'Ian Macdonald, Eddie Obeid, Moses Obeid and the Presumption of Innocence'

The Samuel Griffith Society, Monday 26 July 2021

Chris Merritt[1]

After last week's[2] decision by the NSW Supreme Court,[3] it might seem incongruous to be discussing the presumption of innocence in relation to former NSW ministers Ian Macdonald, Eddie Obeid and Obeid's son Moses. Justice Elizabeth Fullerton decided that all three are guilty of a conspiracy in which it was agreed that Macdonald would engage in misconduct in public office.

So unless there is an appeal that overturns that verdict, there is nothing to presume: all three have been found guilty after a trial whose fairness has not been questioned.

It is however worth considering what has happened in this case because it highlights a structural flaw that had the effect of forcing the judge to delay the case and abandon her plan for a jury trial.

The starting point for such a trial is that the onus rests with the prosecution to overturn the presumption of innocence by proving guilt beyond reasonable doubt before an unbiased decision maker.

However Justice Fullerton was confronted with public statements by the media and senior political figures that, unless addressed, could have threatened the fairness of the trial by influencing jurors. The blame, however, should not rest entirely with the media and politicians.

Much of the threat to the fairness of this trial can be traced back to the adverse consequences of the NSW parliament giving less weight to the interests of criminal justice than it gives to publicising the work of its anti-corruption commission.

The NSW parliament has given the Independent Commission Against Corruption a statutory instruction that has the effect of encouraging it to publicise its activities through public hearings and public reports. It has not, however, provided a statutory instruction to ensure that this does not undermine the fairness of foreseeable criminal proceedings.

The commission therefore was doing what it was told when it conducted sensational public hearings in 2012 and 2013 at which Macdonald and the Obeids were accused of wrongdoing and referred to the Office of the Director of Public Prosecutions.

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[1] *Chris Merritt is vice-president of the Rule of Law Institute of Australia* and Rule of Law Education Centre

[2] July 19, 2021

[3] R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 17) [2021] NSWSC 858

That referral shows that ICAC knew criminal proceedings were likely. But the same ICAC report[4] that mentions the referral also outlines the accusations that formed the basis for much of the adverse pre-trial publicity that so concerned Justice Fullerton.

The assertions of wrongdoing that were made at that ICAC inquiry were republished on Twitter six years later by a leading journalist just days before a jury had been due to be empanelled.[5]

This was one of the factors in what Justice Fullerton described as a "journalistic frenzy"[6] that persuaded her to impose a stay on proceedings in order to protect the fairness of the trial.

ICAC's 2013 public hearing was the source of much of the adverse pre-trial publicity that led to this delay. But it was not the only factor.

Eddie Obeid and Macdonald, both former Labor ministers, had been to prison on unrelated matters and at the time of the stay order ICAC was running an unrelated inquiry into corruption inside the NSW Labor Party.

So when politicians and the media conflated all that, they gave new life to the original report about Macdonald and the Obeids. Fullerton feared the pending jury trial might be derailed.

In retrospect, the way the media and certain politicians conducted themselves in the lead up to this trial is best described as unwise. But they should not take all the blame.

Consider the role of ICAC.

Most lawyers would be aware that this commission is not a court. It is a standing royal commission whose findings have the status of unproven accusations. The rules of evidence do not apply and the merits of its findings are not subject to appeal.

But because it adopts the outward appearance of a court, as well as the formalities of a court, many in the media have mistakenly treated its reports with unearned deference.

That, inevitably, helps shape community perceptions about those it considers to be corrupt - which is exactly the outcome that ICAC is under statutory instruction to achieve.[7]

To put this in perspective, try to imagine a situation in which police are told by parliament to abandon the rules of evidence and open their interview rooms to the media in order to make the community aware of what the police consider to be wrongdoing.

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[4] Investigation into the Conduct of Ian Macdonald, Edward Obeid senior, Moses Obeid and others, ("The Jasper report"), Independent Commission Against Corruption, July 2013
[5] R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 8) [2019] NSWSC 1915, paragraphs 32 to 34
[6] R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 8), ibid, at paragraph 59
[7] ICAC's principal objects, as set down in section 2A(a)(ii) of the Independent Commission Against Corruption Act require the commission to "educate" the public about corruption

To ensure the views of police are taken to heart, imagine if parliament provided no way of testing the merits of police reports, required the police to publicise the results of their investigations and tabled them in parliament.

And then try to imagine the impact this would have on potential jurors. That is how ICAC operates.

The commission's power to hold public hearings is contained in section 31(2) of the ICAC Act. This has the effect of requiring the commission to balance the public interest in exposing corruption against the public interest in the privacy of those concerned as well as any undue prejudice to their reputations.

