

PARLIAMENT OF NSW
COMMITTEE ON THE ICAC

REVIEW OF THE ICAC ACT

DISCUSSION PAPER

September 1992

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◇ *COMMITTEE'S FUNCTIONS**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."

◇ *CHAIRMAN'S FOREWORD*

The purpose of this discussion paper is to identify and raise for discussion areas of the Independent Commission Against Corruption Act 1988 which the Committee believes may be in need of amendment.

The Committee welcomes submissions in relation to the matters identified in the discussion paper and any other proposals for amendment of the ICAC Act. The closing date for submissions is Friday 2 October 1992.

This discussion paper should be read in conjunction with the Court of Appeal's decision on the Greiner/Moore challenge and the ICAC's "Second Report on Investigation into the Metherell Resignation and Appointment". Copies of these and other background materials referred to in the paper are available for inspection upon request in the office of the Committee Secretariat.

It is not the purpose of this review to determine whether there should continue to be an ICAC. In fact, the Government, Opposition and the Independents have all indicated a commitment to the continued existence of an effective ICAC. The purpose of this paper is to raise for discussion possible amendments to the ICAC Act to ensure that the ICAC can continue to enjoy public support and operate effectively. It is hoped that the Committee will be able to report on this review of the ICAC Act by the end of 1992.

As I have publicly stated on a number of occasions the Committee intends to conduct a comprehensive review of the ICAC during 1993. During that comprehensive review the ICAC will be required to give a thorough account of its work since its establishment in March 1989.

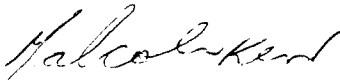

Malcolm Kerr MP
Chairman

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KEY ISSUES

1 *DEFINITION OF CORRUPT CONDUCT - SECTIONS 8 & 9*

Corrupt conduct is defined in sections 8 & 9 of the ICAC Act. It is a very broad definition. Section 8 describes the general nature of corrupt conduct. Section 8(i) describes corrupt conduct in terms of breach of public trust, partiality and misuse of information. Section 8(2) lists a number of specific offences including bribery, blackmail and embezzlement. Section 9 provides a limitation upon the scope of the definition of corrupt conduct. Under section 9, conduct which falls within section 8 does not involve corrupt conduct unless it could involve or constitute a criminal or disciplinary offence or reasonable grounds for dismissal.

◇ **Key Issues:** The following quotes from the Court of Appeal's decision in the Greiner/Moore challenge highlight some of the difficulties with the definition of corruption in sections 8 & 9 of the ICAC Act.

"insofar as the Act required the Commission to apply to the conduct of the plaintiffs the description "corrupt conduct", that description is misleading and apt to cause injustice" (decision)

"The ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects, unclear. One of the most striking aspects of the legislative scheme is that a conclusion that a person has engaged in corrupt conduct, which is unconditional in form, is necessarily based upon a premise which is conditional in substance." (Gleeson, pp.3-4)

"Insofar as there is injustice from the Commission's Report it is because the Report states that the conduct of Mr Greiner and Mr Moore was "corrupt conduct" within the Act and "corrupt" is not a term which, in its ordinary sense, is appropriate to describe what they did... Such injustice results from the operation of the Independent Commission Against Corruption Act. The Commission did what, under the Act, the circumstances required it to do. The injustice arises because the Act applies "corrupt conduct" to conduct which, in the ordinary meaning of the term, is not corrupt. For its own purposes or because of a failure to appreciate the damage which could be done, the Act requires the Commission to apply a misleading description to some of the conduct with which it deals." (Mahoney, dissenting, p.65)

1.1 **Complexity:** It is quite clear that the definition of corrupt conduct contained in sections 8 & 9 is complex and open to some degree of interpretation. Perhaps this is inevitable when one is defining a term such as corrupt conduct. In any case, **the Committee seeks submissions in relation to how the definition of corrupt conduct contained in sections 8 & 9 may be simplified and clarified.**

1.2 **Inconsistency:** It may be argued that the definition of corrupt conduct as it now stands may lead to inconsistency. In the Metherell affair Greiner, Moore and Metherell were found to have engaged in the same conduct. However, unlike Greiner and Moore, Metherell was not found to have engaged in corrupt conduct because he did not fit within

the provisions of s.9(1)(c). **The Committee seeks submissions in relation to how the definition of corrupt conduct in sections 8 & 9 can be amended to ensure greater consistency in ICAC findings.**

- 1.3 **Appropriateness:** The term corrupt conduct has a number of connotations. The community generally perceives corruption in terms of serious matters such as bribery. However, the definition of corrupt conduct in s.8(1) is very broad. It includes contestable terms such as partiality and breach of public trust. It may be that these matters could more appropriately be defined as "official misconduct", as in the Queensland Criminal Justice Act, or "improper conduct". Alternatively, the definition of corrupt conduct could be tightened up. **The Committee seeks submissions in relation to amendments to sections 8 & 9 to ensure that the definition of corrupt conduct reflects the community's understanding of this term.**
- 1.4 **Jurisdiction:** One of the key issues before the NSW Court of Appeal was the question of the application of section 9(1)(c) to the Premier and Ministers of the Crown. There is no debate as to whether the Premier, Ministers of the Crown, Judges, or the Governor for that matter, are covered by s.9(1)(a) - clearly they are. However, the situation with regard to s.9(1)(c) [and perhaps also s.9(1)(b)] is ambiguous. The Queensland Criminal Justice Act appears to be clearer on this point. Disciplinary offences and reasonable grounds for termination apply to persons who are holders of an appointment in a unit of public administration. Persons who are not holders of an appointment in a unit of public administration can only be found to have engaged in official misconduct if the conduct could constitute a criminal offence. **The Committee seeks submissions in relation to amendments to section 9 to clarify the application of the current s.9(1)(c) and s.9(1)(b).**

2 *FINDINGS ABOUT INDIVIDUALS - SECTIONS 74A & 74B*

In June 1990 the High Court brought down a decision in **Balog & Stait vs. I.C.A.C.** which restricted the ICAC's reporting powers. The High Court found that the ICAC could not make a finding that a person had engaged in corrupt conduct because to do so would be tantamount to finding that a person had committed a criminal offence, and questions of guilt or innocence should be left to the courts. In late 1990 the ICAC Act was amended to overcome the High Court's decision. Sections 74A and 74B were introduced, enabling the ICAC to make findings that individuals had engaged in corrupt conduct.

Following the High Court's decision in June 1990 a number of commentators expressed support for the view put forward by the Court. The Hon Athol Moffitt QC, CMG, had an article published in The Sydney Morning Herald entitled "Let us leave corruption findings to the courts". In that article he argues that the ICAC should not have the power to make findings of corruption against individuals.

More recently, the Hon Adrian Roden QC expressed concern about the terms of section 74A in his "Report on Unauthorised Release of Government Information". He called for the Act to be amended to remove the requirement for ICAC reports to contain statements of opinion in relation to individuals as to prosecution, disciplinary action or dismissal. Mr Roden stated that the purpose of ICAC investigations is to ascertain facts.

"Requirements that the Commission determine or consider whether facts fit or may fit within any particular legal category, should, it is submitted, be avoided so far as possible. Such questions are generally more appropriate for the courts."

