

PART ONE

Operations Review Committee

-1- INTRODUCTION

- 1.1 In its "Report of An Inquiry into Matters Raised by Paul Gibson MP", dated December 1991, the Committee identified two areas which required further consideration. Firstly, the Committee was concerned about the fact that the Bayeh matter had not gone before the Operations Review Committee, and raised the question that this might represent a flaw in procedures. Secondly, the Committee suggested that a submission received from the Hon Adrian Roden QC, regarding Deputy/Assistant Commissioners, required further consideration before any definite view could be reached.
- 1.2 As a first step in considering the Operations Review Committee (ORC) matter, the Committee arranged a meeting with the then members of the ORC. This meeting took the form of a public hearing and the following members of the ORC were present:
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| ◇ | Mr Ian Temby QC - | (Chairman) |
| ◇ | Mr Laurie Glanfield - | Director-General, Attorney-General's Department
(appointed on recommendation of Attorney-General) |
| ◇ | Sister Margaret McGovern } | |
| ◇ | Mr Jack Davenport } | Community Representatives appointed on the |
| ◇ | Mr Gerry Nutter } | recommendation of the Premier |
| ◇ | Mr Daniel Brezniak } | |
- The other members of the ORC, the Hon Adrian Roden QC, and the Police Commissioner, were unable to attend. Mr Paul Favret, Staff Officer to the Assistant Commissioner Official Responsibility, attended in the place of the Police Commissioner but did not answer questions.
- 1.3 In addition to the concern about the ORC which arose during the Inquiry into Matters Raised by Paul Gibson MP, a number of other concerns emerged during the meeting with the ORC members on 07 February. Each of these concerns are dealt with in part one of this report.
- 1.4 Mr Roden's statement to, and evidence before, the Committee concerning Assistant/Deputy Commissioners was published as an appendix to the Committee's "Report of An Inquiry into Matters Raised by Paul Gibson MP" with a view to encouraging discussion of the issues raised therein. Additionally, the Committee sought the views of a number of individuals and organisations on these issues. A public hearing was held on 11 February to enable the Committee to receive evidence from those who expressed views on Mr Roden's proposals. The witnesses who appeared before the

Committee were:

- ◇ Mr Mark Le Grand, from the Queensland Criminal Justice Commission;
- ◇ Mr Michael Bersten;
- ◇ The Hon Athol Moffitt, QC, CMG;
- ◇ Professor Brent Fisse;
- ◇ The Hon Michael Helsham QC; and
- ◇ Mr Phillip Bradley, from the NSW Crime Commission.

It should be noted that evidence was also taken at this hearing in relation to the ORC. In fact the majority of Mr Bersten's and Professor Fisse's evidence was in relation to this issue.

- 1.5 A further hearing was held on 27 February to enable Mr Roden to respond to the evidence of the witnesses who appeared before the Committee on 11 February.
- 1.6 The Committee held one of its regular six-monthly public hearings with Mr Temby on 31 March. At this hearing detailed written answers to questions on notice about both the ORC and Assistant/Deputy Commissioners were tabled. Mr Temby also answered a number of questions without notice on these subjects.
- 1.7 These matters were discussed by the Committee at a deliberative meeting on 05 May. A draft report was prepared and distributed to Committee members during June. That draft was considered by the Committee at its meeting on 30 June 1992, amended and adopted as the Committee's report.

-2- FUNCTIONS OF THE OPERATIONS REVIEW COMMITTEE

2.1 *Role of Operations Review Committee*

2.1.1 In his second reading speech upon the ICAC Bill on 26 May 1988 the Premier described the ORC in this way.

"... [The ORC] will advise the Commission on action to be taken in relation to complaints. In contrast to the parliamentary committee it will be closely involved in operational matters, and will have the necessary forensic expertise to provide the commissioner with advice on operations."

2.1.2 Mr Temby described the purpose of the Operations Review Committee (ORC) very succinctly at the hearings on 07 February and 31 March.

"I have always seen and I still see the primary role of the Operations Review Committee as being to ensure that there are not unprincipled cover-ups and failures to pursue investigations."

"...[The ORC] is a group of people who are there to ensure that complaints from the public which should be pursued, are pursued."

2.1.3 Section 20(4) of the ICAC Act, provides that,

"Before deciding whether to discontinue or not to commence an investigation of a complaint, the Commission must consult the Operations Review Committee in relation to the matter."

2.1.4 The ORC is established under part 6 of the ICAC Act which is reproduced on the following pages. The functions of the Committee are set out in s.59(1) of the Act.

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PART 6—OPERATIONS REVIEW COMMITTEE

Constitution of Operations Review Committee

58. There is constituted by this Act an Operations Review Committee.

Functions

59. (1) The functions of the Operations Review Committee are as follows:

- (a) to advise the Commissioner whether the Commission should investigate a complaint made under this Act or discontinue an investigation of such a complaint;
- (b) to advise the Commissioner on such other matters as the Commissioner may from time to time refer to the Committee.

