ICAC
LIVING IN AN IMPERFECT WORLD[1]

Brian Toohey[2]
Journalist and Newspaper Editor

The Independent Commission Against Corruption is learning the hard way about how Australian society works. If it had confined its activities to investigating crooked cops profiting from the illegal drug trade, interspersed with occasional forays against driving inspectors who might be "on the take", I expect it would now be basking in the glow of almost universal approval. But it has strayed into the prickly world of influence peddling on behalf of property developers and is now facing a barrage of vocal opposition.

ICAC still commands strong popular support but has now entered a difficult phase in which its manner of operation could be subject to significant review. This is no bad thing of itself. Australians are far too complacent about the protection of individual rights and it will not hurt for ICAC to have to justify itself. At the end of the process, however, it would be a pity if the only lesson it learns is that going after high level corruption is not really worth the candle.

As we look back on the 1980s I doubt if you could really say that the leading figures in our business, political and opinion moulding circles are so deeply offended by lapses in ethical standards. Self regulation could hardly have said to have been a resounding success. Nor did I notice any conspicuous curbs on various abuses from a policy based on relying solely on the police and the courts. Of course, now that the 'cowboys' have got so out of hand that our international financial reputation comes under threat, there are calls for a restoration of 'standards'. If we actually get the sort of national corporate watchdog "with real teeth" now being demanded by some business leaders, and it genuinely starts to look at the complex skein of cronyism, campaign donations, kickbacks and insider trading that characterise many high level deals in this country, it will not be long before it is accused of trampling on a whole range of fundamental liberties that are routinely ignored in the case of those who lack power and money.

The rich and the powerful are as entitled as any other citizens to the protection of "due process" in investigations undertaken by bodies that have been granted intrusive powers. Unfortunately, in Australia the focus on these protections really only seems to come to the fore when organisations such as ICAC look like lifting a tiny corner of the veil that shields the way those with political influence, such as some property developers, actually operate.

I certainly agree that reputations should not be lightly damaged. Too often media barons such as Rupert Murdoch, particularly in his trashy British papers, allow editors to

---

1 Paper delivered at a public seminar entitled "ICAC: Lessons From the First Twelve Months", convened by the Institute of Criminology at Sydney University Law School, 29 August 1990.

2 The author is editor of *The Eye* magazine.

trample all over the reputations of innocent people who are, in effect, powerless to seek redress.

But worse things can happen to you than to have your reputation harmed. In many parts of the globe you can starve to death, or be tortured to death, you may never learn to read or write, you can be press ganged to serve as a boy soldier in some crazy Middle East war and die of nerve gas poisoning.

In Australia, you can be an innocent person shot dead in a police raid in Redfern, or locked up for several years for a murder you never committed as happened in the early 80s to a hapless Aborigine in Mt Isa. In this case the much vaunted court system managed to incarcerate someone who was already in police custody at the time the murder was committed on the streets of Mt Isa. You can be also arrested for rapes you clearly could not have committed, as happened to Harry Blackburn, and when a straight cop tries to demonstrate this is the case, his career can be wrecked by the "White Knights" of the Force.

In the Australian Capital Territory, it seems the Federal Police can repeatedly harass a murder suspect, saying openly in an Inquest that the right of silence should not apply to this particular person, and no one intervenes to call a halt, not least of all Labor political figures who are so worried about the alleged excesses of ICAC.

Throughout Australia, secret hearings (which I note are much favoured by some civil libertarians) can be used to conceal an overzealous use of power — recently, the National Crime Authority threatened to jail journalists at *Four Corners* if they even revealed who had been summoned before the Authority, let alone the content of what was said.

If you are subject to wrong, but damaging, assessments from your superiors within the public service, the police force, or the private sector, you can easily be left helpless. Astonishingly enough, a Supreme Court Judge in New South Wales recently threatened to jail a public servant if he took action to defend himself against efforts to sack him which were revealed on a video. The Judge gave over-riding priority to claims that the video should be confidential, preventing the public servant (Sanford) from seeking redress in the Industrial Relations Commission or elsewhere.

In contrast, if you can afford to convince a jury that your reputation has been damaged by the media you might collect $50,000 or $500,000 depending on the luck of the draw.

