



The Centre for Public Integrity

713 Brunswick St North
Fitzroy North
Victoria 3068
hannah@publicintegrity.org.au
0427 079 729

30 July 2020

To the ICAC Committee,

Thank you for the opportunity to make a submission to the inquiry on *Reputational impact on an individual being adversely named in the ICAC's investigations*.

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, eliminating the undue influence of money in politics and protecting the integrity of accountability institutions.

Recommendations

1. The existing safeguard and remedies are adequate
2. No additional safeguards and remedies are needed
3. An exoneration protocol is not necessary

The value of public inquiries

The debate around reputational impact of corruption inquiries often questions the necessity of public exposure and public inquiries.

The ability to hold public inquiries is crucial to effectively investigate and expose corruption. The value of public inquiries in Royal Commissions and anti-corruption investigations has been recognised by the High Court, by current and former commissioners, and by the outcomes of anti-corruption inquiries themselves.

In 2018, 34 former judges signed an open letter calling for a National Integrity Commission with the ability to hold public hearings.¹

In the Royal Commission into the Builders Labourers Federation (BLF) in the 1980s, the issue of private hearings was raised in the High Court. Chief Justice Anthony Mason stated that an order that a commission proceed in private:

¹ Open Letter on the Establishment of a National Integrity Commission <https://www.tai.org.au/content/34-former-judges-call-pm-national-integrity-commission-now>

... seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive.

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.²

Reputational impact

The committee's discussion paper says that 'the Committee is aware of examples of individuals concerned about reputational impact from being adversely named in the ICAC's investigations' but does not reference or list the examples.

The reports by David Levine and John Nicholson referenced in the discussion paper outline the alleged reputational damage to Margaret Cunneen, Charif Kazal and Murray Kear. The case studies of Charif Kazal and Murray Kear are explored in detail by Anthony Whealy QC below.

The Operation Hale investigation into Margaret Cunneen was cut short because of litigation commenced by Cunneen. The evidence of the investigation has never been examined or assessed on its merit. As the investigation was stopped from proceeding, no adverse findings or any other findings have been made against Margaret Cunneen. As no one has been named in findings by ICAC, no one could be exonerated by any exoneration process.

Reputations trashed? Case studies of Charif Kazal and Murray Kear By Anthony Whealy QC – July 2018

A common outcry by those opposed to the work of state anticorruption bodies, especially in New South Wales, is that they unfairly trash reputations

Given the large number of thoroughly deserved corruption findings in New South Wales over the last 20 years, it is surprising that the critics of ICAC commonly concern themselves with two cases only - Andrew Kelly/Charif Kazal and Murray Kear. A brief consideration of these two matters reveals that the criticism is largely unjustified. It proceeds essentially from a misunderstanding of the role of ICAC and the appropriateness of the methods for uncovering corruption the parliament has placed in the hands of ICAC

² In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

Charif Kazal and Andrew Kelly

This investigation involved the unhealthy relationship between Andrew Kelly, a senior executive of Sydney Harbour Foreshore Authority, and Charif Kazal, a businessman with deep interest in cafe/restaurant premises in the Rocks area in Sydney.

Kelly was found to have acted in conflict with his official duties when dealing with Kazal and members of his family. At the time, Kelly anticipated being involved with the Kazal family in private business overseas. This conflict was never disclosed. Notwithstanding, Kelly continued to deal with matters affecting the Kazal tenancies and this constituted corrupt conduct.

Kazal was found to have acted corruptly by holding out the prospect of overseas employment to Kelly and by paying his airfares and accommodation expenses for a trip to the Arab Emirates in 2007. Kazal did so with the intention that these actions would tend to influence Kelly to exercise his official functions favourably to the business interests of the Kazal family.

ICAC determined that consideration should be given to obtaining the advice of the DPP as to whether Mr Kelly should be prosecuted for misconduct in public office. It did not recommend disciplinary action against Kelly as he had already resigned in 2008.

Kazal's conduct was found to be corrupt in that it could either directly or indirectly affect Mr Kelly's impartial exercise of his official functions. It could also involve corruptly giving an agent a reward in the expectation that favour would be shown to the Kazal interests.

However, with one exception, ICAC did not consider that Kazal's conduct should be referred to the DPP. This was because the witnesses' evidence to ICAC could not be used in any subsequent prosecution. Consequently there was insufficient admissible evidence to prove a charge against him. The exception was a referral to the DPP for a perjury charge relating to one piece of evidence given by Kazal. He had told ICAC he never intended to settle Mr Kelly's accommodation account but an email he had written on 23 May 2007 gave the lie to this statement, in ICAC's view .

Kelly appealed the findings to the Supreme Court arguing jurisdictional points and claiming, for various reasons, that the findings were a nullity. Justice Ian Harrison dismissed the challenge in March 2013. He found that ICAC had not made any errors and had not exceeded its jurisdiction.

In 2015 Kazal complained to Acting Inspector Nicholson concerning the findings made against him. It should be stressed that this was not a legal challenge but a statutory right upon very limited grounds. However, it is fair to say that the content of this report has fuelled Kazal's subsequent vendetta (and that of the Murdoch press) against ICAC.

The Acting Inspector's principal task was to determine whether there have been any misconduct or maladministration by ICAC. He found they had not. This was a clear and unequivocal conclusion.

