PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

D I S C U S S I O N P A P E R

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

prepared for the Committee by

The Hon A R Moffitt

August 1990

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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FOREWORD

The Independent Commission Against Corruption Act 1988 provides for the establishment of a Parliamentary Joint Committee comprising six members of the Legislative Assembly and three members of the Legislative Council. The Committee's functions are set out in s 64 of the Act. They are:

1 (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.

Earlier this year I sought the views of the Hon Athol Moffitt on a number of issues concerning the ICAC. Athol 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".

In response to my request for advice Athol 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.

Some further discussion followed and Athol 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 be heard on these matters.

These two documents deal with the major issues which have arisen in relation to the procedures of the ICAC, namely the question of public vs private hearings and damage to the reputations of witnesses. These issues are dealt with in a balanced and constructive manner. The Committee believes these documents provide the foundation for a rational and informed public debate about these aspects of the ICAC's operations. The Committee has therefore decided, with the consent of Athol Moffitt, to release these documents as a Discussion Paper in the context of the Committee's next inquiry.

The terms of reference for this inquiry 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).

This Discussion Paper is being circulated widely, to all MPs, relevant interest groups, interested individuals, witnesses at ICAC hearings, academics, commentators etc. All these individuals and groups are invited to provide comments on the Discussion Paper and make submissions to the Committee's inquiry. Written submissions are invited by Friday 28 September 1990 and should

be addressed to:

Mr David Blunt
Project Officer to the
Committee on the ICAC
121 Macquarie Street
Sydney 2000

Submissions (with numbered paragraphs) should preferably, but not necessarily, be typed or printed. All submissions will be made available to Committee members and some persons making submissions will be invited to discuss them with the Committee. The Committee proposes to conduct a series of public hearings as part of this inquiry during October.

M J Kerr MP
Chairman

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Mr Blunt
Project Officer
Committee on the ICAC
Room 1129
121 Macquarie Street
Chief Secretary's Building
SYDNEY NSW 2000

Dear Mr Blunt
I am enclosing herewith an addendum to my earlier document sent to your office on 23 March 1990 on the matter of secrecy and openness in relation to the ICAC.

The addendum speaks for itself but substantially it deals with suggested amendment to s.31 of the ICAC Act and comments upon those suggestions. My two documents should be read together.

Neither the earlier document nor the addendum, the later being in draft form last month, owe their origin to the questions now being raised concerning the powers of the ICAC.

I have been invited to make submissions by the Committee on the National Crime Authority which is reviewing its constitution. I am intending to accept the invitation. Included would be a submission concerning the excessive secrecy of the NCA putting forward the view that the ideal should lie between the NCA and the ICAC but closer to the ICAC model.

In connection with such a submission I think it may be helpful to include a copy of my current submissions concerning the ICAC. If there is any problem in this course could you please let me know.

Yours sincerely

[redacted]

27 July 1990

The Hon A R Moffitt

[redacted]

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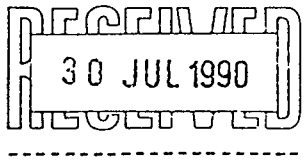

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I

OPENNESS AND SECRECY IN INQUIRIES INTO ORGANISED CRIME AND CORRUPTION

QUESTIONS OF DAMAGE TO REPUTATIONS

I.1 Introduction

I.1.1 Questions whether proceedings should be open wholly or partly or secret and whether the publication of some matters should be prohibited are sensitive because of competing considerations.

I.1.2 S.31(1) of the Independent Commission Against Corruption Act 1988 accepts that it is prima facie in the public interest that hearings of the Commission into the subject matter of corruption should be open. By so providing, in relation to inquiries into corruption, Parliament must have accepted that some damage to reputation will be inevitable, if the greater public interest of openness is to be served. The parallel is the open court system. However, S.31(4) and S.112 accept that it may not be in the public interest to make public or allow publication of some matters put before the Commission. While in the public interest witnesses must accept unavoidable damage to their reputations, it cannot be in the public interest that damage be done to reputations which is avoidable, consistently with the benefits of openness. Also it is in the public interest that the fair trial of persons be not prejudiced.