(2) The Commissioner shall consult with the Committee on a regular basis, and at least once every 3 months.

Membership

60. (1) The Operations Review Committee shall consist of 8 members, being the following:

- (a) the Commissioner, who shall be Chairperson of the Committee;
- (b) an Assistant Commissioner, nominated by the Commissioner;
- (c) the Commissioner of Police;
- (d) a person appointed by the Governor on the recommendation of the Attorney General and with the concurrence of the Commissioner;
- (e) 4 persons appointed by the Governor on the recommendation of the Minister and with the concurrence of the Commissioner, to represent community views.

(2) Schedule 2 applies to the appointed members.

Procedure

61. (1) The procedure for the calling of meetings of the Operations Review Committee and for the conduct of business at those meetings shall, subject to this Act, be as determined by the Committee.

(2) The Chairperson shall call the first meeting of the Operations Review Committee in such manner as the Chairperson thinks fit.

(3) At a meeting of the Operations Review Committee, 5 members constitute a quorum, of whom one must be the Commissioner or Assistant Commissioner.

(4) The Chairperson or, in the absence of the Chairperson, the member who is an Assistant Commissioner shall preside at a meeting of the Operations Review Committee.

(5) The person presiding at a meeting of the Operations Review Committee shall, in relation to the meeting, have all the functions of the Chairperson.

(6) The Chairperson or person presiding at a meeting of the Operations Review Committee shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.

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(7) A question arising at a meeting of the Operations Review Committee shall be determined by a majority of the members present and voting.

Disclosure of interests

62. (1) A member of the Operations Review Committee who has a direct or indirect interest—

- (a) in a matter being considered or about to be considered at a meeting of the Committee; or
- (b) in a thing being done or about to be done by the Committee,

shall, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Committee.

(2) A disclosure by a member at a meeting of the Operations Review Committee that the member—

- (a) is a member, or is in the employment, of a specified company or other body; or
- (b) is a partner, or is in the employment, of a specified person; or
- (c) has some other specified interest relating to a specified company or other body or to a specified person,

is a sufficient disclosure of the nature of the interest in any matter or thing relating to that company or other body or to that person which may arise after the date of the disclosure.

(3) After a member has disclosed the nature of an interest in any matter or thing, the member shall not, unless the Operations Review Committee or (with the concurrence of the Commissioner) the Minister otherwise determines—

- (a) be present during any deliberation of the Committee, or take part in any decision of the Committee, with respect to that matter; or
- (b) exercise any function under this Act with respect to that thing.

(4) A contravention of this section does not invalidate any decision of the Operations Review Committee or the exercise of any function under this Act.

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SCHEDULE 2—PROVISIONS APPLYING TO APPOINTED MEMBERS OF OPERATIONS REVIEW COMMITTEE

(Sec. 60 (2))

Definitions

1. In this Schedule—

“appointed member” means an appointed member of the Committee;

“Committee” means the Operations Review Committee.

Eligibility for appointment

2. A Minister or a Parliamentary Secretary is not eligible to be appointed as an appointed member.

Term of office

3. Subject to this Schedule, an appointed member shall hold office for such period not exceeding 12 months as may be specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

Acting appointed member

4. (1) If for any reason there is a vacancy in the office of appointed member, the Governor may appoint a person to act in that office.

(2) While a person is acting as appointed member, the person has and may exercise all the functions of the member.

Remuneration

5. An appointed member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

Vacancy in office

6. (1) The office of appointed member becomes vacant if the member—

(a) dies; or

(b) completes a term of office and is not re-appointed; or

(c) resigns the office by instrument in writing addressed to the Minister; or

(d) becomes a Minister of the Crown or a Parliamentary Secretary; or

(e) is removed from office by the Governor under this clause; or

(f) is absent from 4 consecutive meetings of the Committee of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Minister or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Minister for having been absent from those meetings; or

(g) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit; or

(h) becomes a temporary patient or a continued treatment patient within the meaning of the Mental Health Act 1958, a forensic patient within the meaning of the Mental Health Act 1983 or a protected person within the meaning of the Protected Estates Act 1983; or

(i) is convicted in New South Wales of an offence that is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.

(2) The Governor may remove an appointed member from office at any time.

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SCHEDULE 2—PROVISIONS APPLYING TO APPOINTED MEMBERS OF OPERATIONS REVIEW COMMITTEE—*continued*

Filling of vacancy in office of appointed member

7. If the office of appointed member becomes vacant, a person shall, subject to this Act, be appointed to fill the vacancy.

Effect of certain other Acts

8. (1) The Public Service Act 1979 does not apply to the appointment of an appointed member and an appointed member is not, as a member, subject to that Act.

(2) If by or under any other Act provision is made—

- (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office; or
- (b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of appointed member or from accepting and retaining any remuneration payable to the person under this Act as an appointed member.

