PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

INQUIRY INTO COMMISSION PROCEDURES AND THE RIGHTS OF WITNESSES

First Report

OPENNESS AND SECRECY IN INQUIRIES INTO ORGANISED CRIME AND CORRUPTION: QUESTIONS OF DAMAGE TO REPUTATIONS

NOVEMBER 1990

TOGETHER WITH MINUTES OF PROCEEDINGS

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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FUNCTIONS OF THE COMMITTEE

INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

"64 1 The functions of the joint Committee are as follows:

(a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

2 Nothing in this Part authorises the Joint Committee -

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint."

TABLE OF CONTENTS

Functions of the Committee

Recommendations

1 Introduction 1

Part One: Public Hearings

2 Public Hearings: The Benefits 4
The Hon A R Moffitt CMG, QC 4
Mr Costigan QC 5
Mr Fitzgerald QC 7
The ICAC's Position 8
Conclusion 9

3 Public Hearings: The Risks 8
Informers and Whistle-blowers 11
Prejudice to Fair Trials 12
Damage to Reputations 13
Preston Matter 14
Conclusion 16

Part Two: Moffitt Amendments

4 Moffitt Amendments 17
Discussion Paper 17
Support for Moffitt Amendments 20
Alternative Amendments 21
The ICAC's Response 21
Litigation 23
Conclusion 24

TABLE OF CONTENTS CONTINUED

Part Three: Alternative Approaches

5	More Flexibility	26
	Present Position: Section 31	26
	Problems with Section 31	26
	Randwick TAFE Matter	27
	Closing Submissions	28
	Conclusion	30
6	Suppression Orders	31
	Present Position: Section 112	31
	Value of Suppression Orders	31
	Adequacy of Section 112	32
	Conclusion	33
7	Prior Notification	34
	Fitzgerald Inquiry Model	34
	Limitations	36
	Conclusion	37
8	Right of Reply	38
	Present Situation	38
	Immediate Reply	39
	Leading of Evidence	41
	Conclusion	42
9	Sifting Evidence	43
	Comments by Mr Costigan QC	43
	Mr McClellan QC	44
	Commission's Response	45
	Conclusion	47

RECOMMENDATIONS

2.6.2 In view of the considerable benefits of public hearings, the principle of public hearings should be adhered to. The ICAC should continue to conduct most of its hearings in public (subject to the safeguards outlined below).

3.6.2 It must be recognised that reputations can be unfairly and unnecessarily damaged in public hearings. Specific steps need to be taken to guard against this occurring.

4.6.2 The Moffitt amendments have considerable merit and are supported in principle. However, in view of the likelihood of litigation inherent in them, and the experience of the Commission over the past twelve months, the Committee would like to see alternative mechanisms explored which could address the problems arising from unrestricted public hearings before such amendments are made to the ICAC Act.

4.6.4 The Commission's document "Procedure at Public Hearings" should be amended to note that the Commission will hear and consider applications for private hearings. The grounds for such an application, as provided for in Mr Moffitt's proposed s.31(8) should also be included. It should also be noted that the Commission may sit temporarily in private and that reasons will be provided whenever a decision is made on an application for a private hearing.

5.3.4 Section 31 of the ICAC Act should be amended to provide the Commission with greater discretion to determine when to conduct a hearing in public or in private. In deciding whether to conduct a hearing in public or in private the Commission shall have regard to the public interest. Specifically, this amendment should enable the Commission to hear closing submissions in private. However the document "Procedure at Public Hearings" should note that most evidence will be heard in public.

6.4.2 The ICAC should make greater use of temporary suppression orders to protect reputations from hearsay allegations. Suppression orders should be used when an allegation is made about a person who is unrepresented or who cannot respond to the allegation on the day it is made. The suppression order can be lifted at a later date when the allegation and response are made public concurrently. However the ICAC should retain discretion over when such orders are made. The document "Procedure at Public Hearings" should be amended to note the general circumstances in which suppression orders will be made.

7.4.1 The Committee endorses the procedure adopted during the Fitzgerald inquiry in relation to the prior notification of persons against whom allegations were made during public hearings. The Committee commends the ICAC on the development of a similar procedure. The Committee also recognises that the Commission must retain some discretion to determine when prior notification is appropriate. However, the Committee believes this procedure needs to be enunciated, in the document "Procedure at Public Hearings".

8.4.1 The Committee commends the ICAC upon the provision of a right of reply to persons against whom allegations are made, even though there is no statutory requirement for the provision of such a right. The Committee also notes the reference to this practice in the document "Procedure at Public Hearings". In light of the development of this practice the Committee does not see a need for amendment of the ICAC Act at this time to provide for a statutory right of reply.

8.4.2 Wherever possible the Commission should seek to provide an opportunity for a person against whom an allegation is made to make a brief response on the day the allegation is made. Where this is not possible the Commission should make use of a temporary suppression order (see 6.4.2). This procedure should be enunciated in the document "Procedure at Public Hearings".

9.4.1 The Committee notes the comments of Mr Costigan and others about the importance of careful preliminary sifting of evidence before a matter reaches the public hearing stage. The Committee also notes the advice of Mr Temby concerning the procedures already in place within the ICAC for such initial assessment and review of complaints and commends these procedures.

CHAPTER ONE

INTRODUCTION

1.1 Background

1.1.1 Early in 1990 the Chairman of the Committee, Malcolm Kerr MP, sought the views of The Hon Athol Moffitt on a number of issues concerning the ICAC. Mr Moffitt is a former Supreme Court Judge, having retired from the NSW Court of Appeal in 1984. In 1973 and 1974 he conducted the first Royal Commission into organised crime in Australia, the Royal Commission into "Allegations of Crime in the Clubs".

1.1.2 In response to the Chairman's request for advice Mr Moffitt prepared a document entitled "Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations". This document was completed on 23 March. It discusses the issue of openness and secrecy and sets out the procedures adopted in the Moffitt, Costigan and Stewart Royal Commissions, in relation to the use of open and closed hearings to deal with evidence which could unduly damage reputations.

1.1.3 Some further discussion followed and Mr Moffitt set about preparing a second document. This document, entitled "Openness and Secrecy in Inquiries into Organised Crime: Addendum", was completed on 27 July. It contains details of a proposed amendment to the ICAC Act which would enable the ICAC to adopt the procedures described in the earlier document. The suggested amendment would provide witnesses with a right to apply for a private hearing.

1.1.4 The Committee resolved, with Mr Moffitt's permission, to release these two documents as a Discussion Paper in the context of the Committee's next inquiry. On 15 August 1990 the Hon Duncan Gay, Vice Chairman of the Committee, tabled the Discussion Paper in the Legislative Council and announced the terms of reference for the Committee's present inquiry. These are:

1 To review the exercise by the Commission of its functions relating to witnesses and other interested parties who appear at Commission hearings or who otherwise assist the Commission in its investigations; and

2 to report to both Houses of Parliament on any changes which should be made to Commission procedures or the Independent Commission Against Corruption Act 1988 (with particular reference to, but not restricted to, matters relating to Commission hearings and the rights of witnesses).

1.2 Conduct of Inquiry

1.2.1 The Committee advertised in the major metropolitan newspapers on Saturday 18 August inviting submissions to its inquiry. The Chairman also wrote to interested individuals and interest groups and a form letter was sent to all witnesses and legal representatives who had appeared at ICAC hearings inviting submissions by 28 September.

1.2.2 By early October the Committee had received more than 60 submissions. The majority of these were from witnesses and legal representatives who had appeared at ICAC hearings. These submissions dealt with a range of issues arising from their personal experiences with the ICAC.

1.2.3 However, a small number of the submissions received (ten in total) dealt in an objective manner with the material contained in the Discussion Paper, namely openness and secrecy and the question of damage to reputations. The Committee therefore decided that it would be possible to deal with the matters raised in the Discussion Paper before examining the range of issues raised in the other submissions.

1.2.4 Two public hearings were held at Parliament House on 12 and 15 October 1990. The witnesses who appeared at those hearings, together with a list of the submissions which were tabled, are set out below.

Friday 12 October - Witnesses

The Hon A R Moffitt CMG, QC - (Former President of NSW Court of Appeal. First Royal Commissioner into organised crime in Australia)

Mr Frank Costigan QC - (Melbourne barrister and former Royal Commissioner)

Ms Beverley Schurr - NSW Council for Civil Liberties

Mr Mark Findlay - Director, Institute of Criminology (Has also written extensively about the Hong Kong and NSW ICAC's)

Mr Michael Bersten - (Canberra based lawyer who has written extensively about the NSW ICAC)

Mr Peter McClellan QC - (Sydney barrister who has appeared for interested persons in two major ICAC hearings)

Monday 15 October - Witnesses

Mr Ian Temby QC - Commissioner, ICAC

The Hon Athol Moffitt CMG, QC

Other Submissions tabled - Friday 12 October

Mr G E Fitzgerald QC - (Queensland barrister and former Commissioner)

National Crime Authority

NSW Bar Association

Law Society of NSW

Mr G Bunbury - President, State Authorities Superannuation Board

Mr Steven Rares - (Sydney barrister)

1.2.5 The Committee held a deliberative meeting on Tuesday 23 October. At that meeting the Committee discussed the matters raised at the hearings on 12 and 15 October and determined the position it would take on these matters. A draft report was then prepared. That report was adopted by the Committee at its meeting on Tuesday 20 November.

CHAPTER TWO

PUBLIC HEARINGS: THE BENEFITS

2.1 None of the witnesses who appeared before the Committee on 12 or 15 October suggested that the ICAC should abandon public hearings altogether. (Neither did any of those who made submissions on the general question of openness and secrecy.) In fact most witnesses expressed strong support for public hearings. This chapter sets out the arguments in favour of public hearings as they were put to the Committee.

2.2 The Hon A R Moffitt CMG, QC

2.2.1 Mr Moffitt made clear his general views on the question of open vs secret hearings in his Discussion Paper. In paragraph I.2.2 he set out the reasons why he and other Royal Commissioners into Organised Crime and Corruption determined that their inquiries should be conducted in large part in the open.

> "The view of prima facie openness was and is based on many considerations. A leading consideration was that organised crime and corruption flourishes on secrecy, codes of silence and on the difficulty of exposing it by criminal proceedings and that revealing it by open investigation is a step towards depriving it of these benefits of the cloak of secrecy. Openness also aids public confidence in the integrity of the inquiry. It helps to mould public opinion concerning organised crime and corruption, so that the public demand or accept strong action against it. Alert to its operations, members of the public can better guard against its operations. Revelations of particular matters under investigation enable and encourage members of the public to come forward and tell what they know."1

2.2.2 When Mr Moffitt appeared before the Committee on 12 October he prefaced his remarks by saying that in relation to the question of openness and secrecy the ICAC Act had got it right while the NCA Act had got it wrong. He said that one of the ICAC's most important functions was exposure and that open hearings were an essential element of such exposure.

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1 The Hon A R Moffitt, "Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations", Discussion Paper, August 1990, p 2.

"My proposals ... accept the philosophy of the Act directed to the public exposure of corruption as a basis for prevention, so hearings are open, with secrecy only on appropriate exceptional occasions ... I firmly believe that exposure is a matter separate from but in addition to prosecution of offenders and is as essential to countering public corruption as it is to countering organised crime."2

2.2.3 However, Mr Moffitt also argued that there was a proper place for private hearings. (See chapter 4.)

2.3 Mr Costigan QC

2.3.1 Mr Costigan's general views on public hearings were set out in volume 2 of the report of his Royal Commission. The following paragraphs from that report were incorporated by the Hon A R Moffitt in his Discussion Paper.