On the other hand, if your reputation in harmed in a privileged forum such as parliament, a court, or an inquest, often you have to cop it on the chin. During the Inquest into the death of Sally Anne Huckstepp, for example, Detective Sergeant Roger Rogerson at the end of his evidence was asked by Counsel Assisting if there was anything else he might like to say. As a matter of fact there was. He would just like to say — experienced detective that he was — that Wendy Bacon had murdered Ms Huckstepp following disappointment in a lesbian love affair. There was not so much as a peep out of the

Counsel Assisting or out of the Coroner. Radio news bulletins led with the story that evidence had been given in the Inquest that Wendy Bacon was the murderer.

In my absence, I have been effectively branded a traitor in late night sittings of the High Court of Australia without any opportunity to contest the unsubstantiated accusations of the QC appearing for a government seeking, and being granted, an *ex parte* injunction about something I never had any intention of publishing. The "evidence", accepted without question by His Honour, was one person's account of what a second person had said a third person had said at a well lubricated dinner party that I had said some weeks earlier. (I didn't, and the government eventually accepted this in a settlement.)

I canvass these matters merely to point out that ICAC is not the only place in which you can be bad mouthed and that, when it comes to a question of protecting reputations, courts are not the angelic places some would have us believe. All sorts of damaging accusations are bandied about by the prosecution in initial addresses, or in bail applications, which never get tested in the course of the trial. Similar considerations can apply to unsworn statements from the dock.

None of which is to say that ICAC should not be extremely careful to avoid unwarranted damage to people's reputations. I say "unwarranted", because not everyone is entitled to a good reputation even if they have not been convicted of a crime in a court of law. For some reason, some people seem to believe that nothing adverse should ever be said about anyone unless they have been convicted of a crime. In fact, much of the adverse publicity attracted by people subjected to scrutiny by Royal Commissions, or ICAC, comes from their own mouth. In the Fitzgerald Commission, for example, an Assistant Police Commissioner announced that he was corrupt. No doubt this damaged his reputation, but I don't think this damage is a matter for regret even though he will never be convicted on any crime.

In ICAC, several witnesses have admitted to wrongdoing that was damaging to their reputations. Some were exposed as liars by their own admissions. Many will never go to trial but this is no reason for their reputations not to be harmed by what they said about their own behaviour in the course of their own evidence.

Often improper behaviour by people in positions of public trust does not constitute a breach of the criminal law. But this is no reason why such behaviour should not be subjected to public censure. The fact that a former Queensland Premier accepted large amounts of cash in paper bags and claimed not to know the identity of the donor, for example, may not be a breach of the criminal law but could still reasonably be considered something deserving matter for adverse comment by a Royal Commissioner.

The calls for the abolition of bodies such as ICAC, and a return to reliance on the system in which the police and courts alone are responsible for combating corruption and malpractice, ignores the manifest failure of this process in the past. Under the Wran government, for example, a demonstrably unsuitable Chief Magistrate had his term of office extended. The old system did nothing to stop his advancement until a TV programme turned on the spotlight. A demonstrably corrupt Prisons Minister was allowed

to collect bribes hand over fist until one newspaper finally blew the whistle. In Queensland the police force was riddled with corruption at extremely senior levels. Reliance on the courts and on that same police force did nothing to stop the rot that was allowed to spread for decades.

I readily agree that courts should be the only places where people are convicted of a criminal offence and face a jail sentence. But to suggest, as some do, that courts should be the only place where someone's reputation may legitimately be damaged is to confuse the role of the criminal justice system. Criminal courts are about determining if a criminal offence exists. With a jail sentence possible, something more than a good reputation is at stake.

But there is no reason why properly controlled bodies such as Royal Commission, ICAC, and the Criminal Justice Commission in Queensland should not hold hearings, and make findings, that have the potential to harm reputations where reputations deserve to be harmed. This is not the same thing as finding that someone is guilty of a criminal offence. Often conduct that stops short of a criminal offence will be subject to adverse comment. In most cases the evidence used would be admissible in courts.

But, as Adrian Roden QC notes in his ICAC Report on North Coast Land Development:

> The rules that apply in our courts are not designed to ferret out the truth ... (Sometimes) it is felt that it is more important to get to the truth, than simply pursue offenders. Disclosure and control are the main goals, rather than conviction and punishment.

The media may need constant guidance and admonition to ensure that unsubstantiated allegations are reported as such, although I have seen far more sensationalised accounts of what is said in parliament and other privileged forums than in ICAC. Harm to reputations will normally be the result of the force of the evidence gathered by the Commission's investigations and the result of its being put to the person in question. If the evidence does not stand up, this will usually be established in the rebuttal presented by the person under investigation and reinforced by the subsequent findings of the Commissioner.