◇ *Key Issues:*

- 2.1 Appropriateness: In view of the concerns briefly outlined above, the question must be asked whether sections 74A & 74B as they are presently framed are appropriate. In terms of findings that individuals have engaged in corrupt conduct it may be that these sections should be repealed. This would return the Commission to the position it was placed in after the High Court decision in June 1990. In respect of opinions as to prosecution, disciplinary action or dismissal the power for the Commission to make such findings could be removed or the Commission could be left with a discretion whether to express such opinions. **The Committee seeks submissions in relation to amendments to sections 74A & 74B concerning findings that individuals have engaged in corrupt conduct and opinions as to prosecution, disciplinary action or dismissal.**

JUDICIAL REVIEW AND APPEAL MECHANISMS

One of the questions discussed before the Court of Appeal in the Greiner/Moore challenge was the question of the court's jurisdiction to review the ICAC's report on the Metherell affair. The scope for judicial review of the ICAC's findings and operations is limited. It is an important area of accountability, however, and it is hoped that the grounds for such review can be enunciated and clarified during the course of the Committee's review of the ICAC Act.

During the proceedings before the Court of Appeal the Chief Justice stated that "there really ought to be a better way of testing or reviewing findings of the Commission than just having the Commissioner in here as a defendant". The Hon Athol Moffitt QC, CMG also raised this issue in his recent article published in *The Australian* entitled, "Why ICAC must reform or perish". Mr Moffitt said that if the ICAC is to retain its power to make findings of non criminal corruption this power "should be subject to all the safeguards of a court trial, including a full right of appeal".

The Committee notes that the Queensland Criminal Justice Commission's Misconduct Tribunals are now subject to appeals against their findings. Additionally, the Queensland Criminal Justice Commission is subject to a statutory right of judicial review in respect of various aspects of its operations.

◇ *Key Issues:*

- 3.1 Extent: The Committee is keen to enunciate and clarify the grounds for judicial review of the ICAC's operations and findings. **The Committee seeks submissions outlining the extent to which the ICAC's reports, findings and operations are subject to judicial review.**
- 3.2 Appeal Mechanism: If the ICAC is to retain its power to make findings of non criminal corruption under sections 74A & 74B consideration could be given to some provision for these findings to be tested or reviewed. **The Committee seeks submissions in relation to whether appropriate appeal mechanisms could be built into the ICAC Act, with particular reference to review of findings of non criminal corruption.**

STANDARDS TO BE APPLIED BY THE ICAC

Whilst the decision of the Court of Appeal in the Greiner/Moore challenge turned upon the construction and application by the ICAC of section 9(1)(c) of the Act, an issue of fundamental importance was raised in the judgements. This is the question of the standards to be applied by the ICAC in making findings about individuals.

The Chief Justice found that the ICAC must apply objective standards, established and recognised by law.

"... it is for the Commission to identify and apply the relevant standards, not to create them. Just as the Courts cannot create new criminal offences ... so the Commission cannot create new grounds for the dismissal of public officials. The observance and application by the Commission of objective standards, established and recognised by law, in the performance of its task of applying s9 to cases before it is essential. It is what was intended by Parliament, it is required by the statute, and it is necessary for the maintenance of the rule of law." (Gleeson, pp.41-42)

In supporting the views of the Chief Justice, Justice Priestley referred to the Second Reading speech when the ICAC Bill was introduced into Parliament in May 1988.

"The Independent Commission is not to be a tribunal of morals. It is intended to enforce only those standards established or recognised by law."

Justice Mahoney in his dissenting judgement, however, described the standards to be applied by the Commission as "normative standards" and suggested that "it is what the standard should be for the existing community which is to be considered" (pp.53-54).

◇ *Key Issues*

- 4.1 Entrenchment: The question of the standards to be applied by the ICAC in making findings against individuals is of fundamental importance to the way in which the Commission carries out its functions. It has been suggested to the committee that the Court of Appeal's comments on this issue are of such significance that they should be entrenched in the ICAC Act. It has also been suggested that the entrenchment in the ICAC Act of these comments may help resolve some of the issues discussed above, including the definition of corruption and findings about individuals. **The Committee draws attention to the Court of Appeal's comments upon the standards to be applied by the ICAC in making findings against individuals, and specifically seeks submissions on the suggestion that the need for the ICAC to apply "objective standards, established and recognised by law", should be entrenched in the ICAC Act.**

5 **PROTECTION OF CIVIL LIBERTIES**

When the ICAC Bill was first introduced into Parliament in May 1988 the major criticism was focussed on the extent of the powers granted to the ICAC. There was a significant degree of concern about the possibility that the misuse of these powers could have a grave effect upon civil liberties. Many of these concerns have proved to be groundless as the ICAC has exercised these powers judiciously. However, whilst the ICAC has exercised these powers with due care, concern remains about the extent of some of these powers. It has been suggested that, rather than relying upon the continued good will of the ICAC in the exercise of these more extreme powers, the Parliament should legislate to proscribe limits upon them.

The Committee identifies two areas in which such legislative action may be appropriate. Firstly, under section 40 (2) the Commissioner of the ICAC may issue his own search warrants. To date the ICAC has adopted a policy of seeking search warrants from judges. This policy decision of the ICAC is supported. Is it appropriate for the Commissioner to retain the legal right to issue his own search warrants?

Secondly, concern has been expressed from time to time about the extent of the Commission's contempt powers under section 98. This concern was voiced particularly in relation to the Commission's decision in 1989 to cite a critic for contempt. Whilst the Commissioner has since indicated that the ICAC is not inclined to use its contempt powers to protect itself from criticism. Is it appropriate that the Commission retain this aspect of its contempt powers?

◇ **Key Issues:**

- 5.1 **Search Warrants:** Is it appropriate that the Commissioner retain the right to issue his own search warrants under the provisions of section 40 (2) of the Act? **The Committee seeks submissions in relation to the extent of the Commission's powers, and specifically in respect of the provisions of section 40 (2) of the Act which enable the Commissioner to issue his own search warrants.**
- 5.2 **Contempt:** Is it appropriate that the ICAC retain the power to cite critics for contempt? **The Committee seeks submissions in relation to the Commission's contempt powers, and specifically the power to cite critics for contempt.**

6 FOLLOW UP ACTION ON ICAC REPORTS

The ICAC has produced a large number of investigative reports and a number of corruption prevention reports. Many of these reports have contained recommendations for changes in legislation, management practices or administrative procedures. Recently, the Hon Adrian Roden QC in his "Report on Unauthorised Release of Government Information", drew attention the lack of action on recommendations contained in to his earlier report on North Coast Land Development. This highlights a danger with the ICAC, that its reports may contain useful recommendations that are never acted upon. This is a problem which has faced Royal Commissions and Commissions of Inquiry.

Of course, Parliament must retain the right to consider, debate and at times ultimately reject ICAC recommendations for legislative change. Similarly the Government must retain the right to consider and at times reject ICAC recommendations for changes to management practices or administrative procedures. However, where this takes place it is reasonable that there should be at least a statement of the reasons for the decision to reject ICAC recommendations.

The Committee would suggest that the best way of ensuring that ICAC reports are not allowed to simply gather dust would be to insert a new provision in the ICAC Act. This provision would require the relevant Government Minister to inform Parliament of his or her response to any ICAC report concerning his or her administration within a certain time frame after the report has been tabled. Six calendar months may be a suitable time frame. Likewise, a similar provision could be inserted in the Act requiring the ICAC and the relevant Minister to respond within a certain time frame to any report of the Parliamentary Joint Committee.