14.042 "The conduct of public sittings was an occasion when the reputations of a number of people were harmed. The harm was done in some cases by the manner in which they answered questions but in most cases by the answers they gave. In truth, not even the answers were the real cause of damage. Rather it was the conduct in which they had engaged which was disreputable and well deserving of a loss of reputation. The public session was merely the occasion of its exposure and the date on which the harm was suffered. The cause was their behaviour.

14.043 There are those who say that the only manner in which matters should be redressed is by the criminal trial of the accused, and his conviction. If that were the only way, many citizens would fall victim to unscrupulous yet clever criminals against whom the evidence may never be amassed which allows their trial and conviction. The opportunity afforded by the conduct of a Royal Commission where the clever and evasive criminal may be brought to account in public, or have his schemes exposed and his criminality made public, often is the only protection available to the honest citizen who may otherwise fall victim.

14.044 As the opening citation to this chapter suggests, there is no swindle, crime, dodge

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2 Transcript of Proceedings before the Committee on the ICAC, 12 October 1990, p 4.

> or trick which will survive when it is exposed to public view. The criminal trial is a poor medium for exposure. It is limited in the manner in which it may portray the criminal scheme, being restricted to the elements of the charge required by law to be laid. Further it takes place years after the event. The matter described in the fifth interim report, a scheme devised in 1981, perpetrated in 1981-2, investigated in 1982 and reported upon in 1983, led to a committal for trial in 1984 and a trial, if all goes well, in 1985. It is too late. The interest of the public wanes, the publicity is slight and the public exposure is minimal. Other like schemes, conducted by the same or other promoters, profit greatly at the cost of innocent victims all because of tender concern for the reputation of the perpetrators.
>
> 14.045 The change of public opinion in respect of taxation fraud would not have occurred, and the frauds would have grown, had the attitudes I perceive today been the attitudes of 1982. It is not merely taxation fraud which should be of concern, All forms of sophisticated crime, be it corporate fraud, white collar crime, major illegal gambling, drug rings, or, most of all, corruption, will thrive in secrecy. The occasional arrest will not impede their success by more than a minor dint. I have little doubt that major criminal organisations would accept increased police efficiency provided it was accompanied by strict prohibition of their activities and the prohibition of public commission of inquiry. If all is done out of the public gaze, the corruption of the administrators of law enforcement agencies, law officers and the judiciary itself is far more easily achieved and criminal operations more readily sustained."3

2.3.2 When he appeared before the Committee on 12 October, Mr Costigan emphasised the public interest in inquiries into organised crime and corruption being carried out in public as far as possible, and the risks associated with such inquiries being carried out in private.

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3 Mr F Costigan QC, Final Report of Royal Commission on the Activites of the Federated Ship Painters and Dockers Union, 1984, pp 163 - 165.

> "In the kind of areas that the ICAC is set up to investigate, there is really a very significant public interest in understanding what it is doing, and a very proper public disinclination to allow those investigations to be done privately. Once you start investigating allegations of public corruption privately, you then add the additional smell of the cover-up, and even though it may be quite unfair the innocent person involved in such an exercise carries with him the unspoken smear - 'What did happen? Where there's smoke there's fire' etc."4

2.3.3 However, Mr Costigan noted that there was a proper place for private hearings and that they were used extensively during his Royal Commission. (See chapter 4.) He also emphasised the importance of evidence being carefully sifted before being presented at a public hearing. (See chapter 9.)

2.4 Mr Fitzgerald QC

2.4.1 In his submission to the Committee Mr G E Fitzgerald QC included some relevant extracts from his report to the Queensland Government. Whilst recognising the problems inherent in public hearings, the Fitzgerald Report argued that the success of the inquiry was at least due in part to these hearings.

> "This Inquiry could not have proceeded without public confidence, co-operation and support. The power of some of the individuals involved, and the type of issues raised were such that it would have been impossible for the Inquiry to have succeeded without public confidence, co-operation and support.
>
> That meant the Inquiry had to be as open as possible, so that the public, including people with information, could see that it was a genuine search for the truth. Such a course was also necessary so that the Inquiry could generate enough momentum to overcome any attempt which might have been made to interfere....
>
> There is no doubt whatsoever that this Commission could not have got as far as it did without openness...
>
> ... openness also helped the innocent. The publication of evidence and allegations brought forward more information and witnesses which, in some cases, helped to rebut allegations. More generally, openness helped to avoid uncertainties which would have bred suspicions and rumours, extending the range of innocent people affected. Of course, innocent people also had the same interest as others in the

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4 Transcript, 12 October 1990, pp 32 & 33.

community in the overall success of the Inquiry, which was dependent on openness."5

2.5 The ICAC's Position

2.5.1 Mr Temby and other senior Commission officers have stated the arguments in favour of public hearings on a number of occasions. One of the clearest statements of those arguments was contained in the Report on to the Park Plaza Site investigation.

This was reproduced, together with some other comments in the Commission's 1990 Annual Report.

> "1 The ICAC Act so provides - section 31(1). That would be a sufficient reason, standing alone. However those that follow would generate the same general rule, even if the Commission had unfettered discretion.
>
> 2 Although not a court of law, the Commission is required to act in a fair and just manner, and to reach important conclusions. These things are best done in the open, with the fact or possibility of public scrutiny. Any person inclined to act in a bullying or irrational manner would always wish to do so behind closed doors. And nobody will never err in respects such as these.
>
> 3 The Commission is required by its Act to regard the protection of the pubic interest as a paramount concern - section 12. The work it does is for the public, it must be prepared to give an account of itself to the public, and to perform its tasks openly will be conducive to that end.
>
> 4 In particular matters it may be quite essential that the public should know a particular matter is under investigation so individuals can come forward with information. Each of the two public hearings conducted to date has proved the truth of that observation.
>
> 5 Finally, one of the functions of the Commission is that of public education, and publicity generated by open hearings can be of benefit in convincing the people generally that public sector corruption is a social evil which ought not be tolerated."

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5 Report of a Commission of Inquiry pursuant to Orders in Council, Queensland Government Printer, 1989, pp 10 & 11.

> "There is no doubt that public hearings have proved to be both the most controversial exercise of power by the Commission, attracting attention from the courts, politicians, the legal profession and the media. They are also the most effective, albeit most expensive, time consuming and resource intensive exercise of power by the Commission.
>
> Senior Commission personnel have thought long and hard about the utility of public hearings. There has been concern about the cost (including payment of costs of legal representative involved) and, form time to time, the coverage of hearings by the media.
>
> The Premier has stated that the procedures of the Commission, including public hearings, will be reviewed. The Commission will express its views on these matters as it considers appropriate. But it must be said that public hearings have enormous benefits. They ensure that the public knows what the Commission is doing, so it cannot be seen as a "Star Chamber", and so that useful information can flow to the Commission. Public confidence in the Commission is vital, and would be largely lost if it had to work behind closed doors. That is not to say that some changes in statutory provisions as to procedures might not be desirable."6

2.5.2 When Mr Temby appeared before the Committee on 15 October, he reiterated the Commission's commitment to public hearings.

> "Public hearings are generally useful in the investigative process because when people know what we are doing they are most likely to come forward with further useful information. They are important, indeed it may be said critically important, as an accountability mechanism. They are of some benefit at least so far as the Commission's public education function is concerned, and in my judgement they are critically important in order to ensure that the Commission can maintain and retain public confidence."7

2.6 Conclusion

2.6.1 As the brief summary above demonstrates, the arguments in favour of public hearings are formidable. Exposure is a key weapon in the fight against the secret crime of corruption. Furthermore, public hearings ensure the ICAC is publicly accountable - the way it exercises its special powers is open to public scrutiny and the public can inform itself of the Commission's activities.

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6 ICAC, Annual Report to 30 June 1990, pp 40 & 41.

7 Transcript, 15 October 1990, pp 2 & 3.

The public has a right to know what the Commission, which was established to protect the public interest, is doing.

2.6.2 **In view of the considerable benefits of public hearings, the ptinciple of public hearings should be adhered to. The ICAC should continue to conduct most of its hearings in public (subject to the safeguards outlined below).**

CHAPTER THREE

PUBLIC HEARINGS: THE RISKS

3.1 Introduction

3.1.1 The Discussion Paper prepared by the Hon A R Moffitt identified three potential dangers in unrestricted public hearings. These related to informers, prejudice to fair trials and unnecessary or unfair damage to reputations. Each of these dangers are discussed below.

3.2 Informers and Whistle-blowers

3.2.1 Mr Moffitt said in his Discussion Paper that the revelation of the identify of informers would "endanger their lives and destroy the informer system".8

3.2.2 Although one witness who has appeared at the Commission has been granted an indemnity from prosecution and witness protection (see 1990 Annual Report p 20), there is no evidence of paid informers appearing at hearings to date or indeed of the Commission cultivating such informers.

3.2.3 However, the NSW Council for Civil Liberties in its submission called for protection for a broad range of informers.

> "The public policy of protecting police informers in criminal proceedings has long been recognised.
>
> Protection for confidential information given in other contexts is also important. Politicians and journalists receive information from public servants on the basis of promised confidentiality. The Moffitt proposals do not exclude claims for the protection from publicity for any kind of confidential information."9

3.2.4 This brings up the whole issue of "whistle-blowers". The Committee notes that this is a complex issue requiring attention in NSW. The Committee notes the recent report of the Queensland Electoral and Administrative Review Commission on Whistle-blower Protection. Mr Temby suggested that this is an issue to which the Committee could productively turn its attention. The Committee will consider this matter further at the conclusion of its present inquiry in the new year.

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8 Discussion Paper, p 4.

9 Transcript, 12 October 1990, p 66.

3.3 Prejudice to Fair Trials

3.3.1 The risk of public hearings, or more specifically sensational media coverage of public hearings, prejudicing a subsequent trial was identified in the Committee's Televising Report.

> "The inquisitorial nature of ICAC hearings, the absence of the rules of evidence, and most importantly the fact that witnesses may be compelled to give evidence against their will, put the ICAC in a unique position.
>
> ... what may be a "balanced and fair report" of an ICAC hearing may, because of the special powers of the ICAC, be a report of evidence totally inadmissible at a subsequent trial."10

3.3.2 The risk of prejudice to a subsequent trial was discussed by Mr Michael Bersten when he appeared before the Committee. He drew attention to two cases which identified the risks of public hearings interfering with the course of justice.11 He called for s.18 of the ICAC Act to be broadened to ensure against such interference. Section 18(2) provides for the Commission to use suppression orders or private hearings during the currency of relevant court proceedings. It also provides for the Commission to defer making any report to Parliament during the currency of such proceedings. Section 18 presently applies to all forms of legal proceedings. The Commission has argued that s.18 should be limited in its application to criminal proceedings.12

3.3.3 When Mr Temby appeared before the Committee on 15 October he pointed out that possible prejudice to criminal trials was regarded by the Commission as a valid reason for hearings to be conducted in private.

> "I can inform the Committee that possible prejudice to criminal trials is seen as a reason in the public interest why it may be hearings should proceed in private, and we have done that even in circumstances where s.18 does not or probably does not operate. There is a particular case in which it was reckoned that in the investigation the Commission was conducting, although not related closely or perhaps not related at all with certain specific criminal charges against the person under investigation, to run

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10 Committee on the ICAC, Report of an Inquiry into a Proposal for the Televising of Public Hearings of the ICAC, June 1989, Executive Summary.

11 Victoria vs BLF 1981-2, 152 CLR 25; A-G (Victoria) vs Hinch, 1987, 164 CLR 15.

12 ICAC, Annual Report to 30 June 1990, p 96.

> the proceeding in public might have an unfair prejudicial effect upon significant criminal proceedings that were under way against the individual; and accordingly we proceeded in private."13

3.3.4 On the other hand, Mr Costigan told the Committee he thought the effect of public hearings on subsequent trials had been overstated. He pointed to the Chamberlain case, where despite the extraordinary level of publicity a number of cases were able to proceed. He expressed faith in the jury system and its independence. If there was concern about any particular case these concerns could be addressed by a time gap between the hearing and the court case.