I.1.3 S.31(4) and S.112 impose on the Commission a statutory duty to consider these questions of public interest and in particular, when these powers should be exercised temporarily or permanently. They impose a duty to organise procedures so these powers can be properly exercised. This seems to require the Commission to consider procedures and ways in which damage to reputations can be minimised and hence confined to that which is necessary or unavoidable, while the Commission still conducts its inquiries with the benefits of openness. In the words of S.31(4), it surely must be in the public interest that matters should not be dealt with in open sitting which unfairly or unnecessarily damage reputations.

I.2 Openness and Secrecy

I.2.1 In the series of Royal Commissions in the last two decades which dealt with organised crime and corruption, discretions concerning openness, secrecy and restrictions on publication have not been circumscribed by legislation or the terms of the commissions. All those Commissioners who have inquired have taken the view that the subject matter of the inquiry was such that the public

interest was that the proceedings should be open with the evidence and documents open to be publicised, except where there was some good particular reason for secrecy.

I.2.2 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.

I.2.3 Commissions (eg. NCA and ICAC) established by statute have had spelled out for them policies concerning openness and secrecy. The policy imposed on the NCA was of absolute secrecy. By doing so it abandoned the considerations just outlined. It did this principally, as the Act expressly said, so no reputations could be damaged. Hearings are in private and in effect nothing can be revealed or published concerning any facts, except in the report to the relevant Minister, who has no obligation to publish the report or lay it before the Parliament. Not even the Intergovernmental Committee for the NCA can be told of facts revealed before the NCA. This policy of absolute secrecy has been criticised by many. I did so in "A Quarter to Midnight" (pp 127-8, 132-6). What was done in respect of the NCA reversed the policy which had been adopted by the prior Royal Commissions.

I.2.4 The ICAC Act 1988 reversed the secrecy policy of the NCA. The statutory policy substituted, which provided prima facie for openness, with private sittings only where there was some special reason to do so, was in accordance with the general policy earlier followed by Royal Commissions. In the end the ICAC is called on to exercise the same discretions as those accepted by the former Commissioners. The subjects which attracted the attention of former Commissioners, and should attract the attention of the ICAC also, is how far the discretions, such as those provided in S.31(4) and S.112, should be exercised in relation to what I have called unnecessary or unfair damage to reputations. Consideration of questions in this area led the earlier Commissioners to lay down and follow special procedures. Just as Commissioners, each in succession sought guidance from procedures used in earlier inquiries, it seems appropriate that the ICAC should do likewise.

I.3 Moffitt Royal Commission

I.3.1 In my inquiry in 1973-4, being the first in Australia into organised crime and its corruptions, there was no available

precedent, because of this absence of any inquiry on the same subject matter. At the outset I laid down the following.

> "(1) The proceedings will be open unless there is good reason to hold some of the proceedings in camera and if good reason is shown, that part will be.
>
> (2) Leave should be sought before seeking. ....."
>
> (Transcript of Commission p 22 par 423)

I.3.2 Point (1) coincides with the provision made in S.31 of the ICAC Act earlier referred to. Obvious exceptions were revealing identities of informers, because it would endanger their lives and destroy the informer system and the revelation of matter calculated to prejudice the fairness of pending or future criminal trials. These exceptions were accepted by me and all other Commissioners and by the ICAC. The other exception, as I saw it, was causing unnecessary, avoidable or unfair damage to reputations. Establishing procedures, where possible, to avoid these dangers, prejudice and such damage would not destroy the benefits earlier outlined flowing from the openness policy. The procedures, which I in fact adopted, did not significantly impede the flow of the operations of the Commission.