(3) The office of an appointed member is not, for the purposes of any Act, an office or place of profit under the Crown.

2.1.5 The ORC at one of its first meetings on 05 May 1989 resolved that its terms of reference be as follows:

- ◇ to advise the Commissioner whether the Commission should discontinue or not commence an investigation of a complaint;
- ◇ to advise the Commissioner at least every three months whether the Commission should continue an investigation;
- ◇ to advise the Commissioner whether the Commission should discontinue an investigation conducted on its own initiative or on a report made to it;
- ◇ to receive from the Commissioner a report relating to the completion of an investigation;
- ◇ to advise the Commissioner on such other matters as the commissioner may from time to time refer to the Committee;
- ◇ to bring to the attention of the Commissioner any matters relating to the operations of the Commission which the Committee considers important.

At a meeting on 04 August the ORC resolved that it be provided with statistical reports relating to the handling of complaints by the ICAC. The Committee has since operated according to these terms of reference.

2.2 *Membership of the Operations Review Committee*

2.2.1 Section 60 provides that the ORC shall consist of 8 members, being the following:

- ◇ **ICAC Commissioner** (who shall be the Chairperson)
- ◇ **ICAC Assistant Commissioner** (nominated by Commissioner)
- ◇ **Police Commissioner**
- ◇ **one person** appointed by the Governor on the recommendation of the **Attorney-General** and with the concurrence of the Commissioner;
- ◇ **four persons** appointed by the Governor on the recommendation of the **Premier** with the concurrence of the Commissioner to **represent community views**.

The following table sets out the changes in membership of the ORC over time, and the present membership.

MEMBERSHIP OF THE ORC

	March 1989 - March 1990	March 1990 - March 1991	March 1991 - March 1992	March 1992 -
ICAC Commissioner	Mr Ian Temby QC	Mr Ian Temby QC	Mr Ian Temby QC	Mr Ian Temby QC
ICAC Assistant Commissioner	Hon Adrian Roden QC	Hon Adrian Roden QC	Hon Adrian Roden QC	Hon Adrian Roden QC
Police Commissioner	Mr John Avery	Mr John Avery	Mr Tony Lauer	Mr Tony Lauer
Attorney-General's representative	Mr Bill Robinson (Legal Aid Commission)	Mr Laurie Glanfield (Attorney-General's Department)	Mr Laurie Glanfield	Mr Laurie Glanfield
Community Representatives nominated by the Premier	Sister M McGovern Mr Jack Davenport Major General R Grey Professor Brent Fisse	Sister M McGovern Mr Jack Davenport Mr Daniel Brezniak Mr Gerry Nutter	Sister M McGovern Mr Jack Davenport Mr Daniel Brezniak Mr Gerry Nutter	Rev Bruce Ballantine-Jones Ms Carmel Niland Mr Daniel Brezniak Mr Gerry Nutter

2.3 *Value of Operations Review Committee*

- 2.3.1 When Mr Temby appeared before the Committee on 31 March 1992 he emphasised the value of the ORC, and stated that it was unfortunate that a similar body did not exist in respect of other agencies.

"The positive is that the ICAC has an Operations Review Committee. That is to say, there is a group of people who are there to ensure that complaints from the public which should be pursued, are pursued. When you think about it, there is no such body so far as any broadly similar organisation is concerned. So, emphasising the positive, is it not a wonderful thing that it is there and that it works. There is not such a thing as far as the police are concerned. Constant allegations are made that things that should have been pursued are not pursued. There is no such body as far as the Ombudsman is concerned. There is no such body so far as the NCA or like bodies are concerned. We are the only one that has such a review body. I am never one to say that any existing arrangement is incapable of improvement, but we ought to emphasise the positive. It is a wonderful thing it is there, and it is a pity there are not some like bodies in other places."

- 2.3.2 Mr Temby had previously spoken to the Committee about the benefits of the ORC as a quality control mechanism for the ICAC. On 27 March 1991 he said,

"From our point of view the Committee is not just an important accountability mechanism; it actually helps in terms of quality control and in the timeliness of our work - to have to sign off files by providing a report to other than a simply internal body. It is a highly desirable mechanism. The Committee is far more important than I thought it would be when it was established—and I was never opposed to it for a moment. It is a very useful part of what we do, and the not inconsiderable work that goes into it is well rewarded."

2.4 *Section 59(1) of the ICAC Act*

- 2.4.1 One of the issues of concern to the Committee which emerged during this inquiry was the form of s.59(1) of the ICAC Act, which sets out the functions of the ORC. Of particular interest was s.59(1)(a) which states that the ORC is "to advise the Commissioner whether the Commission should investigate a complaint made under this Act or discontinue an investigation of such a complaint." It is not clear from s.59(1)(a) whether the Commission is required to consult the ORC before it commences an investigation or whether an investigation may be commenced before the ORC is consulted.