Nowhere in this provision is there any mention of the one factor that should take priority. It does not require ICAC to take account of the possible adverse impact on future jury trials.

Instead, the decision-making process set down in section 31(2) is essentially a balance between exposing corruption and protecting the privacy and reputation of individuals - that is, corrupt individuals.

It's not much of a balance.

In practice, the impact on future trials does not seem to figure in the commission's thinking on when to hold a public hearing. Instead, it seems more interested in its own goal of exposing wrongdoers.

This can be seen in the report on Macdonald and the Obeids that was prepared by former ICAC Commissioner, the late David Ipp. That report, from the inquiry known as Operation Jasper, explains why a public hearing was considered appropriate. It says:

> *"The Commission concluded that the seriousness of the allegations, and the public interest in identifying the facts of what had occurred and exposing any corrupt conduct, outweighed the public interest in preserving the privacy of the persons concerned."*[8]

When Commissioner Ipp wrote those words it was foreseeable that his findings of wrongdoing might well result in a jury trial. Yet the impact of prejudicial publicity on the fairness of subsequent judicial proceedings is not a factor in section 31(2). He was not required to take that into account.

So how did this play out?

Justice Fullerton's judgement of July 19 concerned events that took place up to 14 years ago[9] and had been made known to ICAC ten years ago. The commission received a tip off in February, 2011,[10] and did not produce its Jasper report until July, 2013.

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[8] The Jasper report, ibid; page 14
[9] The Crown indictment that is reproduced in Justice Fullerton's judgement, ibid, at paragraph 3 accused Macdonald and the Obeids of conspiring "between about 1 September 2007 and about 31 January 2009".
[10] Jasper report, ibid, page 12

The prosecutors at the Office of the Director of Public Prosecutions did not produce an indictment until four years after that.[11] To be fair to the prosecutors, once they received ICAC's brief, they effectively needed to start again - checking that everything had been properly obtained.

The prosecutors, unlike ICAC, needed to prepare a case that complied with the rules of evidence.

In 2019, as pre-trial hearings were under way, there was a wave of prejudicial public discussion about the Obeids and Macdonald. This led to the judge taking increasingly strong measures to protect the integrity of what she clearly hoped would be a jury trial.

First there was a suppression order, then she asked the media to take down stories from the internet about ICAC and Moses Obeid and finally, after pushing back this long-delayed trial for another five months,[12] the adverse publicity had not abated so she presided without the assistance of a jury.[13]

The question to consider is whether those measures would have been necessary had ICAC been required to give priority to criminal justice instead of publicising its own efforts.

Such a change in priorities could have required ICAC to give the DPP its files on the Obeids and Macdonald as soon as it had enough material to show that serious misconduct had taken place.

It might also have required the commission to truncate or even forego a public hearing in order to ease the risk of undue influence on a future jury and allow an indictment to be prepared sooner.

In a rational world, it is difficult to see why publicising unproven accusations was considered a higher priority than bringing Macdonald and the Obeids before a court. Yet that is how the system works in NSW.

ICAC's statutory duty under section 31(2) to expose corruption sounds admirable, but it is no less admirable than the goal of exposing homicide or sexual assault.

And this case shows that it can come at a cost - both in delays in bringing these men to court, and the risk that the lasting impact of publicity generated by ICAC could help undermine the fairness of a jury trial.

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[11] Fullerton J's judgement, ibid, paragraph 2

[12] On September 23, 2019, the NSW Supreme Curt issued a statement to selected media outlets that says in part:

"On 23 September 2019, Fullerton J published reasons for the grant of a temporary stay of the joint trial of Mr Moses Obeid, Mr Ian Macdonald and Mr Edward Obeid until 3 February 2020 (R v Moses Obeid; R v Macdonald; R v Edward Obeid (No 8).

"That judgment, along with the preceding seven judgments also the subject of various pre-trial applications, is the subject of suppression orders made under the Court Suppression and Non-publication Orders Act 2010 (NSW) on 16 September 2019. . .".

[13] R v Macdonald; R v Edward Obeib; R v Moses Obeid (No 9) [2019] NSWSC 1785

Those costs need to be weighed against the benefits of the commission's public hearings.

It needs to be kept in mind that public hearings are generally preceded by secret private hearings where the key issues are covered. This was apparent when premier Gladys Berejiklian was brought before a public hearing in October, 2020, and asked about her private life. The transcript shows she made the point several times that many of the commission's questions had been asked and answered in an earlier private hearing.[14]

This means there is at least some degree of duplication between the commission's private and public hearings.

There can be no doubt that the public hearings and report in the Macdonald and Obeids case had a lasting impact. But the issue is whether the justice system should be required to bear the cost of dealing with that impact.

Consider what happened during the pre-trial hearings.