The Committee also notes that under s.64(1)(c) of the ICAC Act it has a responsibility "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."

◇ *Key Issues:*

- 6.1 **Response:** The Committee is concerned to ensure that ICAC reports are not left to gather dust. **The Committee seeks submissions in relation to mechanisms for ensuring that ICAC reports are responded to, and specifically to the proposal that a provision be inserted in the Act to ensure that the relevant Minister inform Parliament of his/her response to any ICAC report concerning his/her administration within six calendar months of the tabling of the ICAC report.**

7 *PROFILE OF CORRUPTION - SECTIONS 13 & 76*

In March this year the Committee asked Mr Temby if the ICAC would be able to prepare a report which would provide an overview of corruption across the public sector in NSW. Mr Temby said that whilst the ICAC sees benefit in the development of an overview of corruption in NSW this would not be an easy task. He said that at present the Commission's Strategic Intelligence Unit had the ability but not the capacity to prepare such an overview. The Committee asked Mr Temby a number of further questions about the legislative powers, resources and staff that would be required to provide the ICAC with the capacity to prepare such an overview. The ICAC has not yet responded to these questions.

The Committee has recently become aware that this matter was raised by a commentator on the ICAC in 1989. The commentator suggested that the annual reports provisions of the ICAC Act should be amended to require the ICAC to prepare a profile of corrupt conduct across the NSW public sector each year. Such a profile would contain a breakdown of the corruption problem and the ICAC's response to it in relation to each section of the public sector. Over time an appreciation of the nature and extent of the corruption problem in NSW could be developed. This would enable an historical record of corruption in NSW and the work of the ICAC to develop and provide the basis for a qualitative evaluation of the ICAC's effectiveness against specified criteria.¹

An alternative would be for a similar requirement as the one outlined above to be added to the ICAC's principal functions under section 13.

◇ *Key Issues:*

- 7.1 Profile of Corruption: The Committee believes there would be considerable benefit to be gained from the ICAC developing and preparing a report on a profile of corrupt conduct on a regular basis. **The Committee seeks submissions in relation to mechanisms to ensure that the ICAC prepares timely overviews or profiles of corrupt conduct in NSW, and specifically seeks comments upon the proposal for an amendment of the annual reports provisions of the Act.**

¹ Michael Bersten, "Making the ICAC Work", Current Issues in Criminal Justice, March 1990, p.105

8 *FALSE COMPLAINTS AND PUBLIC STATEMENTS*

An issue that has been raised before the Committee on a number of occasions over the past three years is the question of how to discourage false reports to the Commission. Concern has been expressed about the number of vexatious/malicious complaints of corrupt conduct made to the ICAC and the way in which these are handled. If not handled properly by the ICAC vexatious and malicious complaints can cause substantial unnecessary distress to the subjects of the complaints.

A number of mechanisms for dealing with this problem have been suggested to the Committee. These have included providing the subjects of such complaints with a right of redress, and requiring the ICAC to disregard anonymous complaints. The Committee believes that a better approach may be available. The Hong Kong Independent Commission Against Corruption Ordinance provides for sanctions against false complaints.

"13B Any person who knowingly -

- (a) makes or causes to be made to an officer a false report of the Commission of any offence; or
- (b) misleads an officer by giving false information or by making false statements or accusations,

shall be guilty of an offence and shall be liable on conviction to a fine of \$20,000 and to imprisonment for 1 year."

Related to the issue of false reports is the problem of people making public announcements that a complaint has been made to the ICAC. This has been most prevalent at the Local Government level, particularly in the lead up to the Local Government elections in September 1991, and represents an attempt to turn the ICAC to advantage against ones political opponents. In some cases the ICAC has found that statements are made about complaints being referred to the ICAC when in fact no such referral has taken place. Moreover, where a matter has been referred there is a danger that a public announcement will have the effect of alerting the subject and the investigation may be compromised. Whilst the ICAC has taken steps to discourage the practice of such announcements being made, it has been suggested to the Committee that some form of legislative action may be necessary to resolve this problem.

◇ *Key Issues:*

- 8.1 False Complaints: The Committee has received a number of suggestions as to how the problem of false complaints may be addressed. At this stage the Committee raises for discussion the approach adopted in the Hong Kong Independent Commission Against Corruption Ordinance of providing for sanctions against false complaints. **The Committee seeks submissions in relation to means of dealing with the problem of false reports of corrupt conduct, and specifically seeks comments upon the Hong Kong approach of providing for sanctions against false reports.**

- 8.2 Public Statements: Whilst the Committee acknowledges that the ICAC has taken steps to deal with the problem of people making public statements about complaints being referred to the ICAC, it remains concerned about this practice. **The Committee seeks submissions in relation to people making public statements about complaints of corrupt conduct being referred to the ICAC, whether these submissions involve legislative amendments or other approaches to the problem.**

9. *DUTY TO NOTIFY ICAC - SECTION 11*

Section 11 of the ICAC Act confers upon the principal officer of public authorities a duty to notify the ICAC of "any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct". The ICAC has issued guidelines as to the matters which should be reported under section 11. However, concern has been expressed about the breadth of matters required to be reported and the impact this duty may have on the efficiency of public authorities.

Concern has been expressed that section 11 places an onerous requirement upon principal officers to report matters which should not properly be the subject of official reports. It has been suggested that the section is unclear because it is difficult to form a view as to what might constitute "reasonable grounds" for suspicion, and what conduct "may concern" corrupt conduct as distinct from conduct that may not concern corrupt conduct.

Furthermore, it has been suggested that the terms of section 11 has the consequence that public officials, not wishing to be the subject of a report to the ICAC under this section, will take steps involving the exercise of such caution in their actions that the administration of Government in many areas may become slow and inefficient.

On the other hand, the ICAC expressed concern in its 1991 Annual Report that some public authorities did not appear to be taking their responsibilities under s.11 seriously and were providing too few s.11 reports. The Committee discussed this matter with Mr Temby at a public hearing in October 1991.

Proposals put to the Committee include amendments to section 11 which would require principal officers to report matters to the ICAC only once a reasonable belief has been formed that a matter concerns corrupt conduct.

Key Issues

- 9.1 Scope: The major concern in relation to section 11 is that it is so broad in its scope that it may be having a deleterious effect upon the efficiency of public administration in NSW. Further, despite the guidelines issued by the ICAC, there is some concern that the section remains unclear and places an onerous duty upon principal officers to report matters which perhaps do not warrant such reporting to the ICAC. **The Committee welcomes submissions in relation to the terms and effects of section 11, and specifically the proposal that it should be amended to provide a principal officers are required to report matters to the ICAC once a reasonable belief has been formed that a matter concerns corrupt conduct.**

10

COMMITTEE REPORTS - ENTRENCHMENT OF RECOMMENDATIONS

Over the last three years the Parliamentary Joint Committee has produced a number of reports on its inquiries pursuant to its duty to monitor and review the exercise by the Commission of its functions. These reports have contained a large number of recommendations. A small number of these recommendations have been for legislative amendment. Most recommendations, however, have been for changes to ICAC procedures. In many cases the Committee has accepted assurances from the Commissioner that these changes in procedure will be effected or indeed have already been effected.