- 2.4.2 At a very early stage of the Commission's existence, legal advice was sought from Mr Brian Sully QC (now his Honour Mr Justice Sully of the Supreme Court) about the terms of s.59(1)(a). Mr Sully's advice was that, when read with ss.10 and 20(4) of the ICAC Act, s.59(1)(a) should not be interpreted as requiring the ICAC to consult the ORC before commencing an investigation. (A copy of Mr Sully's opinion is included as an appendix to this report.)
- 2.4.3 The Committee does not dispute Mr Sully's advice of 13 March 1989. Indeed, it would be unduly cumbersome if the ICAC had to consult the ORC before commencing all investigations. In many cases there will be a need for the Commissioner to make a quick decision to authorise an investigation - a delay in such action until the next ORC meeting could result in serious consequences for a potential investigation. Furthermore, the ICAC has developed what would appear to be appropriate procedures to ensure the ORC is advised at the earliest opportunity of newly commenced investigations, and thereafter kept informed of progress on a three-monthly basis. The ORC retains its power to recommend discontinuance in respect of these investigations.
- 2.4.4 However, the Committee is concerned that s.59(1)(a) is ambiguous. The Committee is of the view that it is not acceptable for the section of the Act which sets out the functions of one of the key accountability mechanisms to require the opinion of a QC to be properly construed. This view was most succinctly put by Mr Tink in the following dialogue with Mr Temby on 31 March 1992.

"MR TINK:

Q: ... It troubles me a little that the opinion of a QC was sought in relation to the definition of that section, and that it is proposed that the section remain as it stands, unamended. If we assume for purposes of the argument — and I think I am right in this recollection — that the essence of section 59 as interpreted by Mr Sully was that the ORC was concerned essentially with the questions of discontinuance of complaints rather than with the threshold question of whether they should be investigated in the first place. It seems to me that if his advice was sought to clarify whatever misapprehension there might have been there, that is something that ought to be spelled out in the Act, inasmuch as it is a statement of the ambit of jurisdiction of a key oversight body?

A: If that was the general view of this Parliamentary Committee, I suppose the Act should be amended. We sought advice — not as I recollect because of serious doubts as to the position, because Sully's advice came as no surprise to us — but

because we had to be absolutely certain that the critical question regarding the commencement of an investigation did not go off the rails at the very first point. If we got it wrong we did not have an investigation when we thought we had one, and then you have a disaster on your hands. I do not recollect any serious doubt about that: it was rather obtaining it out of more abundant caution. But of course if there is still a thought that section 59 (1) when construed in the context of the Act is unclear, it should be clarified. We do not think it is."

2.5 *Conclusions*

2.5.1 The Operations Review Committee 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 once which could well be replicated in other agencies which receive complaints and have the discretion to determine whether or not they are investigated.

2.5.2 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.

-3- COMPLAINTS VS. INFORMATION

3.1 Bayeh Matter

3.1.1 As set out in the introduction, it was the fact that the Bayeh matter did not go before the ORC that sparked the Committee's interest in this subject. The Committee's "Report of an Inquiry into Matters Raised by Paul Gibson MP" contained the following account of the Commission's handling of the Bayeh matter, touching upon the ORC.

"Ms Drennan and Mr Wallace met with Mr Bayeh's solicitor on 09 August to convey the ICAC's response to Mr Bayeh's conditions. Ms Drennan and Mr Bayeh's solicitor then "discussed the categorisation of this matter, the meaning of complaint under the ICAC Act and the role of the Operations Review Committee. It was explained that in the circumstances in which the matter arose the Commission had not regarded it as a complaint but rather the provision of information. [Mr Bayeh's solicitor] requested that it be treated as other than a complaint. ...

Kevin Zervos, the General Counsel of the ICAC, appeared before the Committee on a number of occasions during the course of this inquiry ... In view of his experience in criminal investigations and his former position as Acting Director of Operations with the ICAC, he was asked on 07 November what he would have done differently in this matter with the benefit of hindsight.

CHAIRMAN:

Q: Having heard all the evidence or with the benefit of hindsight, you said that everybody has said given what they know now, they would have done it differently. I think you were an acting Director of Operations for a period of time. ...

Q: There is one other difference you have given, if you were dealing with it as at then, about which you have given evidence. I think you said you would have regarded it as a

complaint.

A: Yes.

Q: In consequence the Operations Review Committee would have had jurisdiction?

A: It does not have jurisdiction. In my opinion the matter is a complaint.

Q: You would have treated it as a complaint at that time?

A: I see it as a complaint and I also see it as a matter that was current, and is still current basically because of this inquiry. But it probably came to an end when IPSU had completed its investigation and the Office of the Director of Public Prosecutions made its decision in relation to the material it had before it. I agree with you that the matter is a complaint and at some time when the decision is made that it not be investigated further, it is to be referred to the ORC. ...