On March 19 of 2019, Moses Obeid asked Justice Fullerton to delay the trial until media outlets - including Google and Yahoo - had removed information on the internet concerning ICAC and himself.

Had Fullerton agreed, it would have embroiled the judge in a dispute with all the organisations named in Moses Obeid's notice of motion - The Sydney Morning Herald, The Daily Telegraph, The Australian - as well as what he referred to as "other newspapers and media outlets".

On April 1 of that year, media lawyer Peter Bartlett of Minter Ellison - who has advised The Age for decades told me that if this order were granted, the media would appeal. He made the point that such an order would have little utility, given the nature of the internet and would impose unnecessary costs.

Fullerton had already expressed doubts about whether her court had jurisdiction to order Google and Yahoo to comply with the proposed orders. She was however clearly concerned about what had been reported in the past about the Obeids and ICAC.

So instead of issuing an order, she had lawyers from the Office of the DPP write to media outlets with a request, not an order. That letter was signed by Huw Baker SC, who was acting deputy director of Public Prosecutions, and was sent to the media on April 12, 2019.

It points out that the judge had issued a suppression order on April 3 - two days after Moses Obeid's notice of motion - covering any evidence in the forthcoming trial and any information concerning the evidence. It then says:

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[14] ICAC public hearing, Operation Keppel, October 12, 2020, page 1361T
The transcript shows that Berejiklian was able to refer to the earlier compulsory examination because the commission lifted a suppression order covering her earlier secret evidence

> *"Justice Fullerton has asked the Director to write to the media to request that 'in the context of the pending trial, that any historical references to the circumstances in which Moses Obeid came to be charged and implicated in the alleged conspiracy [be taken down]'. Justice Fullerton further indicated that the purpose of the request is to ensure that pre-trial publicity 'does not adversely impact upon Moses Obeid's rights at trial.'[Emphasis added]*

What happened next must have driven Justice Fullerton to distraction. On September 30, 2019, a jury had been due to be empanelled, but with just a week to go the judge found it necessary, on September 23, to stay the proceedings until February 3, 2020, because of prejudicial publicity.[15]

That meant the case would not come on for trial until thirteen years after the conduct that gave rise to a criminal conspiracy involving two former NSW ministers.

As soon as that stay was ordered, the judge imposed a suppression order so only the barest details could be reported based on a statement that was issued by the Supreme Court, not the judgement itself. But that judgement, the eighth in a series of interlocutory rulings involving Macdonald and the Obeids, has now been published on the Supreme Court's website. It is well worth a read.

It reveals a level of frustration not just with what Justice Fullerton described as "journalistic frenzy" but with contemporary remarks about Macdonald and the Obeids that had been made by premier Gladys Berejiklian and prime minister Scott Morrison.

The Sydney Morning Herald was described as "grossly irresponsible"[16] for publishing an extract of a book by Kate McClymont that referred adversely to Eddie Obeid's past conduct and which described him as the "architect of the era of skulduggery" in the Labor Party.

That extract was published in the Good Weekend magazine on September 14[17] which was sixteen days before the jury had been due to be empanelled on September 30.

On August 30 of that year, one month before the trial had been due to start, Fullerton's judgement shows McClymont had tweeted a link to one of her stories from six years earlier about accusations against the Obeids that emerged at the 2013 ICAC[18] inquiry. Part of that 2013 article, which was reproduced by the judge, refers to an accusation the Obeids had secured a "$60 million windfall". Fullerton's final judgement shows this was an issue in the conspiracy trial.

The judge reserved her strongest criticism for Berejiklian and Morrison who had made separate remarks about Eddie Obeid and Ian Macdonald just weeks before the trial had been due to start.

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[15] R v Moses Obeid: R v Macdonald; R v Edward Obeid (No 8), ibid.
[16] R v Moses Obeid: R v Macdonald; R v Edward Obeid (No 8), ibid, paragraph 36
[17] R v Moses Obeid: R v Macdonald; R v Edward Obeid (No 8), ibid, paragraph 35
[18] R v Moses Obeid: R v Macdonald; R v Edward Obeid (No 8), ibid, paragraphs 32 to 34

But for the suppression order, the repercussions from the judge's criticism of the premier and the prime minister would almost certainly have generated even more adverse coverage of Macdonald and the Obeids. This is what she said:

> *"Neither the premier of NSW nor the prime minister of Australia is properly to be regarded as simply a politician whose views might not be deferred to. To the contrary their views might be thought to carry weight even if expressed in the context of party political rhetoric. . .*
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> *"Were I persuaded (and I am not) that the Prime Minister of Australia or the Premier of NSW made the remarks attributed to them aware that the criminal trial of Edward Obeid and Mr Macdonald was pending on a charge that alleged an agreement between them that Mr Macdonald would wilfully misconduct himself in public office with the intention of benefiting Edward Obeid and his family (including in that connection his son Moses Obeid), that conduct would be, at the very least, reprehensible given the obvious potential of those remarks to undermine the right of the accused to a fair trial according to law.*[19] *[Emphasis added]*

There are two main difficulties with the NSW approach to ICAC: the first is that it appears to assume this commission will never make a mistake and there is, therefore, no need to provide a merits review mechanism. To that extent, ICAC is presumed to be infallible.