It has recently been suggested that it is bad public policy for the Committee to rely upon the good will of the ICAC in such matters and that the Committee's recommendations should be entrenched by way of legislative amendment wherever possible to ensure compliance with the Committee's recommendations.²

One reason the Committee has been reluctant to recommend legislative amendments is the risk of creating opportunities for costly, delaying litigation. The Committee was particularly mindful of this in 1990, as a result of the various legal challenges that the ICAC faced during that year which delayed the tabling of a number of reports, when it examined the question of public vs. private hearings.

(For ease of reference the findings and recommendations of previous Committee reports are reproduced as appendices to this discussion paper.)

◇ *Key Issues:*

- 10.1 Entrenchment: The Committee draws attention to the various recommendations for changes in ICAC procedures which it has made in its reports over the last three years. **The Committee seeks submissions in relation to whether these recommendations should be entrenched by way of legislative amendment rather than relying upon the good will of the ICAC to change procedures to effect the recommended changes.**

APPENDICES

**PREVIOUS COMMITTEE REPORTS
FINDINGS AND RECOMMENDATIONS**

A. INQUIRY INTO COMMISSION PROCEDURES AND THE RIGHTS OF WITNESSES, FIRST REPORT, NOVEMBER 1991

Recommendations:

1. 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).
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.
3. 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. 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. 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. 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. 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. 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.
9. 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".
10. 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.

B. INQUIRY INTO COMMISSION PROCEDURES AND THE RIGHTS OF WITNESSES, SECOND REPORT, FEBRUARY 1991

Findings and Recommendations:

PART ONE - COMMISSION HEARINGS: OUTSTANDING ISSUES

Adversarial Treatment

1. The Committee acknowledges that there are a number of factors making it difficult for the ICAC to give full content to the provisions of s.17(2) of the ICAC Act. The ICAC must ensure that all evidence it receives is carefully tested and witnesses at hearings will therefore sometimes be subjected to rigorous cross examination. Furthermore, the issues at stake are such that adversarial positions and tactics are almost inevitable. For these reasons "adversarial treatment" is likely to be something to which witnesses will from time to time be subjected at ICAC hearings.
2. The Committee notes and commends the steps taken by the Commission in terms of seeking and receiving submissions in writing. Furthermore, the Committee recommends that the ICAC conduct a study of the inquisitorial system of criminal justice practiced in Europe and elsewhere, and whether its application to Commission inquiries is appropriate, with a view to further consideration by the Committee.

Legal Representation

1. All persons who may be in peril of being prejudicially affected by an ICAC inquiry should have access to legal representation at ICAC hearings. However, the cost of legal representation is prohibitive for most private citizens. The cost of legal representation before the ICAC is an issue which requires further attention.
2. There are circumstances in which it would be appropriate for political parties and other unincorporated associations to be represented at ICAC hearings. The ICAC should seek a legal opinion as to whether this is possible under the ICAC Act at present. If the advice is that it is not possible, the Act should be amended.
3. The Committee recognises the difficulties the ICAC faces in making suitable arrangements for legal representatives and their clients who are advised at short notice of matters affecting those involved in Commission inquiries. The Committee notes and commends the steps which the Commission has taken in this regard.

Transcripts

1. The Committee welcomes the review by the ICAC of its transcript policy and the advice that witnesses will now be provided with a copy of the transcript of their evidence free of charge.

PART TWO - INVESTIGATIONS

Three-Tiered Approach

1. Mr Helsham's three-tiered approach is a helpful way of conceptualising the ICAC inquiry process. The Committee believes that public hearings, whilst having an essential role in ICAC inquiries, should so far as possible, be the end process of an inquiry. Public hearings would therefore be undertaken only when it becomes necessary for a matter or matters to be explored in that forum. The relevant issues could be more carefully sifted and tightly defined before they reach the public hearing stage. This would reduce the length and cost of hearings which are adversarial in demeanour and costly in terms of legal representation.
2. In view of the Cashman matter, the Costigan model and the recommendation contained in the Salmon Report, the ICAC should review its investigations policy. Consideration should be given to putting allegations to affected persons before a matter proceeds to the public hearing stage. At the very least, the letter of advice to affected persons should invite them to put their case to the Commission at the earliest opportunity.

Statements

1. Persons making statements to the ICAC should be provided with copies of their statements. The ICAC's policy in this area should be strengthened so that copies of statements are made available to those making them except in the most exceptional circumstances.
2. The Committee notes that there are existing sanctions against the perversion of the course of justice. However, if the ICAC considers it necessary, it should seek an amendment to the ICAC Act to provide for a specific offence which would prohibit a person from disclosing the contents of a statement to anyone other than that person's legal representative.

Property

1. It is important for the ICAC to provide a high level of documentation when property is seized or produced. The Committee notes the advice of Mr Zervos that this is an area in which the ICAC acknowledges there may be room for improvement and where the Commission would be prepared to review its current practice.
2. The ICAC has a responsibility to return property to its owners promptly when it is no longer required. In circumstances where property is held for long periods of time due to continuing inquiries, either by the ICAC or agencies with which the ICAC is working in co-operation, the Commission needs to provide better advice to persons about the reasons for the delay in the return of their property. The Committee notes the advice of Mr Zervos that this is also an area in which there may be room for improvement and where the Commission would be prepared to review its current practice. It is the view of the Committee that where appropriate the Commission should provide access, by appropriate means, to property which is held.
3. Where a person is not legally represented the ICAC should have regard to the confidentiality of any material which becomes an exhibit. However, where a person who is legally represented wants to ensure that material which becomes an exhibit at an ICAC hearing is not published, the primary responsibility lies with the legal representative to apply for a suppression order. The Commission should bear in mind the injustice that can be occasioned by the publication of confidential documents.

PART THREE - MISCELLANEOUS ISSUES

Riordan Matter

1. The ICAC needs to recognise the impact of naming a person in one of its reports. Where a person is named in a report and there is no suggestion of impropriety, consideration should be given to the inclusion of a brief statement to that effect. Consideration should also be given to the inclusion of a standard notice in a prominent place at the front of ICAC reports indicating that no inference of wrongdoing can be drawn against a person merely because they are named in an ICAC report. The Committee sees merit in the following proposed wording.

"Persons against whom adverse findings are made in this Report under the Independent Commission Against Corruption Act 1988 are named at page XX of this Report. The fact that other persons are named in this Report does not constitute an adverse finding against them and no inference of wrongdoing can be drawn merely because a person is named in this report."

2. The ICAC should give consideration to contacting any person who is to be named in a report. Moreover, where the report is to contain commentary about a person, fairness dictates that the Commission should provide that person with an opportunity to be heard in relation to any evidence which concerns them.

Alleged Political Bias

1. The Committee has examined and taken evidence with regard to the allegations of political bias made against the ICAC. The Committee has found them to be without foundation.
2. Mr Roden's response to the allegation of political bias in the North Coast report speaks for itself. To the extent that donations to the National Party and Labor Party are dealt with differently in that report, it should be noted that the ICAC was given access to different levels of information by the two parties. Mr Toomey's response to the allegation of political bias against him also speaks for itself.

Contempt

1. The contempt issue is one which requires further consideration before any legislative change could be recommended.
2. The ICAC needs to exercise its contempt powers with restraint. Except in the most exceptional circumstances the Commission should be robust enough to allow criticism to be vented. The Committee notes Mr Temby's advice that "it is not as if we (the ICAC) are strongly inclined to commence litigation or to protect ourselves against any criticism".