Secondly, the Committee was concerned and surprised that a matter of this magnitude had not gone before the Operations Review Committee. This is largely a result of the classification of the matter as information rather than a complaint (as discussed at 3.4.4 above). The Committee is concerned that the Operations Review Committee, which is a key accountability mechanism established under the ICAC Act, may not be receiving reports from the Commission about significant operations such as the Bayeh matter. This is an issue worthy of further attention and may be an area for a future inquiry by the Committee."

3.1.2 Early this year the Committee sought the views of a number of individuals on aspects of the Report of an Inquiry into Matters Raised by Paul Gibson MP. Commenting on the material reproduced above Michael Bersten stated that,

"... a question the Committee needs to consider is whether ICAC has sought to avoid the requirements of s.20(4) of the ICAC Act in any way. One possibility is that ICAC employs the device of characterising matters as "information" which should be regarded as a "complaint" (as appears to have occurred in the Bayeh matter)."

It should be noted, however, that Mr Bersten also said that the Committee "should not readily assume that ICAC is seeking to avoid the ORC. ... "

3.2 *Sturgess Files*

3.2.1 A similar concern arose at the public hearing with Mr Temby on 31 March 1992, that a number of files referred to the ICAC by the Director-General of the Cabinet Office, Gary Sturgess, had likewise not gone before the ORC due to the Commission's categorisation of these files as "information" rather than "complaints".

"MR MUTCH:

Q: I was interested to know whether you had received advice in relation to each and every one of those complaints?

A: There is a general impression that when we ultimately got that list of matters, well after the Commission was established, we simply put it away somewhere. That is not the case. All of the matters were looked at, and some of them were pursued generally as parts of other investigations. We did not take them to the Operations Review Committee because they were not complaints within the meaning of the Act — they were rather the provision of pieces of information and they were being put before us as matters we ought to consider pursuing.

Q: Would not that give you a certain amount of protection? In the same article for instance Gary Sturgess is quoted as saying 'I am personally disappointed that they have not looked at a number of things we referred to them. Some of the material is relevant, and there is very strong evidence.' You probably did not make the decision unilaterally whether to proceed with a particular matter, but it would have been done internally in the Commission?

A: I certainly did not make the decision unilaterally. I instructed the proper officers, principally Vic Anderson the former Director of Operations, who was kept on as a consultant after the event to carry through this process, to do all that was necessary and to make recommendations. Kevin Zervos was very much involved in that process. Some matters were pursued, generally as part of other matters. Some are alive, and there were others that we felt we could not usefully pursue. In some cases we have given reasons for that.

The role of the Operations Review Committee is prescribed by statute, and it is to give advice before a decision is taken whether or not to pursue a complaint. While the role of the

committee can be expanded as a result of discussions between myself and it, I am not inclined to do that except in a quite structured way. They need to know what their brief is, and I cannot just use them as some sort of repository to whom occasionally I throw a curly one. ...

Q: In answer to one of my questions you said that there are a number of matters that had not been referred to the Operations Review Committee from Mr Sturgess. I think you also said at the end that there were some matters that were still on foot, or still around. They would not have been referred to the Operations Review Committee either, because they have not commenced. What worries me is that there could be a suggestion that there are matters sitting there in limbo that have not commenced investigations, and yet the Operations Review Committee has not heard of them?

A: We can act on four bases. One is a complaint, and those matters have to go to the ORC at some stage, and they all will. Next there are reports under section 11, next there are references by the Parliament, and next there are our own-motion investigations. That is to say, we can act as to a complaint, a report, or a reference, or on the basis of things we are told. The 67 matters are in that category — things we are told which could form the basis of an own-motion investigation if we think it is appropriate for that to happen.

Q: What I was concerned about was that there could be a lot of matters that are sitting there, classified as complaints, but you have not started investigating at this stage, and they have not been looked at?

A: There is nothing that is properly categorised as a complaint that has not been looked at, unless it was received yesterday. Every complaint is looked at immediately.

Q: It is put in a file presumably, and the Operations Review Committee would not look at it either?

A: They will all go there.

Q: Eventually?

- A: They will go there, and the arrangements in place are that nothing can just simply sit there for years and years unattended. They will all go there.
- Q: Even if it is just as a matter of noting the name of the case, without getting advice from them as to whether or not to proceed?
- A: With respect to matters of a given age, whatever we might decide that age is, they will receive progress reports, so that matters cannot be sitting in the corner receiving no attention. That would be dangerous, because if from the inside you did not want something to proceed, there are two ways you could try to stop it proceeding. One would be to write a dishonest report to the ORC, which is a bit chancy; and the other way would be to disappear the matter. The arrangements are that everything must be reported on after a given period, so it cannot just disappear.
- Q: None of those matters I referred to earlier had been before the committee?
- A: They are not complaints: they are pieces of information which could justify own-motion investigation if we thought that was justified, but they are not complaints."