3.4 Damage to Reputations

3.4.1 The Hon A R Moffitt clearly set out the nature of the risk of unnecessary or unfair damage to reputation in his Discussion Paper.

> "If hearings were open, without restrictions or special procedures, some prejudice or some unnecessary damage to reputations could well occur before there was an opportunity for the Commission to make a decision whether the material should be given in open or secret sitting or otherwise suppressed... all sorts of flimsy material including unsupported assertions of witnesses or counsel might appear in the course of the open hearing, before the Commission became aware of what was to follow. It might turn out it is never supported or proves to be worthless, yet if it has been given initially in open session, allowing perhaps sensational media headlines so there will be irreparable, unjust damage done to reputations from publications which serve no purpose. In consequence it may damage respect for the inquiry. Headlines are likely to be in proportion to the prominence of the person named and not in accordance with the weight of what is said or revealed. Later revelations undermining what was earlier published, even if also given publicity, will be unlikely to repair the damage.
>
> Realities recognised in the defamation field illustrate the point. It is generally accepted that apologies and withdrawals never repair in any real sense damage done by earlier unjust defamatory statements. In the same way the immediate release and publication of an allegation or one side of it rather than deferring its publication until it appears whether there is an explanation for it or that it has little weight, may do great damage to reputations

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13 Transcript, 15 October 1990, p 3.

which will not be repaired despite the revelations at a much later date. Avoidable and unjust damage will have been done."14

3.4.2 Mr Moffitt added that in his view, "some reputation damaging hearsay material has been admitted in various (ICAC) inquiries and published in the media." 15

3.4.3 It was drawn to the Committee's attention by the NSW Council for Civil Liberties that the protection of reputations is recognised in various international human rights documents.

> "Article 12 of the 1948 Universal Declaration of Human Rights states:
>
> > No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
>
> This is echoed in Article 17 of the International Convention on Civil and Political Rights:
>
> 1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2 Everyone has the right to the protection of the law against such interference or attacks."16

3.5 Preston Matter

3.5.1 In illustrating the potential for unnecessary and unfair damage to reputations both the NSW Council for Civil Liberties and Mr Peter McClellan QC referred to the case of Mr Brian Preston, a barrister, about whom an allegation was made during the North Coast inquiry. As this case exemplifies some of the problems which can occur with public hearings, it is worth recounting the details of this matter.

3.5.2 During the North Coast inquiry the ICAC took evidence concerning a proposed quarry development on a property near Macksville. The Commission's interest in this matter arose from a consultant with whom the landowner was put in contact with in an effort to

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14 Discussion Paper, pp 4-5.

15 ibid, p 12.

16 Transcript, 12 October 1990, p 65.

have some problems resolved concerning the proposed development. In a statement to the Commission the landowner, a Mr Frank, made reference to a visit to this property by some environmentalists and a solicitor from the Environmental Defenders Office. In his statement Mr Frank asserted that during this visit the solicitor, Mr Preston, was implicated in an attempt to solicit a bribe in return for the termination of proceedings, which the environmentalists were bringing in the Land and Environment Court.

3.5.3 Mr Frank appeared as a witness at a public hearing of the Commission in Murwillumbah on 22 June 1989. After his statement was read into evidence he was questioned by Counsel for the consultant. A number of questions focussed on the allegation concerning Mr Preston. Mr McClellan in his submission outlined the resulting media coverage and its effect.

> "Although the ICAC had obtained the statement, it did not tell the barrister about it nor invite him to attend when it was tendered. The statement was read to the Commission and eagerly taken up by the press since the North Coast sittings of the ICAC had generated great media interest, including television. One television channel (Channel 9) decided to run the story as its lead item on the 6.00 pm evening news. It did so together with film footage of the unfortunate junior barrister obtained without indicating it was to be used to support a news story on the inquiry. Amongst other people, his parents happened upon the news item which, as you can imagine, caused them and many others great distress.
>
> The first the barrister knew of the allegation was when a Channel 9 journalist rang him late in the afternoon for comment on it. Not surprisingly he declined to comment - he did not even know with any precision who was making the allegation."17

3.5.4 It should be emphasised that the Channel 9 reporter did contact Mr Preston to seek his response to the allegation before running the story. The ICAC had not attempted to inform Mr Preston of the allegation, even though it had prior knowledge of it through Mr Frank's statement. The ICAC did not notify Mr Preston that he was to be mentioned at the Commission hearing on 22 June.

3.5.5 Mr Temby pointed out to the Committee that on the inquiry's next sitting day, 13 July, the Assistant Commissioner allowed three paragraphs from a document responding to the allegation to be admitted as an exhibit and to appear in the transcript of the Commission's proceedings. These paragraphs refuted the allegation. Furthermore, the Assistant Commissioner made the

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17 Transcript, 12 October 1990, pp 149 & 150.

following comments in relation to Mr Preston:

> "So far as Mr Preston is concerned I can say, if this will help to set his mind at rest, that so far as I'm aware he is not a person who is or ever has been under investigation by this Commission. I don't regard him as a person at this stage subject to any allegations and so far as I am aware there is no likelihood that he will be the subject of any findings of fact to be made at any time by this Commission."**18**

3.5.6 It should be noted that Mr Preston was not mentioned in the North Coast Report. Five pages were devoted to Mr Frank's evidence but this focussed on the consultant with whom Mr Frank came into contact at the time in question.

3.6 Conclusion

3.6.1 The foregoing material seems to indicate that, despite the steps taken by the Assistant Commissioner on 13 July, Mr Preston did suffer unfair and unnecessary damage to his reputation. The Committee has highlighted this material as evidence of the unfortunate side effects in terms of damage to reputations that unrestricted public hearings can have.

3.6.2 **It must be recognised that reputations can be unfairly and unnecessarily damaged in public hearings. Specific steps need to be taken to guard against this occurring.**

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18 Transcript of the proceedings of the ICAC, Sydney, 13 July 1989, p 511.

CHAPTER FOUR

MOFFITT AMENDMENTS

4.1 Discussion Paper

4.1.1 As set out in the Introduction to this report the Discussion Paper prepared for the Committee by the Hon A R Moffitt actually consists of two separate documents. The first document, completed in March 1990 outlines the procedures adopted in the Moffitt, Stewart and Costigan Royal Commissions in relation to open and closed hearings, and recommends that ICAC procedures be reviewed in the light of this experience. The second document completed in July 1990 contains recommendations for amendments to the ICAC Act.

4.1.2 Mr Moffitt's proposed amendments are set out in paragraphs II.2.1 and II.2.2 of the Discussion Paper. They are as follows:

> "Amend s.31 as follows:
>
> (1) Add after the word "under" in subsection 31(4) the words "subsection (1) and (2) of."
>
> (2) Add after s.31(4) the following:
>
> "(5) The Commission may direct that a hearing or part of it be temporarily held in private and, at any time, may order that any part of a hearing held in private pursuant to subsection (1), (6), (7) or this subsection be made part of a public hearing."
>
> "(6) Any person may apply to the Commission for a direction pursuant to subsection (1) or (5) that some part of a hearing be held in private or that it be temporarily so held."
>
> "(7) The Commission shall either hear in private an application made pursuant to subsection (6) or direct, pursuant to s.112(1) that the hearing of such an application be not published."
>
> "(8) Without limiting the generality or operation of this section, an application may be made pursuant to subsection (6) hereof upon any of the following grounds namely that to hear some matter in an opening hearing is likely to:
>
> (a) prejudice the fair trial of a pending or future criminal charge, or;

(b) unfairly or unnecessarily damage the reputation or endanger the safety of some person, or;

(c) be in breach of a promise of confidentiality to an informer or discourage persons in the future from informing on promises of confidentiality, or;

in the case of an application for a direction to sit temporarily in private, upon the ground that,

(d) it is reasonable so to do.

A direction shall not be given on grounds (a) (b) or (c), unless in all the circumstances including such ground or grounds, it is in the public interest, as defined in subsection (4), so to direct.

Amend s.112 as follows:

(1) Add to s.112(1) after the words "the Commission", where they first appear, the words "on the application of any person or on its own motion."

(2) For "(2)" substitute "(3)".

(3) Add "(2) The Commission may give a direction to operate temporarily pursuant to subsection (1) and may at any time revoke a direction given under subsection (1) or this subsection"."19

4.1.3 The proposed amendments would provide procedures for the ICAC to hear applications for private hearings and make decisions according to the "public interest" as provided for in s.31(4). The amendments would not change the presumption in favour of public hearings contained in s.31(1) and would leave the Commission with the ultimate discretion to decide whether a hearing will be held in public or in private. The amendments would enable the Commission to adopt the procedures adopted by former Royal Commissioners, as described in the first document contained in the Discussion Paper.

4.1.4 Mr Moffitt argues that under the ICAC Act the Commission presently has little discretion to sit in private unlike Royal Commissions.

> "... by reason of the express prohibition on s.31(4) there is no power to sit in private for any purpose until there is a positive public interest finding."20

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19 Discussion Paper, pp 9 & 10.

20 ibid, p 11.

He goes on to say that although there have been some ICAC hearings held in private, decisions concerning private hearings have largely been made in private and "policies adopted and the views concerning the public interest have not been revealed."21

4.1.5 The major focus of the proposed amendments is the provision of a statutory right for persons to make an application and be heard on the question of private hearings. Mr Moffitt argues strongly for the need for such a provision in the ICAC Act.

> "In respect of what is a permanent public institution, individuals affected have no right, or at least no express statutory right to be heard on questions which arise under s.31. Decision on what is in the public interest in relation to individuals, a matter of great public concern, is in effect a matter for entirely private administrative decision made prior to a hearing. With the Act in its present form, if there should be an arbitrary or erroneous decision or a failure to exercise power under s.31, such would not be, or at least readily, subject to the supervision of the Court of Appeal.
>
> This is not satisfactory in respect of a permanent body which has such wide powers as those of the ICAC and makes decisions under s.31 which could gravely affect individuals... to safeguard individual rights and interests there should be accessible supervision of administrative bodies in this way by the courts, by the use of their prerogative powers."22

4.1.6 Mr Moffitt suggests that even if the ICAC has presently adopted some of the procedures provided for in the amendments it is still important for them to be codified in the legislation. This would provide certainty and consistency in their application by all Commissioners and Assistant Commissioners, present and future. Furthermore such provisions would enhance the public image of the fairness of the ICAC.

4.1.7 When Mr Moffitt appeared before the Committee on 12 October he pointed out that decisions made administratively without a statement of reasons often led to arbitrariness or inconsistency.

> "Decisions so given often lead to arbitrariness and inconsistency from person to persons making such decisions.
>
> Inconsistency has always been regarded by the courts as itself unjust...

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21 ibid.

22 ibid, p 12.

> It seems that at least one commissioner has taken the view that there are virtually no circumstances where there is prejudice to an individual which could call for some aspect of an inquiry to be dealt with or explored in private hearing.
>
> The paper of Mr McClellan, by its general comments, and by its examples, points to this. In any event this appears to be so if the paper published by the same deputy commissioner in November 1989 is analysed. At the same time he expressly said these views were his own, and 'in no way reflected those of the ICAC'. However, the ICAC is one body, and justice requires that it act consistently in so important a matter. These general views of the deputy commissioner appear to be different from those of the Commissioner, Mr Temby, which appear in his report on the Park Plaza Site inquiry."23

Mr Moffitt pointed to the appellate procedure which works to counter inconsistency in the court system. In the absence of such an appellate system to produce consistency between ICAC Commissioners, Mr Moffitt suggested that his amendments would mean that Commissioners would be required to give reasons for particular decisions. Comity between the Commissioners should then produce greater consistency.