I.3.3 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. In the absence of procedures to prevent this occurring until it could be assessed and, if necessary, excluded from the open procedings, 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.

I.3.4 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 which will not be repaired despite the revelations at a much later date. Avoidable and unjust damage

will have been done. The benefits of the openness principle will still acrue if the initial material is withheld initially but, if found appropriate, later revealed at the same time as the explanation, rebuttal etc. If both sides of a matter were released on about the same occasion, the media would not have a defamation defence unless both sides were fairly reported. This would not apply to initial media publicity and sensationalism, where one side only of a matter is initially released.

I.3.5 The foregoing matters greatly concerned me at the outset of my inquiry, because there was a considerable volume of documentary material, likely to cause considerable damage to reputations and it was quite unclear whether much of the material would later be backed by matter of substance. In the absence of any prior practice, I found help from the Petrov Royal Commission and in substance followed what Mr Windeyer QC (later Sir Victor), who assisted the Commission, did. People referred to in critical documents where not named openly but given letter symbols and only part of the material was initially read in open sittings. At later stages some of this matter including identities, were revealed either when the persons were called to give their version or when other supporting material was presented.

I.3.6 In my inquiry we had three classes of sittings - open, closed, with numerous persons present, and third, totally secret. The third, which dealt with material concerning particular paid informers from the criminal class, which if made public would have led to gangland executions, were held with only two or three present. I wrote out the evidence by hand and at the end of the inquiry the material was deposited in a special file with the Government on the recommendation that it only be examined on the authority of the Premier of the day. As far as possible hearings were open. When what might come up could not be anticipated, sittings were in camera. In the open sittings when witnesses came to give evidence their statements in writing were first presented. In addition, any documents presented, which contained material which might unnecessarily or unfairly damage reputations at that stage, were not given an exhibit number but were marked for identification. The Commissioner and counsel assisting him, by this means, had control over what was then revealed at open sittings. On some occasions all was read, on other occasions parts only of documents or statements were read, having regard to the policy already referred to. What was read in this way in open session was incorporated into the transcript which, in the interests of press accuracy, was available to the press a few hours later. Those present at the open hearing sittings, including the press, were told that some of this material would be revealed at a later stage. In fact at a later stage in the inquiry, when the substance concerning many of these matters had emerged, most of the matter earlier withheld was read in open sittings and incorporated into the transcript. Usually by this time the persons named had had an opportunity to present what they wished concerning matters said against them. In some instances where matters were not supported, the matter remained suppressed.

I.4 Costigan and Stewart Royal Commissions

I.4.1 Mr Costigan QC and Mr Justice Stewart (Mr Asia Inquiry) adopted somewhat similar procedures, using both open and private sittings, the latter of varying types. Each took the view in favour of openness, with some damage to reputations inevitable, but also the view that special steps should be taken to prevent unnecessary or unfair damage to reputations. Costigan took the view that "direct" evidence or what a man himself said damaging to his reputation should be published on the view that the damage to the reputation came from what he did and not the evidence of it. However, he took the view that "tittle tattle" and rumour should be suppressed. Each used the private sittings to establish what should be revealed in the open sitting or in open reports. Costigan had a class of private sitting at which the press could be present in order to avoid the "behind the closed door" reactions, but on the basis of no publication until revealed in later public sittings. I attended one such at Perth by invitation, but in my capacity as a citizen.

I.4.2 Some comments of Costigan and Stewart (Mr Asia Inquiry) are in point. Extracts from Costigan's final open report vol 2 (pp 159-165) include the following:

> 14.038 "In the course of my Commission I have attempted to ensure that at public sittings the evidence is restricted to matters on which the witness spoke from his own knowledge. I do not use the description "admissible evidence" because that is empty of any meaning in an Inquiry where there are no issues. But I do speak of direct evidence and it was that type of evidence that was sought and usually obtained."