3.3 *Categorisation of Matters by the ICAC*

- 3.3.1 It would be fair to say that before its inquiry into the Bayeh matter the Committee was not aware of any categories of information received by the ICAC other than "complaints" and "s.11 reports" from public authorities. This is an area where there is some room for uncertainty. The term "complaint" is not defined in the ICAC Act, and the term "information" (as a category of material received by the ICAC) does not even appear in the Act.
- 3.3.2 However, the ICAC has developed detailed procedures for the categorisation of material it receives. These procedures are designed to ensure consistency and "principled decisions" in determining how matters are to be dealt with. These procedures are set out in chapter two of the Commission's Investigation Manual. The relevant section is reproduced below.

02 CATEGORISATION OF MATTERS

Matters received by the Commission or which initiate an enquiry are categorised in one of eight ways:

- . a complaint;
- . a report;
- . information;
- . an enquiry;
- . dissemination;
- . a matter commenced on the Commission's own initiative;
- . a matter referred to the Commission by both Houses of Parliament; and
- . outside jurisdiction.

2.1 Complaint

Section 10 of the Act provides for any person to make a complaint to the Commission about a matter which concerns or may concern corrupt conduct. A complaint may be made orally or in writing. Complainants can remain anonymous. The complainant does not have to be affected by the matter or have an interest in the possible corrupt conduct, nor does the complainant have a statutory right to know what action the Commission takes in relation to the complaint. A complaint about corrupt conduct received by the Commission under this section must be referred to the Operations Review Committee for advice prior to a final decision being taken that the matter not be investigated.

2.2 Report

Section 11(2) of the Act requires the Ombudsman, Commissioner of Police and other principal officers of public authorities to report to the Commission suspected corrupt conduct as defined by the Act. Section 11 reports are received either by way of an individual report from a public authority or, following agreement to special arrangements, by way of periodic schedule. In September 1990 the Commission issued guidelines to all public authorities which provide advice on how they should meet this reporting obligation. Section 11 matters are not required to be forwarded to the Operations Review Committee for advice but from time to time a matter, if it is particularly sensitive or significant would be so forwarded.

2.3 Information

Whilst a number of matters received by the Commission do not involve a complaint of corrupt conduct they can nonetheless convey information about a circumstance or behaviour which has the potential for corruption. If this circumstance or behaviour has a connection with a public official or public authority it may well be worthy of further examination by the Commission. Matters which fall into this category will be classified as information (see also section below on jurisdiction).

2.4 Enquiry

This category includes enquiries received from people who are concerned about something but unsure who to tell. They may wish to ask, for example, if what a certain person in authority has done is acceptable and what the Commission would do if it was reported. The enquiry in itself has little or no information and does therefore not constitute a complaint. This category also includes questions such as "has a complaint been received about me?", or "Am I being investigated?". Usually the person making the enquiry is encouraged to provide any information they may have about corrupt conduct.

2.5 Dissemination

This category relates to information forwarded to the Commission by Government Agencies which are not New South Wales public sector agencies. It includes Police Forces from interstate, the National Crime Authority and the Australian Federal Police. In the course of the investigative work done by those agencies they may encounter information or intelligence dealing with corrupt conduct as defined by the ICAC Act. The information is then disseminated to us for whatever action we consider necessary. Dissemination is treated as information from another agency and not a matter received by Section 10 or Section 11 of the Act. Enquiries based on disseminated material are not required to go to the Operations Review Committee for advice.

2.6 Own Initiative

Section 20(1) of the Act allows the Commission to conduct an investigation on its own initiative; in other words, a complaint or report of corrupt conduct is not a prerequisite for a Commission investigation. The Commission has conducted a number of enquiries on its own initiative. These enquiries are not required to go to the Operations Review Committee for advice prior to deciding not to pursue a formal investigation.

2.7 Referral from Parliament

Section 13(b) of the Act states that one of the principal functions of the Commission is to investigate any matter referred to the Commission by both Houses of Parliament. To date the Commission has not received any referrals via this Section.

2.8 Outside Jurisdiction

Matters received by the Commission which have no relationship to the New South Wales public sector and are not circumstances which may be conducive to corrupt conduct are classified as outside jurisdiction (see also section below on Jurisdiction).

3.3.3 In addition to developing these procedures for the categorisation of material received, the Committee was pleased to note that the ICAC is also currently developing a brochure which will explain to members of the public the different ways in which information received may be used by the Commission. In a written answer to a question on notice for the 31 March public hearing with Mr Temby, the ICAC stated that,

"The Commission is preparing a brochure for complainants which will explain how information received from members of the public is used, for example, as the basis of an investigation, incorporated into a larger investigation, as the subject of corruption prevention work, or to provide a focus for education work."

3.4 *Conclusions*

3.4.1 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.

3.4.2 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 itself emphasised that "the appearance of impartiality should be respected and maintained, as well as impartiality in fact"¹] The Committee would therefore encourage the ICAC to err on the side of caution and, where there is any doubt, categorise the matter as a "complaint" so that it is referred to the ORC.