4.1.8 Specifically, s.31(5) provides for a temporary sitting in private. However such matters heard in private would be able to be later repeated or read at a public hearing. S.31(6) provides the right to apply for a private hearing. S.31(7) provides that all such applications will be heard in private or alternatively made the subject of a suppression order. S.31(8) outlines some grounds upon which applications for private hearings may be made. The amendments to s.112 would enable the Commission to use temporary suppression orders and hear applications for the use of suppression orders.

4.2 Support for Moffitt Amendments

4.2.1 Most of the submissions received by the Committee which dealt with the openness/secrecy question support the amendments proposed by the Hon A R Moffitt. Support was expressed in the submissions from the major legal interest groups in NSW: the NSW Bar Association, the Law Society of NSW and the NSW Council for Civil Liberties.

4.2.2 When Mr Costigan appeared before the Committee he expressed strong support for the proposed amendments.

> "If I could now turn to the Hon A R Moffitt's Discussion Paper, I might say I am very much in

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23 Transcript, 12 October 1989, p 5.

> support of it. The general proposition behind it is, as one might expect, of very high quality. I am not absolutely certain about the drafting, and I know he will not take that as an unfair criticism, because no lawyer worth his salt would look at somebody else's drafting without wanting to alter it. The general thrust of what he has in his paper, it seems to me, is correct so long as it does maintain the general principle that the ICAC should act in public, subject only to the qualification I have made that there should be a very considerable private element in it, and there should be felt to be no inhibition in the ICAC in going private for purposes of the sort that I have discussed."**24**

He also emphasised that although he was a strong supporter of public hearings there was a proper role for private hearings and that he had made use of private hearings during his Royal Commission.

4.3 Alternative Amendments

4.3.1 Although supporting the general thrust of the Moffitt amendments the submissions received from Peter McClellan QC and the NSW Bar Association included alternative amendments to s.31 of the ICAC Act.

4.3.2 The NSW Bar Association's submission provided an alternative version of Mr Moffitt's proposed s.31(8). The major difference is that where Mr Moffitt provides unfair or unreasonable damage to reputations as a ground for an application for a private hearing, the Bar Association amendment replaced this with "grave damage" to reputations. Most witnesses who appeared before the Committee agreed that this went too far, and would preclude almost any exposure of corrupt conduct. Mr Moffitt, Mr Costigan and others said this alternative amendment was unacceptable.

4.3.3 Mr McClellan's amendment kept the grounds for an application for a private hearing the same as provided for in the Moffitt amendments. The major difference in his amendment was that it removed the presumption in favour of public hearings. Under his alternative amendment the ICAC would be required to conduct a hearing in private whenever certain conditions were met.

4.4 The ICAC's Response

4.4.1 When Mr Temby appeared before the Committee on 15 October he argued that the Moffitt amendments were unnecessary and could end up obstructing the Commission in its investigative work. He pointed out that the ICAC has already used private hearings in the sort of circumstances identified by Mr Moffitt. During the 1990 financial year the Commission conducted 29.5 days private

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24 Transcript, 12 October 1990, p 33.

hearings and 235.5 days public hearings.

4.4.2 Mr Temby said there was no need for a right for witnesses to make applications for private hearings to be legislated. Such applications had already been made and the Commission had already sat in private in response to such applications or on its own initiative.

> "I cannot think of a case in which anybody wishing to make such a submission has not been accommodated, and nobody has pointed to any occasion on which there has been any unwillingness on the part of the Commission to hear submissions to that effect. I can think of a number of occasions when such submissions have been received, and there have been occasions when those submissions have themselves been received in private. At least sometimes that has been at the suggestion of the Commission, and that appears in at least two of our published reports, although the outcome of the debate as to whether the matter should proceed in public or in private differed. In the Park Plaza matter submissions were heard in private and the decision was to proceed in private but to publish the transcript and make a public report. In the Hakim matter the submissions were heard in private but the decision was that the matter should proceed in public. The most significant difference perceived between those two cases was that it was at least possible that in the latter case public knowledge of the investigation may have led to further information being forthcoming. The fact that it did not provided at least some solace and support for the conclusion that the Commission ultimately reached and published in its report. So that is something we do, and I do not for my part see what constraints there are upon our doing it in the Act as it is formulated, and that may be taken as something that we will continue to do if the Act remains in its present form."25

4.4.5 The Commission's major objection to the Moffitt amendments is that they would inevitably lead to litigation which would delay and frustrate the Commission's investigations.

> "The major difficulty that I perceive is, so far as more complex provisions as to when the Commission must or should proceed in private, are that they are practically bound to lead to litigation, which may be no bad thing of itself but has to be a bad thing if it leads to delay and frustration in the investigative process. The risk of that happening is very real. It is I think made manifest by what has happened in relation to the Waverley report, although of course the context is somewhat different and I think

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25 Transcript, 15 October 1990, pp 4 & 5.

> Committee members have heard me suggest before now that the delay in the publication of that report gives rise to real civil liberties questions so far as the individuals and institutions who stand to be affected by that report but are not involved in the litigation seeking its delay, so far as concerns their knowing what the report contains."26

This issue is discussed below.

4.5 Litigation

4.5.1 Mr Moffitt did not deny that his proposed amendments would result in litigation. Indeed the possibility of Commission decisions being subject to "supervision" or review by the Court of Appeal, by the use of prerogative writs, was put forward as an advantage of the amendments. Mr Moffitt said that it was "not satisfactory" that at present the Commission's decisions in relation to its obligations under s.31 did not appear to be subject to the supervision of the Court of Appeal.

4.5.2 The desirability of such litigation was addressed in the submission received from Mr Steven Rares.

> "I think that it would be desirable and not unduly inhibitive of the proper functioning of the ICAC that the capacity for judicial review of its decisions referred to by the Hon A R Moffitt, QC, be open. This would not open floodgates of attempts by persons who might be the subject of inquiries by the ICAC to approach the Court of Appeal. Most of the decisions would be discretionary and the courts take a fairly robust view as to interference in those decisions unless the decision makers fail to have regard to relevant considerations or have taken into account irrelevant ones. It would not be against the public interest that in circumstances such as those (and other traditional ones justifying judicial review) the courts should be able to intervene by overturning a decision made on a wrong basis. Once overturned, the question as to how the ICAC should decide the question would be for the ICAC to consider afresh, except in most unusual circumstances in which no reasonable person could come to a view other than that to which the court comes."27

4.5.3 When he appeared before the Committee on Friday 12 October Mr Moffitt stated that legitimate Court challenges to decisions or actions of bodies such as the ICAC were quite proper. He suggested that the Courts should be able to deal effectively with vexatious litigation. He said that matters suspected of

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26 Transcript, 15 October 1990, p 4.

27 Submission from Mr Steven Rares, p 3, (See appendix 2).

being vexatious could be brought on at an early stage - if an appeal was vexatious it would collapse. Mr Costigan also recommended this method of ensuring against delays. Mr Moffitt said the ICAC could overcome problems caused by any such litigation by simply continuing hearings but imposing a suppression order on all evidence until the litigation had been dealt with.

4.5.4 Mr Temby's views on some of the litigation in which the ICAC has been involved were stated in the Commissioner's Overview in the 1990 Annual Report.

> "It has to be said that the last year has not been devoid of difficulty and disappointment. In particular, the Commission has been subjected to a plague of litigation, one consequence of which was that what should have been its first report has been held up by twelve months, and is still not out. The need for amendment of the Commission's statutes so as to avoid ambiguity, achieve clarity, and prevent avoidable litigation is clear and pressing."28

4.5.5 Litigation is also discussed later in the 1990 Annual Report as a reason for the "less than optimum number of published reports" produced by the ICAC in the reporting year.

> "The most significant factor, however, for the less than optimum number of published reports is litigation commenced against the Commission. It has held up one report for the best part of 12 months, with no sign of resolution. More generally, it has created uncertainty as to how far the Commission can properly go.
>
> The Commission recognises the role of the courts as a major accountability mechanism. However, the level of resort to the courts, by persons affected by Commission investigations, has been so great that defence of legal proceedings became during the year a major distraction (and cost) to the Commission."29

This is the view that Mr Temby put to the Committee on 15 October. He said that greater statutory complexity should be resisted because that would lead to litigation and delay. He said the Commission "strongly favours a simple statutory conclusion".

4.6 Conclusion

4.6.1 The Moffitt amendments have considerable merit. They seek to ensure that the ICAC fulfils its obligations under s.31 by

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28 ICAC, Annual Report to 30 June 1990, p 4.

29 ibid, p 62.

setting out some of the elements going to make up the public interest. However, it is inevitable that the adoption of these amendments would lead to litigation. Whilst this is not a bad thing in itself, in view of the experience of the Commission over the past twelve months the Committee is reluctant to recommend that these amendments be made at this point in time. Before amendments are made which could see the Commission involved in further litigation with its investigations consequently delayed and disrupted, the Committee would like to see any alternative mechanisms used which could address the dangers inherent in unrestricted public hearings, discussed in Chapter 3.

4.6.2 **The Moffitt amendments have considerable merit and are supported in principle. However, in view of the likelihood of litigation inherent in them, and the experience of the Commission over the past twelve months, the Committee would like to see alternative mechanisms explored which could address the problems arising from unrestricted public hearings before such amendments are made to the ICAC Act.**

4.6.3 However, there is no reason why it cannot be set out in the Commission's document "Procedure at Public Hearings"[30] that the Commission will hear and consider applications for private hearings. This document could also list the grounds upon which an application could be made for a private hearing. The grounds should be the same as those provided for in Mr Moffitt's proposed s.31(8).

It should also be noted in this document that the ICAC may sit temporarily in private when it is reasonable to do so, such as when hearing an application for a private hearing. In order to ensure consistency between the Commissioner and Assistant Commissioners on this issue it should also be noted that reasons will be provided whenever a decision is made on an application for a private hearing.

4.6.4 **The Commission's document "Procedure at Public Hearings" should be amended to note that the Commission will hear and consider applications for private hearings. The grounds for such an application, as provided for in Mr Moffitt's proposed s.31(8) should also be included. It should also be noted that the Commission may sit temporarily in private and that reasons will be provided whenever a decision is made on an application for a private hearing.**

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30 ICAC, Annual Report to 30 June 1989, appendix 2, pp 79 & 80.

CHAPTER FIVE

MORE FLEXIBILITY

5.1 Present Position: Section 31

5.1.2 The question of public and private hearings is addressed in s.31 of the ICAC Act.

> "31 (1) A hearing shall be held in public, unless the Commission directs that the hearing be held in private.
>
> (2) If the Commission directs that a hearing be held in private, the Commission may give directions as to the persons who may be present at the hearing.
>
> (3) At a hearing that is held in public, the Commission may direct that the hearing or a part of the hearing be held in private and give directions as to the persons who may be present.
>
> (4) The Commission shall not give a direction under this section that a hearing or part of a hearing be held in private unless it is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given."

There is a clear presumption in favour of public hearings in s.31(1). S.31(4) seems to require a public interest finding before a hearing can be held in private.

5.2 Problems with Section 31

5.2.1 The Commission's 1990 Annual Report contained a number of comments on s.31.

> "Section 31 provides that Commission hearings shall be held in public unless the Commission directs that they be held in private because 'it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given'.
>
> It has not often been considered appropriate to direct the holding of private hearings except for limited

purposes in relation to a hearing that will be, or is otherwise, held in public. The public interest is usually best served by openly receiving evidence.