I.4.3 Elsewhere, Costigan said that he used the private sittings to ensure the removal from public sittings of such things as "tittle tattle" and rumour.

> 14.040 "The public sessions of the Commission comprised the lesser proportion of the total sittings. Out of 444 sittings days only 168, or 38%, were public sittings. One reason for this was to ensure that before matters were put in a public sitting there was a high degree of confidence that they would be material to my enquiries and the expected answers would be likely to be correct. Frequently matters were explored in private sitting, especially by a documentary search, in order to achieve this state."

I.4.4 In adopting these procedures which suppress some material, Costigan accepted they would not prevent the attainment of the objective of openness, which he so keenly pursued and stated in the following paragraphs.

> 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 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."

I.4.5 Stewart did not so precisely state these philosophies, but, by the use of open and closed sessions and open and secret reports, in substance followed those of Costigan, albeit with some differences in the use of open sessions. The particular subject matters of inquires vary and with them the need of how to handle them. Most of what Stewart uncovered had to remain secret, because of pending and future proceedings and informer considerations. However, he culled and left secret, where appropriate, some reputation damaging material. He espoused the importance of public awareness and openness in relation to organised crime and its corruptions and in his open report stated the evidentiary material and his conclusions on it in respect to activities of a great many named persons. However, he excluded, as stated, some reputation damaging material. Presently relevant for example is his comment at p 418-9

> "Accordingly the Commission has culled from numerous allegations made by witnesses before it of corrupt conduct by law enforcement officers only which appear credible and direct. It has not included reference to those which are not credible or which were based on information told to the witness by other persons; in other words, it has excluded rumours or hearsay."

I.4.6 I have at earlier times read the reports of Mr Justice Woodward and Sir Edward Williams (which were later than mine) but do not have those reports before me. My recollection, however, is that both used the open and closed hearing approach using I believe, generally the philosophies of Costigan and Stewart already referred to.

I.5 Conclusion

I.5.1 It would seem that the statutory obligations imposed by S.31(4) and S.112 to consider and accordingly, on appropriate occasions, to make exceptions from openness provided for in S.31(1) should be reviewed by the Committee and/or the Commission itself in the light of the procedures of earlier Commissions which adopted the general approach laid down by S.31(1). I would emphasise however, it seems to me that any procedures laid down should be of general application and not be applied ad hoc in relation to selected individuals or classes of them. That philosophy was applied in my Commission.

II

OPENNESS AND SECRECY IN INQUIRIES INTO ORGANISED CRIME AND CORRUPTION

ADDENDUM

II.1 Introduction

II.1.1 Following my presentation of comments on and suggestions under the above title, the Chairman of the Committee has invited me to add any suggestions as to any amendments to the ICAC Act which might facilitate what I had suggested. It is on this basis I write this addendum. As one not expert, as is a Parliamentary draftsman, I draft the suggested amendments with some hesitation. I do so rather in a way which may show the substance of what could be done. So they can be better understood, I will append some comments and explanations concerning them.

II.2 Amendments of ICAC Act Suggested

II.2.1 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.

II.2.2 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".

II.3 Comments on Suggested Amendments

The amendments suggested have the following consequences or warrant the following comments:

II.3.1 (a) They provide for the ICAC procedures and powers better and more fairly to make the decisions contemplated by s.31, without interfering with, and indeed expressly preserving, its ultimate and overriding provision and philosophy, namely that hearings shall be open and, in consequence, open to be published by the media, unless the ICAC is

satisfied in terms of s.31(4) that it is desirable to do otherwise "in the public interest for reasons connected with the subject matter of the investigation or the nature of the evidence to be given".

II.3.2 (b) The amendments will enable the ICAC to adopt the earlier stated procedures followed in the past by Royal Commissioners, in pursuing what was the same basic concept as that provided by s.31(4). It will allow the ICAC to work out that concept on a fair and considered basis after hearing debate and material advanced by interested parties.