C. REPORT OF AN INQUIRY INTO MATTERS RAISED BY PAUL GIBSON MP,
DECEMBER 1991

MANAGEMENT AND CONTROL OF ICAC OPERATIONS

1. When Mr Bayeh first approached the ICAC in July 1990 the procedures and structures for the management and control of ICAC investigations and operational activities were inadequate. There was not a single line of command or an effective command structure. There was no completed investigation manual and there was no standard operating procedure for the management of informants.
2. The position has improved significantly since July 1990. The Committee notes that the ICAC now has a well developed operations strategy. There is now in existence a completed investigation manual. There is now a standard operating procedure entitled "Command and Responsibility - Operations Department" which clearly spells out the command structure in the Operations Department. There is also a standard operating procedure on dealing with informants.
3. The Committee hopes that these improvements to the procedures and structures for the management and control of ICAC investigations and operational activities would ensure that complex matters such as the approach by Mr Bayeh would now be handled more effectively.
4. Whilst acknowledging the need for flexibility and the use of multi-disciplined teams by the Commission, the Committee believes it is essential that the command structure outlined in SOP 1/91 "Command and Responsibility - Operations Department" is followed. Until such time as matters reach the public hearing stage, investigations should be run by Chief Investigators who are under the command of the Director of Operations through the Deputy Director.
5. The Committee sees considerable merit in Mr Roden's proposal for the establishment of a position of Deputy Commissioner, and recommends the establishment of such a position. There are a number of issues to be resolved before an appointment is made, including the duties and necessary qualifications of the person holding the position. The Committee would wish to be involved in the resolution of these issues. The Committee has noted that the agreement between the Government and the non-aligned Independents in the Legislative Assembly provided for the appointment of the Commissioner of the ICAC, amongst other office holders, to be subject to the approval of an all-party Parliamentary Committee. The Committee would suggest that a similar arrangement be applied in respect of the proposed position of Deputy Commissioner of the ICAC.

6. The Committee has not come to a position concerning Mr Roden's proposal for a distinction to be drawn between the roles of the person managing the Commission and those presiding over hearings. The Committee has included Mr Roden's statement to the Committee and his evidence as an appendix with a view to encouraging further discussion and consideration of this proposal.

RELATIONSHIP BETWEEN THE ICAC AND OTHER AGENCIES

1. The evidence before the Committee indicates that the ICAC and other agencies involved in investigating or prosecuting corruption have developed effective working relationships. Indeed the Committee commends the steps which have been taken, particularly by agencies with responsibilities in respect of complaints against Police, to develop formal and informal liaison mechanisms to ensure matters are dealt with efficiently and effectively.
2. The Committee commends both the ICAC and other investigative agencies upon the mutual co-operation and assistance which is characterising their relationships. The Committee is particularly impressed with the assistance which the NSW Police Service has been providing to the ICAC, including the provision of investigative manuals and the availability of the head of the IPSU to address ICAC investigators on investigative procedures.
3. The Committee would draw the Government's attention to the increasing number of referrals which the Office of the Director of Public Prosecutions is receiving from the ICAC. The Office of the Director of Public Prosecutions may require extra resources in order to ensure these referrals are dealt with in a timely manner.

WITNESS PROTECTION

1. The Committee supports the ICAC's decision not to establish its own witness protection facilities. In most cases where individuals assisting the ICAC require protection it will be appropriate for the Commission to make use of the witness protection facilities of either the NSW Police or the Australian Federal Police. However, in exceptional circumstances it might be most appropriate for the ICAC to consider using the facilities of another agency, such as the Criminal Justice Commission.
2. The Committee draws attention to the need for complementary State and Federal witness protection legislation and is concerned at the delay which has occurred in the finalisation of a national legislative scheme. The Committee calls on the Government to take all possible steps to ensure that work on a national legislative scheme is completed as soon as possible.

D. REPORT ON FIFTH INTERNATIONAL ANTI-CORRUPTION CONFERENCE 8-12 MARCH 1992

KEY ISSUES FOR NSW

This section is designed to briefly outline some of the key issues to emerge from the Conference of relevance to NSW. It also contains some suggestions as to how some of these key ideas could be applied in NSW.

GLOBAL PERSPECTIVE: DEMOCRATISATION AND ADMINISTRATIVE REFORM

The most obvious benefit that each of the Committee's representatives took away from the Conference was a global perspective on anti-corruption issues. It was clear that anti-corruption issues are moving higher up the agenda of international organisations and aid donors, in the context of moves towards democratisation and administrative reform. Increasingly the World Bank and Western aid donors are tying aid to democratic reform and administrative reform, and anti-corruption programs are a central feature of this administrative reform. At the same time, it was emphasised that effective anti-corruption strategies cannot be imposed or developed in isolation from the political and administrative environment in which they are to operate. Indeed, pluralistic political structures, a free press and accountability mechanisms, were put forward as pre-conditions for any effective anti-corruption strategies.

It has occurred to the Committee's representatives that the NSW Parliament may be able to make a contribution to this process. The 1990-91 Annual Report of the NSW Legislative Assembly reveals the large number of overseas delegations from both Commonwealth and non-Commonwealth countries which visit the NSW Parliament each year. Many of these delegations came to the NSW Parliament to study particular aspects of Parliamentary procedure. Others come to more generally observe and study the workings of a Parliament in a pluralistic democracy. Some of these delegations come from either newly democratising countries or countries where there is some pressure for democratic reform. No doubt these visits are extremely valuable. These visits may become increasingly important and increasingly regular throughout the 1990's as democratisation spreads. At the same time there is likely to be a growing interest in administrative reform including anti-corruption strategies.

It may be useful for the Presiding Officers of the NSW Parliament to develop a program for visiting delegations which includes exposure to some of NSW's anti-corruption and administrative reform initiatives. This would include the ICAC, the Ombudsman, the police complaints system, Auditor-General, and Parliamentary Committees. The Presiding Officers may also be able to take a more proactive role by examining the prospects for a small-scale exchange program for Parliamentary staff between the NSW Parliament and Parliament's of newly democratising nations, particularly in our region.

ORGANISED CRIME AND CORRUPTION

The Committee's representatives at the Conference were extremely impressed by the paper's presented by two speakers from New York, Ron Goldstock and Thomas Thacher. Their papers are reproduced in full as an appendix to this report. These papers very clearly set out the relationship between organised crime and corruption, the areas of the public sector which organised crime seeks to infiltrate and the mechanisms by which public officials are corrupted. This is an area of considerable concern to members of the Committee including Mr Hatton MP, who has raised his concerns at a number of Committee hearings. However, there does not appear to have been any concentrated effort by law enforcement agencies or investigative agencies to target this problem. In NSW the ICAC investigates public sector corruption and the NSW Crime Commission investigates drug crime and organised crime. Yet there has been no thorough analysis of the interaction between organised crime and public sector corruption. The Committee has decided to reproduce the papers of Mr Goldstock and Mr Thacher in this report in order to draw attention to the work that has been done in this area elsewhere and to encourage consideration of how this issue may be addressed in NSW.

Attention is particularly drawn to Mr Thacher's paper in the context of the Report of the Building Industry Royal Commission. The Committee draws attention to the methods outlined in this paper for the prevention of racketeering and infiltration of organised crime into public works programs.