3.4.3 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

¹ ICAC, North Coast Report, 1990, p.656, ICAC 1990 Annual Report, p.95.

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.

-4- WORKLOAD AND PROCEDURE

4.1 ORC Workload

4.1.1 One of the issues of concern to the Committee that has emerged during the course of its inquiry into the Operations Review Committee has been the heavy workload faced by the ORC. The ORC meets once a month (apart from January), on the first Friday of the month. The Committee meets at the ICAC premises from about 2.15 pm for three hours. The ORC receives the papers for each meeting a week in advance. The Committee receives summaries of complaints prepared by ICAC staff according to a set format. One of the Deputy Directors of Operations is responsible for maintaining the level of reporting to the ORC.

4.1.2 It must be noted that members of the ORC fulfil their roles on a part-time basis. Although Schedule 2 to the ICAC Act provides that members of the ORC are entitled to receive remuneration for their services, it is believed that the current level of remuneration covers little more than expenses. ORC members devote considerable time and energy to their responsibilities. When he gave evidence before the Committee on 11 February a former member of the ORC, Professor Brent Fisse, indicated that he was obliged to resign from the Committee due to pressure of work - the ORC was taking up at least one full day each month in the reading of the papers and attendance at the meetings.

4.1.3 The following figures give an idea of Committee's workload:

- ◇ December 1991 meeting: 54 reports considered
- ◇ February 1992 meeting: 88 reports (covering 100 complaints) considered
- ◇ March 1992 meeting: 102 reports (covering 107 complaints) considered

It should be noted that the recent figures are probably a little higher than in the past, as the Commission has been seeking to reduce a backlog of complaints that had not been forwarded to the ORC.

4.1.4 The Committee's concern about the workload of the ORC relates to the large number of reports considered by the Committee. If one averages out the number of reports considered at the meetings held in December 1991, February 1992 and March 1992, the ORC seems to be dealing with over 80 reports at each meeting,

which means that each report receives approximately 2 minutes consideration. It is difficult to see how the ORC could effectively scrutinise each report in such a short time. This is of particular concern in terms of the essential role that the ORC plays (as outlined in paragraphs 2.1.2, 2.3.1 - 2.3.2 above) as a key accountability mechanism in respect of the ICAC.

4.2 *Hong Kong Model: Sub-Committee to deal with Minor Matters*

4.2.1 As set out in chapter 2 there is nothing comparable to the ORC in respect to other investigatory or law enforcement agencies in Australia. The only other example of an Operations Review Committee which the Committee is aware of, and which probably provided the basis for the NSW ORC, is the Operations Review Committee which exists in relation to the Hong Kong ICAC. When the Committee visited the Hong Kong ICAC in April it was particularly interested to find out as much as possible about the ORC. As outlined in the Report on the Hong Kong Study Tour, the Committee was impressed with what it saw of the Hong Kong ICAC generally, including the ORC. A number of key issues emerged which appear relevant to the Committee's inquiry, and particularly relevant to the Committee's concerns about the workload of the ORC.

4.2.2 In order to ensure that it does not become overwhelmed with paperwork and bogged down dealing with minor matters the Hong Kong ORC has established a sub-committee which meets once a month, two days before the full ORC, to consider reports on minor matters. This relieves the ORC of a substantial workload in relation to minor matters and enables it to focus on more serious complaints. However, effective oversight of minor complaints is ensured by the fact that the sub-committee is chaired by a non-official member of the ORC (ie. an outsider) on a rotating basis. If the sub-committee has a concern about a matter which comes before it, the sub-committee can automatically refer that matter on to the full ORC meeting two days later. As a result of this filtering process, the full ORC considers a much smaller number of complaints each month, but is able to consider them in more depth than would be the case if they had to consider every report.

4.3 *Random Audit*

4.3.1 One issue that arose during the Committee's inquiry in relation to the procedures of the ORC, was related to the question of the categorisation of matters as "complaints" or "information" discussed in chapter 3. This concern was discussed by persons who had been members of the ORC. It concerned the range of matters that do not come before the Committee. When Sister McGovern met with the Committee on 07 February she said that,

"I have the feeling that sometimes in the ORC we do not know what we do not know. We have quite precise terms of reference and what does not come to us we do not know about. Therefore we cannot comment on it. That is as it is... So there is a potential kind of gap in the machinery."

Professor Fisse raised similar concerns when he appeared before the Committee on 11 February.

"The main reservation that I had right at the inception of the work of the Operations Review Committee—which I still have and which has been confirmed possibly by the Bayeh matter—is that on the Operations Review Committee I was probably only seeing part of the moon. Obviously a range of cases were not going to come to the Operations Review Committee, given its terms of reference. Even given its terms of reference it was in some cases very much at the discretion of the commissioner as to whether a particular matter would be referred to the Operations Review Committee."