The Inspector also noted that he had no jurisdiction to examine or contest the facts as found by ICAC. Not with standing, he then proceeded to examine throughout a lengthy report the findings made by ICAC and reached a number of conclusions which were curious in the extreme and simply beyond his jurisdiction. He also made five recommendations to Parliament. His conclusions included:

- The evidence against Kazal, had it been admitted, would not necessarily have led to his conviction, that is it may not have been possible or likely to prove the charge against him beyond reasonable doubt. Because he was not prosecuted, he was denied his day in court and his reputation had as a consequence been unfairly damaged.
- Kazal might have been entitled to take his complaint to the United Nations.
- The ICAC act should be amended in a number of respects and the offence of misconduct in public office should become a statutory offence.
- While he said it was not part of his role to determine whether the decision to hold a public hearing was warranted he then proceeded to do so.
- He recommended that an exoneration protocol should be included in the ICAC act.

The principal criticisms raised by the Acting Inspector display a complete misunderstanding of the ICAC legislation, its purposes and methods. In particular, the criticisms ignore the fact that ICAC investigations are entirely separate from criminal proceedings.

The following observations are also relevant:

- Criminal courts do not operate as a mechanism for a review of ICAC findings.
- Where a person found to have engaged in corrupt conduct is not prosecuted for a criminal offence, this does not exonerate the person.
- Investigations are inquisitorial not adversarial or criminal in their nature.
- Hearings are not trials nor are they committals.
- The ICAC is in effect a standing Royal Commission and its primary function is investigative. It is prohibited from making a finding of criminal guilt. It determines issues on the balance of probabilities, that is, according to the civil standard.
- An important restriction on the compulsion of witnesses to answer questions is if the evidence obtained cannot be used in subsequent criminal proceedings.
- Witnesses who gave evidence to ICAC may not be compellable, may not be available to give evidence in a criminal trial and may not be willing to do so.
- ICAC investigations are not aimed at producing admissible evidence for some anticipated criminal trial. If this were the case, it would fatally compromise ICAC's capacity to expose corruption.
- A finding of corrupt conduct e.g. a disciplinary offence, may involve no criminal offence at all.

It is important to note that Acting Inspector Nicholson was replaced by the greatly experienced senior counsel Bruce McLintock and that he has acted as full time inspector since 2017. The government has not embraced any of the Nicholson recommendations and neither they nor his general conclusions on factual matters have been adopted by Inspector McLintock.

Murray Kear

On 14th May 2013, Murray Kear, Commissioner of SES, dismissed Tara McCarthy from her position as a Deputy Commissioner. She claimed her dismissal was because she had made reports to Kear that another Deputy Commissioner, Pearce, may have engaged in corrupt conduct. Pearce was a good friend and 'mate' of Kear.

ICAC made two findings against Kear:

Firstly, that McCarthy had been dismissed as a reprisal for making complaints against Pearce. This finding could result in criminal proceedings against Kear for breaching section 20 of the Public Interest Disclosure Act.

Secondly, ICAC found that Kear had failed to properly investigate reasonably based allegations that McCarthy had raised against Pearce.

These included:

- (1) Entry into two valuable contracts which had considerably disadvantaged SES.
- (2) Inappropriate use of corporate credit card to purchase \$684 worth of personal goods for Pearce's vehicle.
- (3) A potential falsification of diary entries by Pearce.

ICAC found that Kear had failed to appropriately manage Pearce in relation to all these matters; that Kear was unduly influenced by his friendship with Pearce and failed to recognise a serious conflict of interest, arising out of his friendship with Pearce. This second finding provided grounds for disciplinary proceedings for Kear's dismissal. However, Kear resigned so dismissal proceedings were never instituted.

The DPP determined to prosecute Kear for an offence under section 20 PID Act - **A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.** A defence is available if the defendant can prove that the dismissal was not **substantially** in reprisal for the person making the disclosure.

The case was heard on the Local Court and in March 2016 Magistrate Grogin found that there was "no element of revenge payback or reprisal" in Kear's dismissal of Tara McCarthy. Kear had made out his defence and the charge was dismissed. Since the dismissal the Australian newspaper, and Chris Merritt in particular, have railed against ICAC proclaiming that an innocent man had been vilified by ICAC.

This reaction fails to appreciate the role of ICAC and the nature of its jurisdiction. The comments made earlier in relation to the Nicholson report apply equally here. In particular:

- It is a matter for the DPP to determine whether criminal proceedings should be brought following an ICAC Hearing.
- It is the role of the DPP to secure a conviction and ICAC plays no part.
- Where a person is found 'not guilty', this does not mean he is innocent or that he has been exonerated. It simply means that the Crown has not been able to prove its case beyond reasonable doubt.
- In the present matter Kear was able to take advantage of a statutory defence to Whistle-blower proceedings. This defence has been criticised by academics and lawyers as being too favourable to employers. Whistle-blowers are often notoriously unpopular with other employees and too often, unfairly branded as 'trouble-makers'.

In June 2018 Inspector McClintock provided a report to the NSW Parliament. He expressed very serious doubts about the fact-finding and reasoning of Magistrate Grogin.

"He does not seem to have understood this relatively obvious point.... had he done so, I doubt he would have acquitted Kear". He emphatically concluded that there was a reasonable basis for the prosecution against Kear.

The final point is this: critics of ICAC have overlooked that there was a second serious finding made against Kear and, had he not resigned, this would have certainly led to his dismissal.

The Centre for Public Integrity would be happy to provide the committee with further information on this or other relevant points.

Warm regards,

A handwritten signature in blue ink, appearing to read 'H. Aulby', is centered within a light gray rectangular box.

Han Aulby
Executive Director
The Centre for Public Integrity
hannah@publicintegrity.org.au
0427 079 729