CORRUPTION PREVENTION AND PUBLIC EDUCATION

There was almost universal support at the Conference for the work/strategy of the Hong Kong ICAC, particularly its public education program. There was considerable discussion about the matters to be covered in, and most appropriate methods of, public education, with many of the most practical suggestions coming from the Hong Kong ICAC. However, many delegates expressed concern about the difficulties in maintaining public support for long term public education programs. There was also considerable discussion about the need to market corruption prevention programs and to convince public and private sector managers that corruption prevention was in their best interests. It is clear from Ann Reed's paper that these are issues which the NSW ICAC is well aware of and seeking to tackle.

EVALUATION

Another theme which was discussed by a number of speakers and participants was the need for mechanisms to evaluate the effects of anti-corruption programs. This was raised specifically in relation to industry self-regulation about which there was considerable debate but nothing by way of hard evidence upon which to base an assessment. There was some attention given to the public opinion surveys and complaints statistics of the

Hong Kong ICAC as an evaluation mechanism. Again the NSW ICAC is clearly aware of the need for proper evaluation mechanisms. It has conducted a number of public opinions surveys (as outlined in Ann Reed's paper) and is continuing the development of its corporate plan and performance indicators.

STRATEGIC INTELLIGENCE AND IDENTIFICATION OF TRENDS

Ron Goldstock and Thomas Thacher, whose papers are reproduced as an appendix to this report, both emphasised the importance of intelligence in their work against organised crime. They also discussed the need for a proactive approach, for example in the construction industry for authorities to identify companies which have links with organised crime in a pre-qualification assessment stage before tendering. Jim Buckle from the Hong Kong ICAC gave a very interesting paper which summarised the major trends in corruption in Hong Kong and the key forms of corruption facing the Hong Kong ICAC during the next few years. The Committee has recently discussed with the NSW ICAC the role of its strategic intelligence unit. The Committee has sought to encourage the ICAC to develop an overview of corruption in NSW and to identify trends in corruption.

POLICE CORRUPTION: ISSUES NEW AND OLD

Considerable attention continues to be paid to questions of Police corruption. One of the key issues under consideration in many countries is the question of civilian oversight of investigations into Police corruption. It was pleasing to note that, this is an area in which NSW seems to be something of a leader, with an appropriate balance already struck between civilian oversight through the Ombudsman and investigation by Police officers through the Police Internal Affairs Branch. This balance will be further refined as a result of the recent report of the Committee on the Office of the Ombudsman.

A second issue raised in relation to Police corruption was the effect of community policing. This was discussed in the paper presented by Professor Dorothy Bracey in which she argued that community policing with its emphasis upon interaction with the community required a rethinking of anti-corruption strategies, particularly in terms of the receipt of gifts that would have been defined as low-level corruption in recent years.

The third issue raised in relation to police corruption was the need for a broad view of police corruption which pays due regard to the perversion of the course of justice as a serious instance of police corruption. This point was made very powerfully by Mr G Markham in his paper on his inquiry into the flawed Police investigation into, and conviction of, Winston Silcott.

MONEY LAUNDERING

There were a number of important presentations at the Conference on the subject of money laundering. The major issue to emerge was the importance to law enforcement

agencies of identifying "dirty" money at the point at which it is first placed into the legitimate financial system. It was interesting to note the steps which have been taken to combat money laundering in different countries. It was clear that Australia is at the forefront of efforts in this area with the provisions contained in the Cash Transaction Reports Act for financial institutions to report suspect transactions in addition to transactions of over \$10,000. Indeed, there was a considerable body of thought at the Conference that the reporting of suspect transactions was the most important step that could be taken in combating money laundering. The National Crime Authority has recently completed an inquiry into money laundering in Australia, which will lead to further developments in this area.

REPORT ON HONG KONG STUDY TOUR, 11-18 APRIL 1992

RELEVANT ISSUES FOR NSW

Throughout its study tour the Committee was conscious of the significant differences between Hong Kong and NSW, particularly the differences in the political structures. Therefore, the Committee is not going to lift ideas from the Hong Kong ICAC and seek to apply them directly to the NSW ICAC. However, the Committee was impressed with what it saw in Hong Kong. This is only to be expected - the Hong Kong ICAC has been in existence for 18 years and has a worldwide reputation as a competent and professional organisation. This section of the report summarises some of the most important lessons that the Committee feels can be gained from the Hong Kong experience. These issues are put forward by the Committee as matters for consideration with a view to encouraging discussion - they are not put forward as definitive recommendations for reform at this stage.

OPERATIONS REVIEW COMMITTEE

The NSW Operations Review Committee has been under review by the Committee for some time. The Committee hopes to finalise a report on this issue shortly. The Committee was therefore keen to find out as much as possible about Hong Kong ICAC's Operations Review Committee. There were three key issues that emerged during the Committee's discussions with Mr Peter Graham and with members of the ORC. Firstly, the Committee was impressed with the use of a sub-committee which meets two days before the ORC to consider non-pursuable and minor complaints. This relieves the ORC of a substantial workload in respect of minor matters and enables it to focus on more serious complaints. However, effective oversight of minor complaints is maintained by the fact that the sub-committee is chaired by a non-official member of the Committee (ie. an outsider) on a rotating basis. Staff of the Operations Department are regularly called before the ORC or the sub-committee to justify the recommendations in their reports.

The second significant matter discussed in relation to the ORC and the processing of complaints was the daily record sheet, prepared at 7.00 am each morning, logging all

complaints received during the preceding 24 hours. Once a matter is logged on one of these sheets an investigation cannot be stopped until either the Attorney-General agrees to a prosecution or the ORC endorses a recommendation that the investigation be terminated.

The third issue to emerge from the Committee's discussions with ICAC staff and members of the Operations Review Committee was the formalised structure put in place to advise the subjects of investigations once the Operations Review Committee had advised that an investigation should be discontinued. Copies of the form letters used have been reproduced above.

COMPLAINTS COMMITTEE

Although it meets infrequently and considers only 10-20 complaints each year, it is clear that the Complaints Committee is an important accountability mechanism. ICAC staff confirmed that this Committee subjects the ICAC to intense scrutiny and can be quite tenacious. The existence of this Committee means that there is a formalised, recognised structure for the consideration of complaints against the ICAC. In NSW the Parliamentary Joint Committee and the ICAC have reached agreement on a mechanism for dealing with such complaints. However, it would be fair to say that this mechanism is not all that satisfactory and both the Committee and the Commission have some concerns about it.

The question of how to best deal with such complaints has been discussed in recent reports of both the Joint Committee on the National Crime Authority and the Queensland Parliamentary Criminal Justice Committee. The Queensland Committee recommended that the Parliamentary Committee should continue to be responsible for dealing with such complaints as it helped it gain an appreciation of possible problems with CJC procedures, which in turn assisted it to pursue its monitoring and review function in respect of the CJC. The NCA Committee, on the other hand, favoured giving responsibility for the handling of such complaints to either the Ombudsman or the Inspector-General of Intelligence. Ultimately, the Committee recommended that the Inspector-General of Intelligence be given this role, a recommendation to which the Commonwealth Government has agreed. The Parliamentary Joint Committee on the ICAC has not yet come to a considered view on this issue. However, the Hong Kong Complaints Committee model appears to have merit and it is put forward for further consideration.