II.3.3 The discretions and hence procedures open to Royal Commissioners were at large, by reason of their unlimited charter from Executive Governments. Those of the ICAC (as with the NCA) depend on statute. It is arguable that some of the procedures provided by the amendments are already open by implication from the ICAC Act. Some may already be in use. Some certainly appear not legally to be open. One example is this: by reason of the express prohibition in s.31(4) there is no power to sit in private for any purpose until there is a positive public interest finding. The ICAC cannot legally sit temporarily in private, in order properly to acquaint itself with the true nature of doubtful matter or in order to receive material or hear submissions from interested parties in order to determine whether some matter should only be received at a private sitting. Thus, it cannot sit temporarily in private to the point where it may be apparent some matter or aspect of its inquiry is worthless or irrelevant and yet is highly damaging to some reputation, which it is certainly not in the public interest to allow to be done by the use of the wide powers of the ICAC. By the time the true nature of the material emerges in a public sitting it will be too late to order a private hearing or make a suppression order under s.112(1). For reasons originally given, later revelation of the worthlessness of earlier matter does not rectify damage already done. Thus compelling a public hearing until the positive conclusion required by s.31(4) can be made, may result in the very damage intended to be avoided, being damage which in most cases will not be avoided or repaired by the later exercise of the suppression power. S.31, and in particular s.31(4), needs some amendment to permit the very provisions of s.31 to operate as intended.

II.3.4 (c) There have been some private hearings by the ICAC, but decisions to hold private or public hearings and of what shall be excluded from one or the other have themselves been made in private. For the most part the nature of the private hearings and the policies adopted concerning and the views concerning the public interest have not been revealed.

II.3.5 In the Tweed inquiry it appears from the report that there

were some private hearings at the outset in order to determine whether in some area there possibly were corrupt practices warranting investigation and attracting jurisdiction to do so.

II.3.6 Some reputation damaging hearsay material has been admitted in various inquiries and published in the media. It does not appear what view particular commissioners take of such material in relation to the public interest. 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.

II.3.7 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. It has been the accepted wisdom, particularly in the last few decades, both in Australia and the United Kingdom, that 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. No tribunal or single instance judge who is confident of the soundness of its or his decision can be concerned to object to being overruled by the operation of the supervisory or appellate systems. According to the accumulated wisdom of a collection of minds, all judges, including myself, have been sometimes right, sometimes wrong.

II.3.8 (d) Even if it is arguable that <u>some</u> of the procedures expressly provided in the amendments suggested are to be implied or are already in use by the present Commissioner or the Assistant Commissioner or both of them, the provision expressly of a specific code of procedures, such as the amendments provide, should have these advantages:

II.3.9 (i) Their express provision as against their being left to possible implication, should lead to certainty and their more likely use by the ICAC and persons affected.

II.3.10 (ii) They will facilitate uniformity of their use by all commissioners and assistant commissioners, past and future.

II.3.11 (iii) Their express and public statement and open availability and use will enhance the public

image of fairness of the ICAC, a matter which long range is of considerable importance to public acceptance of the ICAC and hence its proper operation (see later).

II.3.12 (iv) What is said in (iii) is of particular importance when applied to the provision by s.31(8) of an express statutory right of persons adversely affected, to be heard and the express definition of the grounds which the Act officially recognises as being required to be balanced with the central requirements and philosophies of the Act (in particular 31(1) and (4)), including the need for corruption to be dealt with in the open. Each of grounds (a) (b) (c) are not made absolute grounds for a private hearing order, but as an element which may contribute in all the circumstances, including the openness philosophy, to a public interest finding. This is made expressly clear by the terms of (8). As earlier indicated, Royal Commissioners considered each of these grounds in this light, namely as to how far they reflected the overall public interest. The rights and interests of individuals are accepted as relevant to what is the public interest.