The Premier has said that the Government will review the procedures of the Commission. This has been taken to include hearing procedure. In light of this development, the Commission considers that it would be untimely to make recommendations in this report regarding the matter. A couple of points, however, should be made.

The Commission would oppose any proposal that public hearings cease to be the norm. For the Commission to maintain credibility with the public, this aspect of its investigative work must not be forced behind closed doors.

This is not to say that some legislative change should not occur. For example, the Commission is increasingly requiring final submissions regarding evidence to be made in writing. Section 17(2) authorises this course. However, if the legislation made this position even clearer, the Commission would have no difficulty with that. Similarly, if the legislation gave the Commission greater scope to receive submissions in private, even where the evidence had been received in public, that would be no bad thing. After all, it is submissions which involve widely variable assessments of the evidence, as perceived by each person on whose behalf a submission is made, and which often concern attacks, legitimate or otherwise, upon the reputation and credibility of witnesses and other persons. Media reporting of such submissions may unfairly damage those persons when the submissions are treated as statements of fact rather than merely as counsels' opinions and arguments that seek to cast a particular light on the evidence."31

5.3 Randwick TAFE Matter

5.3.1 Two issues arise from this discussion. Firstly, the requirement for a public interest finding before a matter can be heard in private, has forced the Commission to conduct at least one hearing in public which could have been dealt with more suitably and more expeditiously in private. This is the Randwick TAFE matter. The report on this matter was five pages in length. It found that there was no evidence warranting consideration of prosecution or disciplinary action. No recommendations were made concerning corruption prevention. When Mr Temby appeared before the Committee he indicated that this matter would not have been heard in public except that this was required by the Act.

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31 ICAC, Annual Report to 30 June 1990, pp 96 & 97.

> "A good example of that is the TAFE matter concerning which a report was brought forward and has been tabled in the Parliament. That was a relatively minor matter, although had a different assessment as to the credibility of witnesses been made it would have been of importance. I do not want to denigrate it in all respects. Nonetheless it was not of outstanding public importance or interest. If we had been able to, we would have conducted that hearing in private, and would not have had to burden Parliament with a report which does not say much. So there is an example of a case in which the present s.31 led to what I would urge are undesirable consequences. I do not pretend that those undesirable consequences are of devastating strength: nonetheless I think they were undesirable."32

5.3.2 Mr Temby went on to suggest that it would be an improvement if the ICAC Act was amended to provide the Commission with greater discretion to determine when to hold a hearing in public or in private.

> "The first suggestion put forward is that the statute provide that the Commission be empowered to sit in public or in private and be obliged to have regard to the public interest in deciding what course will be followed. That is effectively what has happened before Royal Commissions, although there is no such statutory provision. It is similar to the present position but there is no statutory bias in favour of public hearings. It would certainly give rise to useful results because there will be cases - although they are perhaps not very frequent - in which the Commission is required, having decided to conduct an investigation, to sit in public, would wish not to ...
>
> We would sit in private a little more, somewhat more than we do, if there was not the present statutory bias in favour of public hearings, and I suggest that that would be an improvement."33

5.4 Closing Submissions

5.4.1 Secondly, the Commission is constrained by s.31 from hearing submissions, including closing submissions, in private. The media reporting of closing submissions, particularly closing submissions from Counsel Assisting the Commission, has been a matter of concern to both the ICAC and the Committee for some time. When Mr Temby appeared before the Committee on 30 March he outlined his concerns about such media reporting.

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32 Transcript, 15 October 1990, p 7.

33 ibid.

> "As far as the closing submissions are concerned, they are views put by individuals or typically lawyers as to what approach the Commission should take, and in making the closing submissions they will be adopting a slant or a viewpoint depending on the interest they serve...
>
> There is a strong tendency to assume that the submissions of counsel assisting, which are only submissions on the evidence, in some way represent the provisional views of the Commission, and they do nothing of the sort. That is my major concern. Also submissions are not in any sense sworn evidence. It is just assistance to the Commission in writing its report. The fear I have is that it will finish up the wrong way, the submissions getting the greater coverage and the report the lesser. The report is the definitive document, which ought to be looked at more closely."34

5.4.2 This question of closing submissions was raised with most witnesses who appeared before the Committee. In each case support was expressed for moves to have closing submissions heard in private. This matter was taken up most vigorously by Mr McClellan in his submission.

> "One matter which Hon A R Moffitt does not appear to directly address in his paper is the problems created by the public exposure and reporting of the submission process of an ICAC inquiry. In my paper I instance occasions where remarks of counsel assisting and an assistant Commissioner have been expressed as conclusions with respect to the conduct of individuals. These remarks have been reported and, carrying the weight which properly attaches to them, have caused harm to individuals which cannot be ameliorated although the individual may never be the subject of an adverse finding. In my opinion, in addition to significant modification of the public inquiry process, consideration should be given to the prohibition of the publication of the submissions of counsel assisting in so far as they relate to the conduct of persons the subject of the inquiry."35

5.4.3 Despite the general support for closing submissions to be heard in private it must be recognised that even if s.31 of the ICAC Act is amended to enable this to occur, there will be occasions where someone appearing before the Commission will want their

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34 Committee on the ICAC, Collation of Evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on General Aspects of the Commission's Operations, 30 March 1990, pp 1 & 2.

35 Transcript, 12 October 1990, p 131.

closing submission heard in public. This may include instances where an allegation has been made in public and there is a desire to have a response made in public. As Mr Temby put to the Committee on 30 March, "... if they want that you could hardly stand in their way. If that is going to happen, then closing submissions by counsel assisting have to be the same ..."[36]

5.5 Conclusion

5.5.1 In terms of the witnesses who appeared before the Committee, there appears to be strong support for the provision of greater discretion to the Commission to determine when to conduct hearings in public and in private and specifically to enable the Commission to hear closing submissions in private. The provision of such flexibility would put the ICAC on a par with Royal Commissions.

5.3.2 This must be counter-balanced by two points, however. Firstly, as noted in chapter two, in view of the considerable benefits of public hearings the ICAC should continue to conduct most of its hearings in public. In providing more flexibility for the Commission to hold hearings in private the presumption in favour of public hearings would need to be removed from the Act. Whilst the present Commissioner has made it clear that he supports public hearings, it would be helpful if the Commission document "Procedure at Public Hearings" were to include some statement that most evidence will be taken in public.

5.3.3 The second point to be noted is that which Mr Temby made to the Committee on 30 March. That is, when there are no legislative impediments to the Commission hearing closing submissions in private some persons may still want to have their submissions heard in public. In these circumstances the Commission would almost have to accede to such a request. Submissions from Counsel Assisting would also probably have to be heard in public in these circumstances.

5.3.4 **Section 31 of the ICAC Act should be amended to provide the Commission with greater discretion to determine when to conduct a hearing in public or in private. In deciding whether to conduct a hearing in public or in private the Commission shall have regard to the public interest. Specifically, this amendment should enable the Commission to hear closing submissions in private. However the document "Procedure at Public Hearings" should note that most evidence will be heard in public.**

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36 Collation of Evidence, 30 March 1990, p 2.

CHAPTER SIX

SUPPRESSION ORDERS

6.1 Present Position: Section 112

6.1.1 Under s.112 the Commission may use suppression orders. Section 112 provides that:

> "(1) The Commission may direct that -
>
> (a) any evidence given before it; or
>
> (b) the contents of any document, or a description of any thing, produced to the Commission or seized under a search warrant issued under this Act; or
>
> (c) any information that might enable a person who has given evidence before the Commission to be identified; or
>
> (d) the fact that any person has given or may be about to give evidence at a hearing,
>
> shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.
>
> (2) A person shall not make a publication in contravention of a direction given under this section.
>
> Maximum penalty: 50 penalty units or imprisonment for 12 months, or both."

6.2 Value of Suppression Orders

6.2.1 The Moffitt Discussion Paper proposed amendments to s.112 to specify that the Commission was able to use temporary suppression orders. When he appeared before the Committee on Monday 15 October Mr Moffitt said that suppression could be a most effective means of ensuring against unfair and unnecessary damage to reputations. He said that suppression orders could be imposed when an allegation is made but where the person against whom the allegation is made is not represented or is unable to respond. The order could then be lifted at a later date when the allegation and response are made public at the same time. This would mean that any fair and balanced media report of the allegation would have to give equal weight to the allegation and response. Similarly, suppression orders could be used for

documents which contain such allegations. Documents subject to such orders could be marked for identification and not made public until a later date when the order is lifted. Mr Moffitt added that the grounds set out in his proposed s.31(8) would represent appropriate grounds for the use of suppression orders.

6.2.2 When Mr Costigan appeared before the Committee he expressed strong support for the use of suppression orders. He said that suppression orders were the best method of ensuring against unnecessary damage to reputations, particularly from hearsay allegations.

> "The immediate way to deal with something which is clearly hearsay and peripheral to the main thing, is to make a suppression order on the spot."37

Mr Bersten and the Council for Civil Liberties also expressed support for the use of suppression orders.

6.3 Adequacy of s.112

6.3.1 Mr Temby put forward the use of suppression orders as an alternative option to the Moffitt amendments. He said that the Commission had already made use of suppression orders. However, he suggested that for the Commission to make greater use of suppression orders s.112 would need to be amended to increase the bases upon which the Commission is empowered to make suppression orders. He also emphasised that the Commission should retain the discretion in the use of such orders. (This was in response to a suggestion from Mr Moffitt that a statutory right to apply for a suppression order could be considered similar to his proposed amendments for s.31.)

> "... it might be useful to increase the bases upon which the Commission is empowered to make suppression orders so as to give us a sort of check-list against which the possibility can be examined. That would be useful to counsel, particularly to counsel who come in not being experience in the ways of the Commission, because they would know the sorts of matters to which the Commission is likely to advert in deciding what course should be followed. It may be thought that that would be useful. Suppression orders are made for reasons having to do with the protection of witnesses, particularly in the sense of life, limb or unwarranted interference. We have made suppression orders for example as to a name out of considerations of tender solicitude to the individual concerned. We would certainly make suppression orders in favour of minors or on national security grounds if made out, or on trade secret grounds. There could be no objection to a list being included in the Act, so long as it was not a closed list, of bases upon which suppression

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37 Transcript, 12 October 1990, p 35.

orders could be made, although it is strongly urged that that be done not in mandatory terms but rather in terms of empowering the Commission."38

6.3.2 Mr Moffitt and Mr Bersten questioned whether there was a need for s.112 to be amended to enable greater use to be made of suppression orders. Indeed it appears that even the amendment to s.112 proposed in the Moffitt Discussion Paper may be unnecessary, as the Commission has already used temporary suppression orders. Rather than amending s.112 it appears that it would be possible for the ICAC to make greater use of the powers which it already has to make suppression orders.

6.4 Conclusion

6.4.1 There was strong support from the witnesses who appeared before the Committee for the ICAC to make greater use of temporary suppression orders to protect reputations. This was seen as a particularly useful tool for use when a surprise allegation or hearsay evidence is raised in a public hearing.

6.4.2 **The ICAC should make greater use of temporary suppression orders to protect reputations from hearsay allegations. Suppression orders should be used when an allegation is made about a person who is unrepresented or who cannot respond to the allegation on the day it is made. The suppression order can be lifted at a later date when the allegation and response are made public concurrently. However the ICAC should retain discretion over when such orders are made. The document "Procedure at Public Hearings" should be amended to note the general circumstances in which suppression orders will be made.**

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38 Transcript, 15 October 1990, p 8.