ADVISORY COMMITTEES

The Committee was particularly interested to find out as much as possible about the Hong Kong ICAC's Advisory Committees. These are discussed above at some length in the accounts of briefings from the various departments of the ICAC. As those accounts state, the senior staff of the ICAC with whom the Committee met were unanimous in their view

that these Advisory Committees play a valuable role and make an important contribution to the work of the ICAC's various departments. It needs to be emphasised that these committees are advisory or consultative bodies, which enable the ICAC to receive the benefit of the expert advice of the members of the committee, rather than accountability mechanisms (such as the ORC or Complaints Committee). Again, whilst the Committee has no intention of imposing this aspect from the Hong Kong model on the NSW ICAC, it does see considerable merit in these Advisory Committees and suggests that careful consideration be given to the applicability of this structure in NSW. Advisory Committees on Corruption Prevention and Public Education could be of great assistance to the NSW ICAC's work in these areas.

PROFESSIONAL ADVISORY PANELS

The Committee was impressed by the steps which the Hong Kong ICAC had taken to establish panels of professionals able to provide advice to investigators on complex matters within their area of expertise. As stated previously a panel of volunteer accountants was established with the assistance of the Hong Kong Society of Accountants in 1989. The panel has eleven members with particular expertise in a range of areas including banking, stockbroking, insurance, import/export, manufacturing, construction and real estate. Panel members are kept up-to-date on relevant ICAC developments. The main benefit to the ICAC is in the free advice which the panel gives to ICAC investigators on particular questions. This has been particularly valuable in respect of the major fraud and commercial crime cases with which the ICAC has been dealing in recent years. Such panels, of accountants and possibly other relevant professional groups as well, may be worthy of consideration by the ICAC and other Australian agencies.

STAFF TRAINING

Although the Committee did not actually visit the ICAC's Operations Department Training School, the Committee was impressed by what it heard about the facilities provided. Even though many investigators come to the Hong Kong ICAC with considerable experience from other agencies or from British Police forces (although this is decreasing as localisation proceeds) the ICAC puts a high priority upon training. This training must be of a high quality judging by the accounts the Committee received of the quality of the briefs lawyers receive from the ICAC and the support expressed for the capabilities of the ICAC's investigators. The Corruption Prevention and Community Relations Departments also place a strong emphasis upon training. The Committee is not about to suggest that the NSW ICAC establish its own training school. Clearly, the Hong Kong ICAC is of a size where such an establishment is justifiable whereas that would not be the case with the NSW ICAC. However, the Committee was impressed with the emphasis placed upon training by the Hong Kong ICAC, particularly with regard to its investigators. The Committee has not in the past paid much attention to the NSW ICAC's use of training for its staff although it will probably do so in future. The Committee noted

that the Hong Kong ICAC accepts overseas participants in its training courses and that in 1990 an officer from the Internal Affairs Department of the Australian Customs Service attended the Command Course. It may be worthwhile for the NSW ICAC to consider sending a small number of staff to these courses.

SANCTIONS AGAINST FALSE REPORTS

The Committee has received a number of complaints from persons claiming to have been the subject of vexatious or even deliberately false reports of corrupt conduct to the NSW ICAC. These people have complained that at present they have no means of redress in this situation and that there are no sanctions against persons making false reports. The Committee therefore noted with considerable interest the following provision in the Hong Kong Independent Commission Against Corruption Ordinance:

"13B Any person who knowingly -

- (a) makes or causes to be made to an officer a false report of the Commission of any offence; or
- (b) misleads an officer by giving false information or by making false statements or accusations,

shall be guilty of an offence and shall be liable on conviction to a fine of \$20,000 and to imprisonment for 1 year."

STRATEGIC INTELLIGENCE

The Committee was most interested in the strategic intelligence work of the Hong Kong ICAC and a delegation met with officers of G Group as discussed above. The Committee has been encouraging the NSW ICAC to develop its strategic intelligence capabilities and was impressed by the work of G Group in identifying trends in corruption and preparing profiles of certain Government departments or industries. Most significantly, the Committee was told that there was no threshold level of intelligence required before trends in corruption could begin to be identified. This suggests that the NSW ICAC should be in a position to prepare at least an interim overview of corruption trends in NSW.

EDUCATION: STRATEGIES

The Committee was impressed with some of the strategies used by Hong Kong ICAC's Community Relations Department to get its message across. These strategies include having an officer address each induction course for new public servants, and having an

officer address each final year high school and college class. These seem to be appropriate target audiences for anti-corruption messages. The Committee was also impressed with the anti-corruption packages which have been prepared for different industries and are sent out by ICAC regional offices. Of course, the Committee recognises the limitations upon the resources of the NSW ICAC in the public education area. It may be that other agencies or industry representative groups should take responsibility for the preparation of such packages, with the assistance where necessary of the ICAC.

EDUCATION: COMPETITION WITH OTHER GOVERNMENT AGENCIES

Although the Committee was very impressed with the Community Relations Department of the Hong Kong ICAC it was disturbed by one problem which the department faces in getting its message across. As previously discussed, the problem is one of competition from other government agencies with public service messages. The Hong Kong ICAC cannot compel schools to use its education material. Rather, it must seek to convince teachers of the value of using its material. In this it is in direct competition with a number of other Government agencies also wishing to get their messages through to the classroom. Consequently, the ICAC needs to devote considerable resources to promoting its material to teachers instead of educating students or the public directly.

The Committee is concerned that the potential exists for a similar situation to develop in NSW. In the area of citizenship studies there are already a range of agencies seeking to get materials into the classroom - these include the ICAC, the Law Society and the NSW Parliament. (This is not to mention other government agencies with educational agendas such as the Health Department and the Environment Protection Authority). In order to ensure against such a situation developing in NSW the Committee suggests that some sort of co-ordinating body be established in relation to either "citizenship"-type studies or else in relation to all Government agencies wishing to get educational materials into the classroom. Perhaps a committee with representatives from the relevant Government agencies and educational authorities should be established, chaired by an eminent person.

POLICE COMPLAINTS

As outlined in the accounts of the meetings with the Ombudsman, Police Complaints Committee and representatives of the Royal Hong Kong Police the Committee received a great deal of information about the system for dealing with complaints against police in Hong Kong. The basic impression that the committee came away with was that the issues currently being addressed in respect of police complaints in Hong Kong are very similar to those being addressed in NSW. A similar balance has been struck between internal police investigation and civilian oversight. The Hong Kong system is perhaps a few steps ahead in relation to the informal resolution of minor complaints, but NSW is now moving down the same path (and will move further in this direction under the recommendations

outlined in the recent report of the Ombudsman Committee). It would be very pleasing if the Hong Kong record of having 27% of complaints informally resolved could be replicated in NSW. The Committee was also impressed by the high level of statistical information provided on complaints against police in Hong Kong and would draw the attention of both the NSW Ombudsman and NSW Police Internal Affairs Branch to this level of statistical sophistication.

E. REPORT ON OPERATIONS REVIEW COMMITTEE AND ASSISTANT/DEPUTY COMMISSIONERS, JULY 1992

Findings and Recommendations

FUNCTIONS OF THE OPERATIONS REVIEW COMMITTEE

1. The Operations Review Committee (ORC) plays a crucial, if limited, role in relation to the ICAC's investigations. Its purpose is to ensure, by advising the Commissioner on the action to be taken on complaints from the public, that there are no cover-ups, no failures by the ICAC to pursue matters that should be investigated. As such it is a bold innovation contained in the ICAC Act, and one which could well be replicated in other agencies which receive complaints and have the discretion to determine whether or not they are investigated.
2. The Committee is concerned that s.59(1)(a) of the ICAC Act is not sufficiently clear in setting out the functions of the ORC. The Committee believes it is not appropriate that a QC's opinion is necessary to clarify whether or not the ICAC may commence an investigation before consulting the ORC. The Committee therefore recommends that s.59(1)(a) be amended to clearly state the functions of the ORC and provide for an orderly manner in which investigations can commence.