II.4 Explanations of Suggested Amendments

To facilitate understanding of some of the particular purposes sought to be achieved by the suggested amendments and as a guide to any future draftsman, I refer to such purposes:

II.4.1 (a) For the reasons outlined elsewhere, there is provision in s.31(5) for temporary sittings in private. The amendment to 31(4) will have the result that it does not extend to (5), so that a public interest finding is not a precondition to a temporary inquiry in private, in which the public interest question is inquired into or may emerge.

II.4.2 (b) To meet the situation where it appears at a private hearing held on any basis that matter emerges which in the public interest should be given at a public hearing, the provision made in the last part of s.31(5) will enable the matter to be repeated or the private transcript read at a public hearing. This power and that given by new s.112(2) to reverse suppression orders gives greater flexibility to the sorting out, on a pubic interest basis, of the private or public

matter which can or does emerge.

II.4.3 (c) So that an application that some matter be heard in private can be freely debated and material in aid introduced and not itself do the damage sought to be avoided, provision is made by s.31(7) for an automatic hearing of the application in private.

II.4.4 (d) In order that s.31(7) (as referred to in (c)) cannot be abused to provide some unwarranted secrecy haven, the general power in the last part of s.31(5) is available to be applied, so that, if an application (held in private) fails, the details of the hearing of the application can be incorporated into an open hearing.

II.4.5 (e) The alternate in s.31(7), (to a private hearing of the application) of a temporary suppression order to cover the hearing in public of an application, is designed to prevent another possible abuse. This alternative, which on a serious matter will not be satisfactory, could be used to avoid a public hearing being continually disrupted, as it would be, by constant adjournments to hear numerous applications in private by one party or one counsel in respect of individual items of evidence on minor matters or by an accumulation of parties making many applications apparently insubstantial or vexatious. The temporary suppression order, until the application is determined, could be used. Also the nature of an application could be explored under temporary cover of a suppression order and, if necessary, then adjourned in a serious case to be heard at a later time in private.

II.4.6 (f) I regard s.31(8) as important because it makes express provision for applications being made by persons interested and outlines some grounds for doing so, which have to be dealt with in the context elsewhere discussed such as in II(c)(iv) above (and in II(c)(iii) as to the public image of fairness).

II.5 General Comment

II.5.1 My first document on the same subject should be read with the present comments directed to the suggested amendments.

II.5.2 I believe that if amendments on the lines suggested are made, they could have important long range consequences for the ICAC as an institution. The ICAC Act has been operating for just over a year, I believe with general, but not complete public support. There have been some indications of some unease on the fairness issue arising from the open hearings. It is appropriate while this "honeymoon" is current, to consider whether its public image and support can be made more secure. This is most important because the ICAC is an important and innovative institution in the attack on corruption, which is at the base of much organised and other crime. I am convinced that public institutions, such as commissions of inquiry, particularly those which intrude significantly into civil liberties or what are claimed to be civil liberties, cannot operate successfully for very long unless they continue to have clear public support and are clearly perceived to operate fairly. It should never be forgotten that public support can quickly change, particularly on perceptions of some action or ruling, even one, which is unfair or wrong or is seen so to be.

II.5.3 The ICAC (as compared with the NCA) importantly has been set up as a body independent of political direction and which, subject to just exceptions, must sit in the open. It provides a model (if successful), and in my view an important one, hopefully to be adopted elsewhere in Australia and, in the long run, even for the NCA. Ultimately, whatever NSW does, particularly in the organised crime area, needs to be done on an Australia wide basis.

II.5.4 In the long range interests of the ICAC as an institution, it is important that its image be not tarnished by some unfairness, or the appearance of it, in particular in the use of its wide powers. There are danger points which it would be wise to perceive at an early stage if public and bi-partisan support, essential to it, is to continue.