CHAPTER SEVEN

PRIOR NOTIFICATION

7.1 Background

7.1.1 In the Preston matter (see paragraph 3.5 above) it appears that the ICAC made no effort to inform Mr Preston about the allegation that was to be made about him. This was despite the fact that the Commission had prior knowledge of the allegation through Mr Frank's statement. A number of witnesses before the Committee indicated that they believed that the problems exemplified in this case could be overcome in large part by the provision of adequate notice to persons about whom allegations are to be made at public hearings.

7.2 Fitzgerald Inquiry Model

7.2.1 Earlier this year the Committee met with members of the Queensland Parliamentary Criminal Justice Committee. At that meeting mention was made of the procedures whereby persons were notified before they were to be adversely named at the Fitzgerald inquiry. The Chairman subsequently wrote to the Chairman of the Queensland Committee seeking further advice on this issue. In August a reply was received from Sir Max Bingham, Chairman of the Criminal Justice Commission. That reply included the following advice.

> "In relation to the second issue that you raised, Commissioner Fitzgerald had a policy of notifying in writing, where possible, all persons (including corporations) where it was anticipated that evidence may be given before the Commission which raised the possibility that they were involved in unlawful behaviour. The term unlawful was robustly interpreted to include adverse allegations of a criminal or disciplinary nature.
>
> The person was advised that they were entitled to appear before the Commission at the time that the evidence was to be given. They were also provided with a very brief summary of the relevant area which was to be covered by the evidence. For example, that the person was concerned with and involved in the use, keeping, management and control of premises for purposes connected with prostitution.
>
> There were instances where witnesses made adverse allegations against persons when that evidence had not previously been foreshadowed by Commission officers.

> In these instances, clearly notices of allegation could not be provided beforehand, however they were forwarded as soon as possible to the person adversely mentioned allowing him the opportunity to respond. This response was not always permitted in person. They were at least entitled to respond by way of statutory declaration presented to the Commission."39

7.2.2 The Committee supports the approach taken in the Fitzgerald inquiry, as outlined above. When the Chairman tabled the letter from Sir Max Bingham at the hearing on 15 October Mr Temby said that when the ICAC published the scope and purpose of an investigation this served a valuable role in terms of notifying those who may be able to assist the inquiry or who may be substantially and directly interested in the subject matter of the investigation.

7.2.3 However, it must be noted that considerable concern surrounds persons who are not substantially and directly interested in the subject matter of the investigation but about whom allegations are made incidental to the investigation. Mr Preston is a case in point. The publication of the scope and purpose of the North Coast inquiry did not serve as adequate notice for Mr Preston.

7.2.4 Although such a procedure was clearly not in place when the allegations were made about Mr Preston on 22 June 1989, the Committee notes Mr Temby's further comments on 15 October that the ICAC has since developed a similar procedure to that adopted during the Fitzgerald inquiry.

> "... we behave in a generally similar way, although the extent to which it is put in writing in a letter is less than the impression conveyed here. I do not know the extent of the qualification 'where possible' in the second line. It may be fairly large. We have not just openings but what might be called sub-openings as a new issue arises in the hearing. We generally tell people who are going to be named, of that fact. We send transcript out to people or otherwise communicate with them to advise of allegations that have been made, and we provide them with a right of reply, particularly in circumstances where any adverse finding can be made. I do not think anyone can point to an occasion where we have made an adverse finding without giving a right of reply. I would be very surprised and disappointed if that were the case, because the obligation to do it is a very clear one indeed.
>
> I suppose on the fringes there is room for a bit of debate as to how far you go in giving notification. There might be some material which somebody might be offended by, where we do not encourage them to come in

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39 Transcript, 15 October 1990, pp 24 & 25.

> and have their say. If somebody is called a liar they do not like it, but that is not necessarily of absolutely critical significance from our viewpoint. As the Committee has heard me say before now, at least in this respect we are well ahead of the courts, because before the courts witnesses have no right of appearance. It is a right which is normally granted before the Commission.
>
> So we do something which is like that, although not letters formally advising of allegations made."**40**

7.3 Limitations

7.3.1 The Committee recognises, though, that there are circumstances in which it would be inappropriate for prior notification to be given. Mr Temby said that one issue to be considered was the likelihood of evidence being tampered with or destroyed.

> "You cannot do it always, because to do it always will lead to undesirable consequences - at the extreme to the destruction of evidence. We have had occasions when evidence has been destroyed, and I have no doubt that those occasions would be more frequent if we invariably and to everybody gave full chapter and verse before they were even called as a witness. It needs to borne steadily in mind that the hearings are in aid of the investigative process and we are not sitting as a court sits."**41**

The Fitzgerald Report acknowledged that this danger was inherent in all public hearings. Furthermore, Mr Costigan indicated that during the course of his inquiry prior notification was often not provided. He said the first some people knew about being under investigation was when they were arrested and charged.

7.3.2 The comments contained in the final paragraph of the submission from the National Crime Authority are relevant here. If the primary function of the ICAC is "considered to be exposure of corrupt conduct, and the recommendation of remedies to prevent or diminish it, then pubic hearings and pubic reports will be an appropriate mechanism".**42** However, there would need to be restrictions on these reports and hearings. The provision of prior notice of allegations to be made would be important in this regard. In this case there may only be limited prosecutions - evidence may be destroyed. On the other hand the priority for the ICAC could be seen to be prosecutions. In this case the value of public hearings and reports would be greatly

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40 Transcript, 15 October 1990, p 25.

41 Transcript, 15 October 1990, p 12.

42 Submission from National Crime Authority, p 7 (See Appendix 2).

diminished. Prior notification of allegations would often be unsuitable.

7.3.3 Clearly, the ICAC has roles both in terms of exposure and assembling evidence which may be used in prosecutions. To the extent that both roles are pursued at the one time there is a need for the ICAC to strike a balance between the alternative approaches which could be taken. Therefore the Commission must retain some discretion to determine when prior notification is appropriate and when it is not.

7.4 Conclusion

7.4.1 **The Committee endorses the procedure adopted during the Fitzgerald inquiry in relation to the prior notification of persons against whom allegations were made during public hearings. The Committee commends the ICAC on the development of a similar procedure. The Committee also recognises that the Commission must retain some discretion to determine when prior notification is appropriate. However, the Committee believes this procedure needs to be enunciated, in the document "Procedure at Public Hearings".**

CHAPTER EIGHT

RIGHT OF REPLY

8.1 Present Situation

8.1.1 There is presently no statutory requirement for the ICAC to provide persons against whom an allegation has been made with a right of reply. Despite the lack of a statutory requirement Mr Temby has publicly stated on a number of occasions that the Commission will provide persons with some right of response. One such occasion was when he appeared before the Committee on 30 March.

> "The requirements of natural justice as recognised by the Courts certainly dictate that a finding which could affect rights must be preceded by a opportunity to respond. The Commission goes further, and seeks to give witnesses who are attacked some right of response. The Commission also seeks to give to a person who faces criticism such an opportunity. That may be done by putting propositions in the course of their evidence, or by giving notice of possible conclusions. The latter will always be required in the case of persons substantially and directly interested in the subject matter of a hearing."**43**

8.1.2 The Committee also notes that the Commission document "Procedures at Public Hearings" makes reference to this right of response.

> "14 Persons against whom corrupt conduct is alleged, will generally be called and given an opportunity of answering the allegations, but will generally only be called after the evidence of such alleged conduct has been led."**44**

8.1.3 When Mr Bersten met with a delegation of the Committee on 06 September 1990 he pointed to the decision of the Privy Council which followed the Mt Aerobus air disaster as establishing in case law the right for a person to be heard.**45**

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43 Collation of Evidence, 30 March 1990, p 10.

44 ICAC, Annual Report to 30 June 1989, p 80.

45 Air New Zealand vs Mahon, (1984) AC 808

8.2 Immediate Reply

8.2.1 The Committee commends the ICAC on the provision of a right of reply to those against whom allegations are made although there is no statutory requirement to do so. Despite this, the Committee has received suggestions that a more extensive right of reply should be provided.

8.2.2 The Hon A R Moffitt called for the provision of a right to make an early reply to allegations, that is on the same day an allegation is made. He emphasised that the problems of unfair or unnecessary damage to reputations arose on the day an allegation was made.

> "Mr Temby talks of the early reply. I think everybody must see that that is an important thing that the ICAC should do and it has been done, but I suggest that that is not really sufficient, because of what has happened and is likely to continue to happen. It is not an early reply, because it is the problem of Day 1, the problem of media reporting, very often quite accurate on what has happened on Day 1. They get the whole of the bad, or the allegations of the bad, which come out in the reporting on Day 1. Even in the Preston case you get the response on Day 1, but in other cases three months later. The damage is irreparably done on Day 1, so although it is highly desirable that there be an early reply, I would suggest that it does not meet the problem."**46**

8.2.3 The problems about damage to reputations on "Day 1" are borne out by the Preston matter (see 3.5 above). Although the Assistant Commissioner allowed three paragraphs of a statement rebutting the allegation to be read into evidence and made a statement from the bench in relation to this matter on the next sitting day, this was not until three weeks later. By this time the damage had been done. Indeed the damage was done on the 23 June when an item appeared on the 6.00 pm television news outlining the allegation. Even if Mr Preston had been able to make a response on the next day the damage would have been almost irreparable.

8.2.4 Mr Moffitt suggested two means by which this problem could be addressed.

> "It (the problem) can be met in one of only two ways. One is an immediate, even though temporary, suppression order, maybe a suppression order until the party affected could be heard to some degree. The other would be to do what was proposed in the Salmon report. There should be some practice note or some guidelines or something whereby on the occasion that an adverse allegation is first made, or the occasion

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46 Transcript, 15 October 1990, p 95.

when some adverse material appears unexpectedly or otherwise, at that time the person affected should be given an opportunity through his counsel to make a concise statement, it may be limited to three minutes or such longer time as would be allowed, to say something in anticipation, either that it is denied or that his instructions are that his client was not there on that day. Then the damage is not done, but the next day it is too late.

It depends on whether the media bother reporting it, because it is not that spectacular. If it is on that day, and the media do not report it, they are going to be exposed in a defamation action that it is not a fair report. If it is on the same day or the same occasion that the bad and the good are said, if the bad is reported and a good is left out, they have no defence of a fair report."**47**

8.2.5 Mr Moffitt based his call for such a right to an early response on the recommendations in the Report of the Salmon Royal Commission into Tribunals of Inquiry regarding the need for opportunities to respond to opening statements at an inquiry.

"In the past the opening statement of counsel for the Tribunal has sometimes contained strong criticisms of persons to be called as witnesses before the Tribunal. These criticisms have been given the widest publicity yet it has not been possible to call the persons concerned until a much later stage in the inquiry. Accordingly they have been deprived, sometimes for weeks, of giving their side of the story and answering the criticisms that have been publicly made against them. This unfortunately is sometimes unavoidable. It is not however a feature peculiar to Tribunals of Inquiry but occurs equally in the ordinary civil and criminal courts. We consider that solicitor or counsel for any witness before the Tribunal should be given the opportunity of making a short speech of not more than about five minutes duration immediately after the conclusion of the opening speech by counsel for the Tribunal. In most cases we think it unlikely that anyone will wish to avail himself of this opportunity. There may however be cases in which the opportunity to make a particular point or refer to a document at an early stage will immediately put the case in an entirely different light and go far to mitigate the effect upon the public of the criticism made in opening. It is for this reason that we recommend that it should be the practice of Tribunals to accord solicitor or counsel appearing for witnesses the opportunity of making a very short statement immediately after the opening. Whilst this is an

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47 Transcript, 15 October 1990, p 96.