Obviously, the Commissioner needs sufficient intellect and sense of fairness to draw the right conclusions from the evidence. For this reason, it is important that the Commissioner's findings can be tested against what has been put on the public record. Although there may be a limited case for occasional confidential hearings, perhaps to sift out wild allegations or protect endangered sources, the public hearing process allows public confidence in bodies such as ICAC to grow or diminish in accordance with the degree of fairness and competence shown. In every case, persons subjected to adverse evidence should be given the chance to rebut it. As well, Commissioners need to ensure that the focus remains on the issue under investigation and that witnesses do not spray accusations all over the place.

Compared to other bodies, ICAC has a good record in this regard. The one serious lapse of which I am aware concerns the evidence given by the Deputy Police

Commissioner, Tony Lauer, in the Hakim enquiry. The Commission had trouble with a number of senior police officers, all supposed "White Knights", making unsubstantiated accusations under privilege. Lauer claimed that John Wells, the then press secretary of the Federal Opposition Leader, as well as being an associate of criminals was involved in a deep conspiracy with Hakim. However, Lauer had the wrong John Wells and did not produce a jot of proof of any conspiracy. Similarly, Bob Bottom made a number of loose accusations in order to support the "White Knights" at ICAC.

As far as I am aware, ICAC has done nothing to ensure that Lauer publicly, and handsomely, withdraws his slur on Wells. Bottom was not given quite as much leeway as Lauer, but there are some matters he too should be made to correct. Both should be recalled to ICAC and made to apologise. In passing, I should add that I agree with Commissioner Temby's decision in this case to apply criminal standards of proof in coming to the conclusion that Lauer and his colleagues had not loaded Hakim up with heroin even though the later had been warned of their raid, giving him ample time to get rid of any heroin that could be found in his coat pocket.

Australians have long accepted the role of Royal Commissions in investigating, and making findings, about issues that the traditional police/court nexus has proved unable to handle satisfactorily. The inroads made by corruption in New South Wales and Queensland led to strong public support for permanent bodies to be set up to carry out these sort of investigations.

The ICAC model of confining investigations to discrete topics, and reporting the findings within a relatively short time span, seems to be preferable to inquiries such as Fitzerald's which spread in many directions then wound up leaving the great bulk of the evidence unresolved. (I have given detailed examples elsewhere of the inequities that arose from Fitzgerald's failure to make findings as required under the *Act*.[3])

Bodies such as ICAC are not supposed to be courts. They are not asked to make findings of criminal conduct — quite properly that should be left to courts. But I can see nothing wrong with undertaking investigations, conducting hearings, and making findings. It is what Royal Commissions have done for decades. Most conclusions will not impinge of whether a criminal offence might have been committed. However, I cannot see that a finding that prosecution authorities should examine particular matter is different from such a finding by a Royal Commission or, for that matter, any more damaging than an adverse decision arising from committal proceedings in the courts.

Often, of course, ICAC findings will have nothing to do with individuals and instead refer to recommended changes in the law or in administrative practices to reduce the chances of corruption. Its recommendations on political donations, I suggest, would help remove understandable public concern that the present system breeds the potential for buying influence.

3 Toohey, Brian *Corruption and Reform: The Fitzgerald Vision* (1990)

When it comes to individuals, I can see no particular reason why a recommendation from ICAC to refer matters to prosecuting authorities to see if charges are warranted should unduly prejudice the ability of a jury, much further down the track, to concentrate on the evidence before it. In the end, however, I don't place a high priority on people going to jail. If it comes to a choice, I would prefer that ICAC retains the ability to inform the public about corrupt activities in our society rather than maximise its chance of locking someone up. Provided the information presented in its reports is accurate, and this can be tested against the evidence I'm not sure that it matters greatly if those who have engaged in what is clearly defined as improper or corrupt conduct lose some of the shine off their reputations.

We live in an imperfect world. Some people will always be tempted to engage in corrupt behaviour. Equally, some people will always be tempted to abuse powers given to them to expose the corrupt. The solution is not to give virtual free rein to the former by abolishing the latter. It should be possible for ICAC to put a brake on corrupt behaviour while remaining sensitive to the basic rights of the individual. The checks and balances on ICAC's own, necessarily, imperfect behaviour would seem to be at least as effective as those applying to many other powerful bodies in our society. To ensure continued scrutiny, however, its activities should remain as open as possible.