 2018:

*"A critical safeguard on the kind of information that an ICAC should be able to give us, in cases of unfavourable findings, is that we should no longer be told that an individual has engaged in corrupt conduct, let alone that he or she has been found to have done so because their conduct involved the commission of a criminal offence.*

*"No other officer or agency briefing a prosecutor or committing a charged person for trial thereby informs the community that the person in question is a criminal. That would be a very serious kind of misinformation in a society still attached, I think, to the notion of a fair trial before conviction."*[40]

The logic of Walker's position is compelling. The sanctity of a fair trial, like the presumption of innocence, are fundamental to the rule of law. While ICAC might consider it important to publicly denounce individuals before they face criminal proceedings, such statements amount to prejudicial pre-trial publicity and should be avoided.

It was once possible to rely upon the passage of time to ease the prejudicial impact of such statements upon potential jurors. But the internet has rendered that impossible.

[40] Bret Walker SC, Whitlam Oration to the Whitlam Institute within the University of Western Sydney, June 5, 2018

Even if ICAC continues to remove particular reports from its website for a period before each trial, other copies would be available on other websites. Media articles based upon such reports would remain available online - potentially forever - at multiple websites, many of which would be beyond the control of publishers. In these circumstances, court-ordered take-down orders are futile.

It is possible for criminal trials in NSW to be conducted by a judge alone, without the assistance of a jury, in order to overcome the possibility that a jury pool has already developed fixed beliefs about a matter. But instead of seeking to alter the procedures of the justice system to accommodate ICAC's desire for publicity, a better option would be to require ICAC to adjust its procedures to accommodate the needs of the justice system.

Once the commission concludes that a matter is so serious that it should be referred to the DPP, it should be required to stop any public inquiry and respect the primacy of the justice system. It should be required to decline to make any statement or issue any report that would traverse issues that could come before a court. Once the commission decides to refer a matter to the DPP it is entirely foreseeable that any public statement about the merits of the matter or any further public testimony would remain online forever where it - or news reports based on that material - would be available to potential jurors.

Less serious matters give rise to different considerations. Public statements and reports about incidents that are not referred to the DPP do not trigger concern about the impact on the potential jury pool. There is no reason why the results of ICAC's investigation of these matters could not be made available on a confidential basis to relevant authorities in the public sector.

It would make little sense to declare in public that each of these less serious matters amounted to corruption, while remaining silent - as it should - about the serious matters that are referred to the DPP. The education of the public about serious wrongdoing takes place when a court decides, after an adversarial hearing that adheres to the rules of evidence, that serious wrongdoing has taken place. Any benefits associated with the public denunciation of those involved in less serious maters would be outweighed by the erosion of the presumption of innocence and the skewed perspective on corruption that would be conveyed to the public.

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This submission does not necessarily represent the views of the Governing Committee of the Rule of Law Institute of Australia