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Gladys Berejiklian proof that ICAC public hearings are a disgrace that must stop

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By **CHRIS MERRITT**,
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This week's public humiliation of Gladys Berejiklian marks a turning point. The Independent Commission Against Corruption has disgraced itself. It has behaved like a peeping Tom that gets its jollies by prying into a woman's relationship with her boyfriend, quizzing her about what she meant by particular terms of endearment and leaving her vulnerable to ridicule.

None of that should have happened in public. This agency has overstepped the mark and removed all doubt that the law governing public hearings needs to change.

Politically, Berejiklian is damaged goods. Whether ICAC has killed her career is still unknown. But it is clear it cannot be trusted to conduct public hearings — regardless of the final fate of the NSW Premier.

What ICAC did to her was not an investigation, it was a medieval public shaming. Much of the information to emerge from the inquisition into her private life was already known to the agency. In August, she was subjected to a secret compulsory examination that covered much the same ground. This is apparent from the transcript of the public hearing where she repeatedly points out that certain matters had already been discussed at the private hearing.

At one stage this was recognised by ICAC's counsel assisting, Scott Robertson, who said: "So you're drawing attention to the fact that I showed you the messages that are now on the screen during your compulsory examination on 16 August, 2020?"

Later, the Premier reminds Robertson that "you brought that matter to my attention during the private hearing" and later still "well, not to my specific recollection, but you brought that to my

recollection recently, during the private hearing".

What happened this week shows that the shift to a three-commissioner model and several tranches of statutory changes have not altered the culture of ICAC. It remains little changed from the days of zealous self-righteousness under former commissioner Megan Latham.

Remember her? She was the one who said examining witnesses at public hearings was like pulling the wings off butterflies "and it's a lot of fun".

This agency was right to investigate whether the NSW Premier had turned a blind eye to the dodgy conduct of her then boyfriend, former politician Daryl Maguire. It was also right to require her to attend a secret compulsory examination. This, by the way, is where she would have learned that ICAC had been eavesdropping for years on their telephone conversations.

That private hearing was appropriate but should never have been followed by a public hearing. This is because ICAC appears to be working on a case theory in which the personal relationship of the Premier and her boyfriend was inextricably linked to the question of whether this led her to remaining silent about improper conduct — an accusation Berejiklian denies.

That meant it would have been impossible to pursue ICAC's case theory without also delving into the nature of the relationship with Maguire and trampling on her privacy. That was not a problem so long as it was done behind closed doors.

Going public was entirely different. It meant dealing with a provision that had been inserted into the ICAC Act with the intention of forcing the commission to consider privacy and reputational damage before deciding to hold a public hearing.

Section 31 of the ICAC Act says it can only hold public hearings after considering several factors including whether the public interest in exposing certain conduct "is outweighed by the public interest in preserving the privacy of the persons concerned". Another factor that must be considered is "any risk of undue prejudice to a person's reputation". What happened this week shows those provisions are worthless. The Premier's privacy and the risk of reputational damage should have been given substantial weight.

Another factor weighing against holding a public hearing was the reality that much of the ground had already been covered at the private hearing. Weighing against that, however, was ICAC's desire for publicity.

One of the curious aspects of this affair is that ICAC decided to subject Berejiklian to this while the NSW parliament's ICAC oversight committee is considering a reform strongly opposed by the commission.

That committee recently conducted an inquiry into whether to introduce an "exoneration protocol" that would provide a remedy for those who have been accused by ICAC of wrongdoing but have been acquitted in court or had the case against them thrown out by the DPP. The Rule of Law Institute made a submission to that inquiry supporting such an initiative and arguing that it should be followed next year by the abolition of public hearings.

After this week's events, the institute proposes to seek permission to make a second submission to that inquiry.

If the factors in s31 were not sufficient to save Berejiklian from the immense harm to her privacy and reputation, it seems clear that ICAC is determined to pursue publicity regardless of what the law says.

Self-righteous zeal blinded it in the past when it engaged in activities that had no basis in law, inflicting damage on innocent people who remain without a remedy until parliament enacts an exoneration protocol.

The decision to subject Berejiklian to a public hearing shows it has still not learned its lesson. Parliament tried and failed to reform public hearings. They now need to be abolished, leaving ICAC to investigate, produce reports and provide briefs of evidence to the DPP.

Berejiklian might be finished. But parliament should never again allow this agency to indulge its thirst for publicity.

Chris Merritt is vice-president of the Rule of Law Institute of Australia

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