II.5.5 It is one thing to have these powers in aid of investigation. I believe these powers are necessary properly to investigate corruption and counter it, but they must be used with care lest they operate oppressively or unfairly or are seen so to do or lest they are so used that the operations of the ICAC are manipulated or misused by persons with a bias. Openness of the ICAC is critically important, but openness and the exercise of power must be melded by fine tuning which seeks to avoid unfairness or exploitation which is unjustly damaging to persons and in the end the ICAC itself.

II.5.6 What I have said should be applied to the exercise of power which produces in public damning but unsubstantiated allegations or hearsay, helpful though they may be to an investigation in private. It applies also to any unrestricted use in public of the power to overrule the privilege against self incrimination.

II.5.7 Danger lies in these and other wide powers when taken with the requirements of openness by s.31(4). The potential of s.31(4)

is that openness will be the order of the day with the interest of an individual otherwise being dismissed on a general view on openness and because the exception requires prior proof for which there is no satisfactory means given to provide the proof. If s.31(4) in terms is applied there is a danger of arbitrary and unnecessary damage in consequence to individuals, which in the end will be apparent.

II.5.8 Public views change, so support for investigative bodies can change to doubt, even opposition so rightly or wrongly, the McCarthy label can be placed on those who inquire, as some unjustly alleged against Mr Costigan QC and later Mr Fitzgerald QC, in each instance because of alleged unjust and overexposure of reputations. In the end these attitudes can be promoted by political or other powerful forces and do much to negative the work of the institution. An unjust cloud still hangs over Costigan's important and innovative work.

II.5.9 For this reason, in my view, the ICAC should not be left with the bare requirement of s.31(4) which gives the appearance of arbitrariness. On the face of things the ICAC appears to be a reaction to the NCA and a complete reversal of its policies. For absolute secrecy there appears to have been substituted absolute openness. In fact this is not so, because of the power to order secret sittings, but this is provided in a minor and insignificant way without any effective provision being made enabling the required proof of the exception of secrecy.

II.5.10 For this reason, in my view the ICAC should not be left with the bare requirement of s.31(4) unless there is seen a will and a means to inquire to see whether the exception in (4) is met.

II.5.11 As I have said, in a way the ICAC was a reaction to the NCA. Accordingly, I think that, in the long range interest of the ICAC as an institution, hopefully permanent, there should now be made express statutory provision on the lines suggested, so the right of individuals to be heard etc can be fairly and be seen fairly to be dealt with and so precise procedures and powers are laid down for the use of present and future commissioners and assistant commissioners. In this way there can be consistent procedures which can aid the sound and fair separation of matters proper to be dealt with openly and properly to be dealt with in private.

II.6 Postscript - s.10, s.20(3), s.31(4)

II.6.1 I add a further matter on which my earlier submissions and suggested amendments do not depend, but which would benefit by the amendments suggested and ought to be considered with any proposal to amend s.31.

II.6.2 S.10(1) confers on any person the right to make a complaint of corruption which will set the ICAC function in motion and could lead to hearings which will attract the open hearings requirement of s.31(4). S.10 is an important provision designed to free the ICAC from political control and justify its title "Independent". In this respect it stands in contrast with the NCA. Strangely, despite this purpose of s.10, it could itself be an instrument for abuse, being an abuse which the other virtue of the ICAC, ie. openness, would assist. Such an abuse would be more difficult to avoid because of the present terms of s.31(4).

II.6.3 Charges made in a court or allegations made in conjunction with a government reference to a Royal Commission or in conjunction with a notification under s.11 or by reason of a reference by Parliament under s.73, which then have priviledged publicity by reason of an open hearing, are ordinarily only made if some prior responsible examination has revealed that there is some substantial support for them. Ordinarily there is no such constraint in respect of a private complaint made under s.10.

II.6.4 What should be realised is that s.10 could lead to an inquiry being pursued to the open hearing stage upon a complaint outwardly bona fide, apparently by a concerned citizen but in reality for some political or spurious motive and perhaps at the undercover behest of some other person. Such an abuse of s.10 appears not so far to have been attempted, but in reviewing the scope of s.31, the possibility of it occurring and proceeding to an open hearing stage cannot be dismissed as never likely to occur.