> advantage not enjoyed in the ordinary civil or criminal courts, it must be recognised that witnesses before an inquisitorial tribunal are sometimes in an exceptionally difficult position and should be accorded every possible safeguard."48

Mr Moffitt said the principle involved was equally applicable to the situation where allegations were made and an immediate, brief response would be helpful.

8.2.6 The immediate right of reply suggested by Mr Moffitt closely follows the right to make an unsworn statement which was afforded to persons against whom allegations were made during the Fitzgerald inquiry (see 7.2 above). Where surprise allegations were made, which had not been foreshadowed by evidence before the Commission, the person was informed of the allegation as soon as practicable and given an opportunity to respond.

8.2.7 The Committee believes the provision of an opportunity to make an immediate response to an allegation would be a significant improvement on the present practice whereby a response may not be given for some weeks or even months.

8.3 Leading of Evidence

8.3.1 When the Director of the Institute of Criminology, Mr Mark Findlay, appeared before the Committee on 12 October he expressed concern about the Commission's procedures in relation to the leading of evidence by witnesses.

> "It is one thing for the commissioner to say 'You have the right then to say that that criticism is wrong'. It is all very well to have half a dozen witnesses saying that I am without credit, and then for me to turn to the commissioner and say 'Well, I am actually a credit-worthy witness'. There are occasions in the past where the commissioner has chosen not to allow witnesses before a hearing to call evidence on their behalf."49

8.3.2 This matter was raised with Mr Temby when he appeared before the Committee on 15 October. Mr Temby outlined some of the criteria taken into account when deciding whether to allow witnesses to lead evidence on their behalf. These include the connection of the evidence with the matters at the focus of the investigation, the circumstances surrounding the allegations and alternative means for redressing the allegations. He emphasised that is was important for the Commission to maintain control over the

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48 Report of Salmon Royal Commission into Tribunals of Inquiry. Cmnd. 3121, 1966, p 27.

49 Transcript, 12 October 1990, p 104.

evidence to be led.50

8.3.3 The Committee agrees that the Commission should retain the discretion to determine what evidence should be led before it. However, the criteria which are applied in determining which evidence may be led needs to be spelt out, perhaps in the document "Procedures at Public Hearings" or in the information which is provided to witnesses who appear before the Commission.

8.4 Conclusion

8.4.1 **The Committee commends the ICAC upon the provision of a right of reply to persons against whom allegations are made, even though there is no statutory requirement for the provision of such a right. The Committee also notes the reference to this practice in the document "Procedure at Public Hearings". In light of the development of this practice the Committee does not see a need for amendment of the ICAC Act at this time to provide for a statutory right of reply.**

8.4.2 **Wherever possible the Commission should seek to provide an opportunity for a person against whom an allegation is made to make a brief response on the day the allegation is made. Where this is not possible the Commission should make use of a temporary suppression order (see 6.4.2). This procedure should be enunciated in the document "Procedure at Public Hearings".**

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50 See forthcoming Collation of Evidence, 15 October 1990, p 44.

CHAPTER NINE

SIFTING OF EVIDENCE

9.1 Comments by Mr Costigan QC

9.1.1 When Mr Costigan appeared before the Committee he outlined the procedures adopted during his Royal Commission. He focussed on the importance of preliminary inquiries or sifting of evidence before a public hearing begins. He said that on a number of occasions during his Royal Commission preliminary investigations into an allegation would be carried out in private and that at the end of that investigation there was a decision not to pursue the matter any further, because there was little or no substance to the allegation. On other occasions the matter would proceed to the next stage, that of a public hearing. The following passage from Mr Costigan's evidence outlines the general procedure followed.

> "You get all sorts of information coming into a body like the ICAC I am sure which indicates that perhaps there might be something wrong in a particular area. That is all you have in the beginning. The first thing you ought to do is to start investigation to see whether there is in fact any basis for that suggestion that there might be something wrong. The extent to which you take those investigations depends on the nature of the allegations...
>
> One result of making those inquiries is that you may be satisfied beyond reasonable doubt that the allegation is not true. There was no basis for it. That happened a number of times in my commission, that we would investigate a matter and we would go a certain way down the track and would realise because of the investigations we had done in confidential sessions that there was not any basis for it, and that was the end of it. There had been no public allegations made and there had been no damage done to the reputation, although there had been some inconvenience to the person one was looking at because one was making some inquiry into his private affairs.
>
> If as a result of that preliminary investigation - the calling of evidence in confidence, the looking at bank accounts, looking at travel movements, and so on - you formed the view that there really was a significant basis of evidence to justify a further investigation, then you had reached the next stage where you embark on a full investigation, and as it becomes apparent to

you that there is a good deal of evidence which needs to be explained, that is the point at which you seriously contemplate going public. Again it is a matter for the commission, I would think, to determine whether you would go immediately public on that or whether you would give the person against whom the allegations are being made an opportunity to answer them in a confidential session.

On a number of occasions what we did was, having reached the stage where we were very suspicious about a certain course of behaviour, we would call in the person and say 'We have been looking at your affairs, would you mind telling us what has been going on?' That would give him an opportunity, with counsel there, to explain what was going on. Normally we would not then accept that, but we would adjourn it and go away and investigate what he said and check it over. If it checked out, we would bring him back and say 'We have checked this out and what you told us was right. Perhaps you have been a bit naughty in some areas but not the matters we were concerned in following. Thank you very much.'

If it did not check out, and this often happened, we found that there were serial lies. We then would go public. We would ask the man to come along and we would put to him all the facts we had pulled together in our private inquiries. That is the way we worked, and I think that is the kind of way really; you try to achieve that balance between the very genuine public interest in seeing what is going on in our society, and the very real damage that can be done to a private person's reputation merely by being mentioned in the context of a body like the ICAC, and the very real difficulty of curing that damage down the track."51

9.2 Mr McClellan QC

9.2.1 Mr McClellan also supported the need for the ICAC to carefully sift evidence before bringing a matter to the stage of a public hearing. In his submission that he stated that,

> "... the inquiry process must be modified to ensure that allegations which could never amount to corrupt conduct are not ventilated...
>
> These processes must be in private at least until the investigation has established a degree of confidence in any allegation which justifies the damage which will accompany its public ventilation. Unless individuals have this basic protection, the Commission

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51 Transcript, 12 October 1990, pp 31 & 32.

processes will always be perceived as unfair."52

When he appeared before the Committee he expanded upon this.

> "As to the public confidence situation, all that I am suggesting really is that until the Commission - and I am sure this is what Mr Moffitt has in mind too - comes to the point where with some degree of confidence it is of the view that the allegation should be given a public airing; without doing these things, and then it should be proceeding in private. It seems to me that at that point in time, if it then makes available material which it has collected in private, which can then be published, and if need be proceed thereafter in public, there should not be any problem with public confidence in the institution. On the contrary, I think, is promoted by the press, and I happen to have a view which I have expressed about their capacity to deal thoroughly with inquiries during the allegation investigation stage."53

9.3 Commission's Response

9.3.1 When Mr Temby appeared before the Committee on 15 October he addressed this question of the degree of preliminary work which takes place before a public hearing is conducted. He emphasised the substantial work that is done before a matter goes public. During the assessment phase, allegations are examined in detail for substance and bona fides. He said that few matters are pursued to the public hearing stage. Over 1,000 complaints were received by the Commission during the year ending 30 June 1990. Only 2% of these were made the subject of a formal investigation.54

9.3.2 As Mr Temby felt it was important to address this issue in some detail on 15 October it is worthwhile to quote his comments in full.

> "... he (Mr Moffitt) and a number of other witnesses have urged that allegations should be assessed for their substance and their apparent bona fides. That is something which is done as a matter of course, and it is done both in the course of what we call the assessment phase which precedes the investigation stage, and it is also done as ancillary to the investigation phase. So far as the former is concerned, Committee members know that we receive large numbers of allegations, and even when one puts to one side those that are beyond jurisdiction or

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52 Transcript, 12 October 1990, p 163.

53 ibid, pp 174 & 175.

54 ICAC, Annual Report to 30 June 1990, p 22.

lacking in particularity so that they cannot be pursued, there are a fair number and only a relatively small proportion of those are pursued.

The winnowing process involves a close examination of the material that has been received, to decide what should be pursued and what should not. Our tentative view that matters should not be pursued is then confirmed or otherwise by the Operations Review Committee. In the course of deciding whether a matter should be pursued, regard is had to a multiplicity of matters, the most important being the importance of the particular matter and the opportunities that it may present for systemic change. But also and very significantly for present purposes an assessment is made as best one can as to the credibility and likelihood of the allegation which is made, and we are reluctant to pursue matters which are unlikely to have any content at all at the end of the day. One has to be careful of course not to foreclose the process of examining evidence and all the rest of it, and obviously the Commission does bring forward reports that are entirely or almost entirely exculpatory in nature. Nonetheless we are reluctant to take on matters that are not likely to have legs.

In the course of the investigation process we do likewise. For example, the chief investigator who mostly worked on the Tweed matter informs me that about 70 prospective witnesses who were interviewed were put to one side and not called at the hearing, for reasons which varied, sometimes because it was thought they were not truthful and would not make credible witnesses. That is obvious enough, and you are always making judgements about this. About a third of the witnesses I have mentioned were put to one side, although the allegations made seemed to have apparent substance, and although it could not be said that the witness was unlikely to be looked upon as credible, but because there was no external support for what the particular prospective witness said, and accordingly an adverse finding to the Briggenshaw standard was thought to be unlikely on the basis of the assertion of that witness only.

So in a number of cases, twenty plus in the Tweed matter and in a number of matters - it is happening all the time - we put witnesses to one side because it is thought that their evidence unsupported is very unlikely to sustain an adverse conclusion against an individual, and accordingly it would not be productive to call the witness and it would be unfair to the individual for that to happen.

It is also necessary, and this is the second point under this heading, to stress the importance of the

formal way in which decisions to proceed with investigations are made. You all know that that is done by means of the scope and purpose document which lays down the metes and bounds of the particular investigation, and certainly the Commission has avoided what might be described as long protracted and perhaps even free-wheeling investigations such as has been seen in the Fitzgerald and Costigan cases. I am not saying that critically: both did important work and that is an undeniable historical fact. Nonetheless we have laid down terms of reference that are fairly confined and we have, as best we can, kept those terms of reference tight in their drafting and also in the way that they are looked upon in the investigative process.

Third, it is important to point out that hearings both public and private are only held in the course of formal investigations, which means a judgment has to be made as to jurisdiction, and a judgment has to be made that an investigation is warranted, and those judgements are made by myself. We do not hold private hearings just to do a spot of fossicking to see if an investigation may be called for.

Public hearings in particular are not held until the Commission has looked closely at the particular matter and the available material.55

9.4 Conclusion

9.4.1 **The Committee notes the comments of Mr Costigan and others about the importance of careful preliminary sifting of evidence before a matter reaches the public hearing stage. The Committee also notes the advice of Mr Temby concerning the procedures already in place within the ICAC for such initial assessment and review of complaints and commends these procedures.**

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55 Transcript, 15 October 1990, pp 5 & 6.

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

WEDNESDAY 18 JULY 1990

AT PARLIAMENT HOUSE, SYDNEY AT 9.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Tink
	Mr Turner
	Mr Whelan

An apology was received from Ms Nori.

The Minutes of the meetings on 5 June and 12 June 1990, as circulated, were confirmed.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

That the Committee reply to Mr Hakim's letter of 1 June in the terms of the circulated draft letter.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That the Committee reply to Mr Temby's letter of 25 June in the terms of the circulated draft letter.

The Committee noted the letters from Mr D Catt, dated 18 June; Mr G Roberson, dated 18 June; Mr K Robson, dated 22 June; Mr D Landa, dated 22 June; Mr M Bersten, dated 22 June; Mr G Sturgess, dated 29 June; and the Hon J Dowd MP, dated 3 July 1990.