COMPLAINTS VS. INFORMATION

1. It is clear that the ICAC receives information from a wide range of sources. It is appropriate for the Commission to be able to categorise some of this information as other than "complaints" or "s.11 reports" which are the only two categories specifically mentioned in the ICAC Act. The procedures developed by the Commission to ensure consistency in the categorisation of information received, as they are set out in chapter two of the Investigation Manual, appear to be appropriate.
2. The ICAC is able to exercise considerable discretion in categorising the information which it receives. It goes without saying that this discretion must be exercised with scrupulous care. The Committee is not suggesting that this discretion has been exercised in such a way as to avoid the requirements to seek the advice of the ORC by defining as "information" matters which should properly be defined as "complaints". However, in relation to the two examples given above (3.1 and 3.2, the Bayeh matter and Sturgess files respectively), the ICAC seems to have left itself open to criticism in this regard. In each case the Committee would have thought that, for more abundant caution, these matters should have been defined as complaints and referred to the ORC. It is essential that the ICAC not only do the right thing but also be seen to be doing the right thing. [The Committee notes that the ICAC has itself emphasised that "the appearance of impartiality should be respected and maintained, as well as impartiality in fact."]³ The Committee would therefore encourage the ICAC to err on the side of caution and, where there is any

³ ICAC, North Coast Report, 1990, p.656; ICAC, 1990 Annual Report, p.95.

doubt, categorise the matter as a "complaint" so that it is referred to the ORC.

3. With the ICAC having the discretion to categorise information received from members of the public in different ways, it is important that members of the public understand the implications of the way in which they frame the material they are presenting to the Commission and the ways in which it may consequently be categorised. The Committee was therefore pleased to note that a brochure is being prepared for complainants explaining how information received may be used by the Commission. The Committee believes it is essential that complainants also be informed of the role of the ORC. Where a complainant expresses a view that information provided should be reviewed by the ORC, such a view should be taken into account.

WORKLOAD AND PROCEDURE

1. The Committee is concerned about the high workload faced by the ORC and the consequences for the level of scrutiny which it is able to give to each complaint. The Committee recommends that consideration be given to adoption of the Hong Kong model in terms of the establishment of a sub-committee, chaired by a non-official member (an outsider) on a rotating basis, to meet a few days before the ORC each month to consider minor complaints. This will relieve the ORC of a substantial workload in respect of minor matters and enable it to focus on more serious complaints.
2. The Committee shares the concerns expressed by two former members of the Operations Review Committee about the limits upon what it can look at. The Committee believes that the functions of the ORC would be assisted by the addition of a random audit role in relation to the categorisation of matters as "complaints" and "information" by the ICAC. In order for the ORC to be able to effectively fulfil such a role it is recommended that the ICAC follow the Hong Kong ICAC's practice in preparing daily record sheets of information received, with notations made as to the categorisation of each matter. These sheets should be provided to the ORC to enable ORC members to easily identify particular matters to audit.
3. The Committee recommends that the Hong Kong ICAC's practice be followed in two further ways. Firstly, the ORC should be able to call for ICAC staff to appear at ORC meetings to justify the recommendations contained in their reports. Secondly, the ICAC should adopt a formalised procedure for notifying the subjects of investigations when an investigation has been discontinued on the advice of the ORC.

DISSATISFIED COMPLAINANTS

1. The Committee accepts that some complainants whose complaints are not investigated by the ICAC will never be satisfied with the ICAC's decision (based upon the advice of the ORC). The Committee also recognises that it would be extremely resource intensive, and largely fruitless, for the ICAC to be required to persuade some of these complainants of the correctness of the ICAC's decisions in relation to their complaints.

2. However, the Committee is firmly of the view that, in the interests of public accountability and fairness, the ICAC should provide complainants with reasons for its decisions. The Committee therefore recommends that s.20 of the ICAC Act be amended to include a provision along the lines of s.2.24(4) of the Criminal Justice Act 1989.
3. In putting forward this recommendation the Committee acknowledges that the ORC is the appropriate body to objectively assess complaints and advise the ICAC whether or not they should be investigated. The Committee believes that there is a clear distinction between requiring the Commission to provide reasons (which is the recommendation) and requiring the Commission to persuade or satisfy complainants that its decisions are correct (which is not being recommended). Once reasons are given for a decision the ICAC need not enter into further correspondence with a complainant unless further information is provided by the complainant. In that case the matter should be referred to the ORC for further consideration.

REPORTING

1. The Committee agrees with the comments of Michael Bersten that, in order for the ORC to be a credible accountability mechanism, it is important for it to report on its activities. The Committee accepts the ICAC's (and the ORC's) contention that the Parliamentary Joint Committee and Operations Review Committee should be viewed as separate accountability mechanisms and should not be placed in any sort of hierarchy. Therefore, whilst the two Committee's will meet together at least annually, the ORC should not report to the Parliamentary Joint Committee.
2. It may be that the most appropriate mechanism for the ORC to report would be to require it to provide an Annual Report to Parliament. [If this is to happen the Parliamentary Joint Committee should also be required to provide an Annual Report to Parliament on its activities.] The Committee would like to discuss the matters to be included in these Annual Reports with the ORC, when the two Committee's next meet.
3. Whilst initially attracted to Professor Fisse's "dotted-line" proposal the Committee accepts the ICAC's assurances in relation to the mechanisms for dealing with contention within the ICAC. The Committee notes Mr Temby's statement that, where there is disagreement between ICAC officers about how a matter should proceed, contending views are put before the ORC. Similarly, the Committee notes Mr Temby's assurance that the ICAC would not stand in the way of staff coming to either the Police or the Parliamentary Joint Committee with concerns about internal corruption, fraud or other misconduct. Finally, the Committee also notes the policy on "Notification of Corrupt Conduct and Complaints against Staff" incorporated in the ICAC Code of Conduct and published in the Commission's 1990 Annual Report.

ASSISTANT/DEPUTY COMMISSIONERS

1. The Committee believes that, through the written answers to the questions on notice from the 31 March public hearing, the ICAC has effectively addressed the concerns raised by Mr Roden concerning Assistant/Deputy Commissioners.
2. The Committee notes Mr Temby's advice that he is not opposed to the idea of an Assistant Commissioner being appointed to effectively act as his deputy and that he would be surprised if such a person was not appointed at some point during the next few years. The Committee welcomes this advice and reaffirms the desirability of there being a person fulfilling a role as deputy to the Commissioner of the ICAC.
3. The Committee notes the ICAC's advice that the delegation provisions contained in s.107 of the ICAC Act, which enable the delegation of powers to Assistant Commissioners, are presently broad enough and do not require expansion. The Committee notes the ICAC's advice that the provisions of s.6(3) of the ICAC Act setting out the functions of Assistant Commissioners are sufficiently broad and enable an Assistant Commissioner to deputise for the Commissioner. The Committee also notes the ICAC's advice that the title "Assistant Commissioner" conveys the role that they are required to play under the ICAC Act, and that there is no need for a change in this title.