II.6.5 The Act itself, (s.20(3)), acknowledges the possibility and gives the ICAC the power to dismiss or not commence an investigation of a s.10 complaint on various grounds, which include that the complaint was "not bona fide", which of course would require a positive decision to that effect on some basis. A decision to dismiss a claim cannot be taken lightly because before doing so the ICAC must "consult" the Operations Review Committee (s.20(4)). On the face of it, these provisions would protect against a misuse of s.10 by a claim not bona fide, such as to damage a political or other opponent.

II.6.6 However, the power given by s.20(3) itself is no guarantee that such a complaint will not reach the hearing stage where the open requirement of s.31(4) will operate, so there is a public hearing and a smear allegation under privilege against defamation action, and so the spurious purpose is achieved.

II.6.7 What may appear on its face to be genuine, with some factual support, may not be able to be shown to be otherwise until a hearing commences and the claimant and the person accused have been heard and questioned. The smear tactic usually attaches to some actual event and gives it a sinister twist, requiring some inquiry to reveal the truth. The openness requirement of s.31(4) would be likely to prevent the issue of bona fides being

sorted out before the intended damage is done.

II.6.8 No provision is made in the Act for the person the subject of the claim to be heard on whether the investigation should not be pursued to a public hearing on any of the grounds provided by s.20(3). He has no right to give evidence or question the claimant on the issue of bona fides before the damage is done. The amendments proposed would go some way to meet the situation outlined. It would enable the bona fides question to be raised in conjunction with an application for a hearing in private, with the consequences earlier stated. The whole issue could be sorted out in a private hearing and the allegations only made public if the lack of bona fides was not established.

II.6.9 On a long range view of the ICAC or of s.31, the possibility to which I have referred should not be dismissed as unlikely ever to occur. Throughout history here and elsewhere, the smear, the whispering campaign and legal and other proceedings have been used mala fide in political and other fields to damage and destroy an opponent. These are often the tactics of the powerful and the determined with an "axe to grind" who cloak their participation by the use, as a deputy, of some minor figure. With some twist to an actual event, a plausible but in the end false case, sometimes innocently seized on by an interested outsider, is pursued sufficient to do damage which is to the benefit of the one behind the scene.

II.6.10 Thus, despite the laudable intention that the ICAC should be free of political direction and the use of s.10 for this purpose, s.10 could be used as a back door means of subverting this purpose. In respect of the more plausible misuse of s.10, the ICAC Act is not adequate to prevent some fruits of the misuse being gained. If the ICAC is deceived to the open hearing stage, irreparable damage could be done to the ICAC itself. It would be seen to be the tool of the undercover exploitors of the system.

II.6.11 The amendments proposed would further enable the ICAC to protect others as well as itself from the damage which would occur from an open hearing of such a claim.

II.6.12 An alternative would be to give to a person, in respect of whom a claim is made under s.10, early notice of such a claim and a specific power to apply to the ICAC for an order under s.20(3), such application to be heard in private, the claimant open to be questioned and the applicant entitled to give and call evidence.

APPENDIX

Sections of the Independent Commission Against Corruption Act 1988 discussed by the Hon A R Moffitt: s.10, s.20(3), s.31, s.112

10 (1) Any person may make a complaint to the Commission about a matter that concerns or may concern corrupt conduct.

(2) The Commission may investigate a complaint or decide that a complaint need not be investigated.

(3) The Commission may discontinue an investigation of a complaint.

20 (3) The commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion) -

(a) the subject-matter of the investigation is trivial; or

(b) the conduct concerned occurred at too remote a time to justify investigation; or

(c) if the investigation was initiated as a result of a complaint - the complaint was frivolous, vexatious or not in good faith.

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.

112 (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.