The second difficulty concerns the presumption of innocence, and this is the more egregious. If a narrow view is taken, such as that in Article 11 of the Universal Declaration of Human Rights, the presumption is confined to criminal proceedings. But the Universal Declaration has only existed since 1948. It is not the source of this doctrine and is merely declaratory of an idea that was already part of the history, culture and common law inheritance of this country: the fair go.

Nicholas Cowdery, who is a former DPP in NSW, has argued that Magna Carta, sealed in 1215, provided inspiration and support for progressive development in governance worldwide - including the presumption of innocence, equality before the law and due process.[20] In 2015, Cowdery endorsed the view of Sir Gerard Brennan, a former Chief Justice of Australia, that Magna Carta lives in the hearts and minds of the Australian people and is a set of ideas that had been brought to Australia with the first English settlers. "In the English common law system, it is the touchstone of the rule of law," Cowdery wrote.[21]

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[19] R v Moses Obeid: R v Macdonald; R v Edward Obeid (No 8), ibid, paragraphs 57 and 59
[20] Nicholas Cowdery; Magna Carta: 800 Years Young, in The Magna Carta in Australia, Celebrating the 800th Anniversary of the Granting of the Magna Carta, edited by Robin Speed; The Rule of Law Institute, 2016, page 34
[21] Nicholas Cowdery, Magna Carta: Its History and Enduring Relevance, the Sixth Sir Harry Gibbs Memorial Oration, in Upholding the Australian Constitution, Proceedings of the Samuel Griffith Society, Volume 27, August, 2015

Bret Walker SC explained the concept at a recent online conference run by the Rule of Law Education Centre. He gave the example of those facing criminal prosecution who had the benefit of the presumption of innocence but were not entitled to be regarded by others such as prosecutors as being in fact innocent.

> *"In short the presumption of innocence involves an open mind about the outcome of a trial but not the magical thinking that says that until a person is convicted they were innocent and should never have been tried.*
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> *"Guilt of a crime in our society at least is only ever of conduct that was criminal at the time it was committed. And you have been guilty, as a matter of English, since you committed the offence.*
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> *"So I would very much like to see the presumption of innocence understood as being a cardinal principal of the fairness and propriety and decency of the criminal system that calls for accusations to be made good rather than defences to be demonstrated.*
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> *"But I would very much like it to be banished from discourse concerning people who are the objects of criminal process. They are presumed innocent. It doesn't mean they are innocent."*[22]

There is another view that the presumption of innocence applies generally, not just in criminal cases, and requires those making an assertion to discharge the onus of proving their case. But on either view the starting point in criminal justice is that a fair trial takes place in a court, not a commission, and requires the prosecution to prove guilt beyond reasonable doubt before an impartial decision maker.

In our system of justice punishments can only be imposed by courts, not commissions. And people come before courts in the expectation that their conduct will be judged according to law by an impartial tribunal. But in NSW, it is becoming clear that ICAC has been empowered by the state to punish people it considers to be corrupt by damaging their reputation and "educating" the community to accept its view. That, necessarily, means that if ICAC succeeds in discharging this statutory responsibility those who form juries in corruption cases will have been subjected to this educational process. That cannot be a positive development for the presumption of innocence.

It took a public statement by Lloyd Babb SC, the current DPP in NSW, to ensure the true nature of this commission could no longer be denied. Babb was refreshingly frank in July, 2020, when he made a formal submission to a parliamentary committee that says parliament intended ICAC's findings to have an adverse impact on the reputation and lives of the people concerned. He accepted that this was a punishment:

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[22] Address by Bret Walker SC at a conference on The Presumption of Guilt, hosted by the Rule of Law Education Centre, June 15, 2021. A video of Walker's address is available at www.ruleoflaw.org.au

An adverse finding can have significant effects on a person's reputation and life. Such effect was clearly intended by parliament both as a deterrent and a form of punishment for undesirable conduct in the public sphere. Any reputational impact is a necessary and intended consequence of ICAC exercising its functions to expose and prevent corruption in the NSW public service."[23] *[Emphasis added]*

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[23] Lloyd Babb SC, NSW Director of Public Prosecutions, submission to an inquiry by the NSW Parliamentary Committee on ICAC into the Reputational Impact of an Individual Being Adversely Named in the ICAC's Investigations; July 30, 2020; paragraph (g)