The Committee noted the Crown Solicitor's advice, dated 25 June 1990, on the televising issue.

The Committee noted the proposed program of liaison with relevant agencies.

Meeting of the Committee on the ICAC
18 July 1990

The Committee deliberated over the High Court decision in the matters of Balog and the ICAC and Stait and the ICAC.

The Committee deliberated over a set schedule for future Committee meetings.

At 10.05 am the Committee left Parliament House and travelled to the ICAC premises in Redfern.

The Committee received a briefing from Ian Temby, Commissioner of the ICAC, and Ian Lloyd, Stella Walker and Ann Reid, officers of the ICAC, on the corruption prevention and education strategies of the Commission.

The Committee and Mr Temby then discussed other matters of mutual interest.

The Committee adjourned at 12.30 pm until Wednesday 8 August 1990 at 2.00 pm.

.....
Chairman

.....
Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

WEDNESDAY 8 AUGUST 1990

AT PARLIAMENT HOUSE, SYDNEY AT 9.30 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Kerr
The Hon D J Gay	Ms Nori
	Mr Tink
	Mr Turner

Apologies were received from Mr Hatton, Mr Mutch and Mr Whelan. (Ms Nori left the meeting at 9.45 am.)

The Minutes of the meeting on 18 July 1990, as circulated, were confirmed.

The Committee noted the letters from Dr Trau, dated 23 July and Mr Temby dated 3 August.

Resolved on the motion of Mr Gay, seconded by Mr Tink:

That the Committee write to Dr Trau, forwarding a copy of the Commission's Statement to the Committee on the Operations Review Committee.

The Committee noted the letter from Mr Bersten, dated 17 July 1990.

Resolved on the motion of Mr Turner, seconded by Mr Dyer:

That a meeting with Mr Bersten be arranged for the week beginning 3 September.

The Committee deliberated on the letter from Mr Temby, dated 17 July 1990.

Meeting of the Committee on the ICAC
8 August 1990

Resolved on the motion of Mr Dyer, seconded by Mr Tink:

That Mr Temby be advised of the Committee's intention to table this letter in the Legislative Council during the next sitting.

The Committee then deliberated on the letter from the Hon A R Moffitt, dated 26 July 1990, together with two documents prepared for the Committee.

Resolved on the motion of Mr Turner, seconded by Mr Dyer:

That the two documents prepared by the Hon A R Moffitt be tabled in the Legislative Council during the next sitting and released as a discussion paper.

The Committee deliberated on the letter from the Hon JRA Dowd MP, dated 30 July. The Committee noted the letters from Mr D Catt, dated 1 August; and Mr M Findlay, dated 30 July and 1 August 1990.

The Committee noted the revised arrangements for the program of liaison with relevant agencies.

The Committee then deliberated about its next inquiry.

Resolved on the motion of Mr Gay, seconded by Mr Dyer:

That the Project Officer and Clerk be authorised to prepare, and circulate to members for approval, draft terms of reference for the next Committee inquiry together with a revised foreword to be included in the Discussion Paper.

The Committee adjourned at 11.05 am sine die.

..... Chairman

..... for Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 11 SEPTEMBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 6.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Ms Nori
	Mr Turner

Apologies were received from Mr Tink and Mr Whelan.

The Minutes of the meeting on 8 August 1990, as circulated, were confirmed.

The Committee noted the letters from Sir Max Bingham, dated 8 August; Mr Mark Findlay, undated and received on 10 August; Dr Blair Hunt, dated 15 August; Mr Ian Temby, dated 17 August; Mr David Catt, dated 23 August and 16 August; Mr John Turner MP, dated 21 August; Professor John Goldring, dated 24 August; and Mr Ernie Chaples, dated 26 August 1990.

The Committee deliberated on the letter from Dr Jerzy Trau, dated 17 August.

Resolved on the motion of Mr Gay, seconded by Mr Dyer:

That the Committee write to Dr Trau, drawing his attention to s.64(2) of the ICAC Act which precludes the Committee from becoming involved in operational matters and indicating that in view of Mr Temby's advice the Committee does not propose to take any further action on this matter.

Meeting of the Committee on the ICAC
11 September 1990

The Committee deliberated on the letter from Mr Norman Rosenthal, dated 20 August.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That the Committee write to Mr Rosenthal drawing his attention to s.64(2) of the ICAC Act which precludes the Committee from becoming involved in operational matters.

The Committee deliberated on the letter from Mr Charles Dimich, dated 7 August.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

That the Committee write to Mr Dimich informing him of the role of the Ombudsman in investigating complaints against Police under the Police Regulation (Allegations of Misconduct) Act.

The Committee noted the submissions received for the inquiry into openness and secrecy and the rights of witnesses, together with the acknowledgments of invitations for submissions to be made.

Resolved on the motion of Mr Hatton, seconded by Mr Dyer:

That Mr Dyer, Mr Gay and Mr Hatton form a sub-committee to consider the submissions received.

The Committee noted the report on the program of liaison with relevant agencies and endorsed the recommendations in the report, subject to the letter to Mr Temby being amended to include reference to Judge Thorley's comments about the large numbers of complaints about possible corrupt conduct which the ICAC is unable to investigate.

The Committee then deliberated on the arrangements for the inquiry into openness and secrecy and the rights of witnesses.

Resolved on the motion of Mr Dyer, seconded by Mr Gay:

That the Committee be empowered to engage the Hon A R Moffitt, and any other person that it sees fit, as a consultant during the course of this and any future inquiry.

Meeting of the Committee on the ICAC
11 September 1990

Resolved on the motion of Mr Gay, seconded by Mr Dyer:

That the Committee tackle this inquiry in two stages, the first examining the general question of openness and secrecy in inquiries into organised crime and corruption and the second dealing with other issues raised in submissions from witnesses and legal representatives who have appeared at ICAC hearings.

The Committee then considered the dates for public hearings as part of this inquiry.

Friday 12 October and Monday 15 October 1990 were set aside as the dates for hearings into the general question of openness and secrecy.

The Committee adjourned at 6.38 pm until 6.00 pm Tuesday 9 October.

.....
Chairman

Leslie Gönye.....
Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 09 OCTOBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 6.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
	Mr Tink
	Mr Turner
	Mr Whelan

Apologies were received from Ms Nori and Mr Mutch.

The Minutes of the meeting on 11 September 1990, as circulated, were confirmed.

The Committee noted the correspondence from Geoffrey Roberson, President, Law Society of NSW, dated 18 September; Ian Temby QC, dated 18 September; Frank Esparraga, Senior Lawyer, ICAC, dated 25 September; Gary Sturgess, Director-General, Cabinet Office, dated 28 September; Sir Lawrence Street, dated 28 September; and Mark Findlay, Director, Institute of Criminology, dated 05 October 1990.

Resolved on the motion of Mr Dyer, seconded by Mr Gay:

That the Committee note the submissions received for the inquiry into openness and secrecy and the rights of witnesses, together with responses to invitations to make submissions to the inquiry.

The Committee noted the arrangements for the hearings on Friday 12 October and Monday 15 October 1990.

The Committee then deliberated on questions to be put to Mr Temby on Monday 15 October 1990.

The Committee adjourned at 6.40 pm until 6.00 pm Tuesday 23 October.

..... Chairman

..... for Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

FRIDAY 12 OCTOBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Mr Tink
	Mr Turner

Apologies were received from Ms Nori and Mr Whelan.

The Committee deliberated.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

That the minutes of evidence taken before the Committee be made available to the ICAC and the Committee on the NCA.

The media and public were admitted.

The Clerk read the terms of reference of the Committee and Legislative Assembly Standing Order No.362 relating to the examination of witnesses.

Athol Moffitt, retired judge, was sworn and examined. Evidence concluded and the witness withdrew.

Frank Costigan QC, barrister at law, was sworn and examined. Evidence concluded and the witness withdrew.

Beverley Schurr, solictor, was sworn and examined. Evidence concluded and the witness withdrew.

Meeting of the Committee on the ICAC
12 October 1990

Mark Findlay, Director, Institute of Criminology, was sworn and examined. Evidence concluded and the witness withdrew.

Michael Bersten, lawyer, was affirmed and examined. Evidence concluded and the witness withdrew.

Peter McClellan QC, barrister at law, was sworn and examined. Evidence concluded and the witness withdrew.

The Committee adjourned at 5.20 pm until Monday 15 October 1990 at 10.00 am.

..... Chairman

..... Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

MONDAY 15 OCTOBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 10.00 AM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
	Ms Nori
	Mr Tink
	Mr Turner
	Mr Whelan

An apology was received from Mr Mutch.

The Committee deliberated.

The media and public were admitted.

The Clerk read the terms of reference of the Committee and Legislative Assembly Standing Order No.362 relating to the examination of witnesses.

Ian Douglas Temby QC, Commissioner of the ICAC, was examined. Evidence concluded and the witness withdrew.

Athol Moffitt, retired judge, was examined. Evidence concluded and the witness withdrew.

The Committee adjourned at 4.50 pm until Tuesday 23 October 1990 at 6.00 pm.

..... Chairman

..... Clerk

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS

OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 23 OCTOBER 1990

AT PARLIAMENT HOUSE, SYDNEY AT 6.00 PM

MEMBERS PRESENT

Legislative Council	Legislative Assembly
The Hon R D Dyer	Mr Hatton
The Hon D J Gay	Mr Kerr
The Hon S B Mutch	Ms Nori
	Mr Tink
	Mr Turner

An apology was received from Mr Whelan.

The Minutes of the meetings held on 09 October, 12 October and 15 October 1990, as circulated, were confirmed.

Resolved on the motion of Mr Dyer, seconded by Mr Hatton:

That the Committee follow the advice in the letter dated 05 October 1990 from Mr R G Humphrey, Director-General, Premier's Department and apply to the Joint Presiding Officers for additional Committee funding.

The Committee noted the letter from Mr P Beattie MLA, Chairman, Queensland Parliamentary Criminal Justice Committee dated 08 October 1990.

Meeting of the Committee on the ICAC
23 October 1990

The Committee deliberated on the letter from Mr J M Riordan, Deputy President, Australian Industrial Relations Commission dated 15 October 1990.

Resolved on the motion of Mr Dyer, seconded by Mr Tink:

1 That the Chairman write to Mr J M Riordan suggesting that his letter form a submission to the Committee's inquiry.

2 That the letter be referred to the sub-committee if Mr Riordan is in agreement with the letter being taken as a submission.

The Committee noted the letter from Dr J Trau dated 17 October 1990.

The Committee deliberated over the letter from Mr David Catt, dated 19 October 1990.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That the letter from Mr David Catt be referred to the sub-committee to be discussed with Mr Temby when they meet with him and that the sub-committee express the general viewpoint of the Committee on the matters raised by Mr Catt.

The Committee noted the late submissions received for the inquiry into openness and secrecy and the rights of witnesses.

The Committee then deliberated over the issues arising from the public hearings on 12 and 15 October.

Resolved on the motion of Mr Hatton, seconded by Mr Gay:

That the Moffitt amendments should not be pursued at this time but that the ICAC Act should be amended to remove the bias in favour of public hearings and enable the Commission to hear closing submissions in private, and that the Commission should make greater use of suppression orders.

Resolved on the motion of Mr Dyer, seconded by Mr Tink:

That the Project Officer prepare a collation of Mr Temby's evidence on general aspects of the Commission's operations and include in that report an account of the meetings with agency heads in August.

Meeting of the Committee on the ICAC
23 October 1990

The Committee deliberated over its next meeting date.

The Committee adjourned at 6.45 pm until 6.00 pm Tuesday 20 November 1990.

..... Chairman

..... for Clerk