4.3.2 Mr Tink then asked Professor Fisse whether he thought this concern could usefully be addressed by the development of some kind of audit role for the ORC in relation to the categorisation of matters as "information" rather than as "complaints".

"Mr TINK:

Given the comments about the very thorough paper work you get from the Operations Review Committee, that is, during the time you were there, there seems to be concern on your part about not so much what you see but about what you don't see. I think you described it in terms of the dark side of the moon not coming before the committee. I was interested in that because Sister McGovern, who you no doubt know and who was on the committee in your time and still is, expressed precisely the same concern, using different words but making the same point. She said, "We don't know what we don't know". Those two comments underline one another, it seems to me. That is not in any way expressing any concern about what the Independent Commission Against Corruption might have been putting to you but that perceptions are very important where there are checks and balances. You and Sister McGovern have obviously got a point to make in those terms. Assuming that is so, and I understand that it is, it then gets into the matter you raised, talking about corporate compliance systems.

I am wondering, in the context of the way in which corporations are checked, the concept of an audit comes up pretty centrally. I am wondering whether or not there is not some scope for an audit type of role for the Operations Review Committee. In other words, in addition to looking at matters put to it by the ICAC, whether or not there should not be some capacity for the Operations Review Committee to ask on a random basis to see papers in relation to particular matters—not, I stress, because there is any problem at the moment but because in terms of perceptions and the very basic corporate compliance type role that an audit has, there may not be some scope for that with the Operations Review Committee in terms of things being seen to be done. Do you have any comments on that?

Prof. FISSE:

I would agree subject to some qualifications. A starting point here would be the experience in governmental operations generally and also within private enterprise. Certainly, the audit control function is part and parcel of well run public or private organisations. For example, you would not find a company like Exxon today, particularly in light of its experience in the foreign bribery cases, in the position of not being able to point to a regular audit program to confirm the fact that it has adequate control procedures in place. I would say that every company with an adequate liability control system relies in part on an audit program. It is an essential part of the monitoring function. I would agree that some adaptation of the audit control would be useful here.

The main qualification I would voice is one of not interfering excessively with the efficiency of the organisation because audits can be highly intrusive and highly divisive of resources. The other qualification I would voice is that I think there are material differences between the nature of some private enterprises where the emphasis is on a profit motive and organisations such as the Independent Commission Against Corruption where there is no question of a profit motive which can induce people to violate the law or to do things in a slight way. Those qualifications said, I would agree that there is a role for a controlled audit function.

Mr TINK:

It would not have to be more than a very minor part of the role of the Operations Review Committee. As much for the sake of

appearances as anything else, it seems to be a way of tackling the problem that both Sister McGovern and you have highlighted, namely, to use her words, "You do not know what you do not know". Still you will not know a lot more, but at least you would be in a position to obtain information on a random basis. For the sake of appearance, that would provide a check.

Prof. FISSE:

I agree, with respect. I think that could be done without disrupting the work of either the Commission or the Operations Review Committee. As has been suggested, a random selection of two or three cases that would not otherwise have come to the Operations Review Committee could be scrutinised by being delegated to one member of the Operations Review Committee in the first instance. That person could then make a report to the Operations Review Committee."

- 4.3.3 When Mr Temby appeared before the Committee on 31 March he was asked about such an audit function by Mr Hatton. Mr Temby indicated that, whilst he thought it was unnecessary, he would not object to the ORC carrying out some sort of random check of matters defined as "information" rather than "complaints".

"Mr HATTON

Q: It looks to me as though there ought to be a structure whereby the ORC ... can on a random sample technique satisfy themselves that everything is right and proper in their view?

A: In the classification of matters into complaints and non-complaints?

Q: First they could look at the protocol as to how you classify complaints. Do they know of the protocol as to how you classify complaints?

A: They know of the protocol, it has been tabled before them.

Q: And they do a random check against that protocol?

A: They do not do a random check against that protocol, but if they wanted to I would not stand in their way. I think it would be a wasted effort, because these are really legal questions. Is this or is it not a complaint, according to a legal test, which has

been published. But I do not mind if they want to do a random test. Some of these things are pretty close to ludicrous.

Q: I have no doubt that some of them are. I am looking at mechanisms of accountability, how they may or may not operate. ..."

4.3.4 The problem with any random audit function being developed for a Committee of part-time virtual volunteers is knowing where to start, with limited time and resources. It is here that another aspect of the Hong Kong model may be instructive. The Committee was impressed with the procedures adopted by the Hong Kong ICAC for the daily recording of complaints. Every day at 7.00 am a record sheet is prepared which summarises and logs all complaints received during the previous 24 hours. Once a matter is logged on one of these record sheets an investigation cannot be stopped until either the Attorney-General agrees to prosecution or the ORC advised that the investigation should be discontinued. [These report sheets are considered each day at a morning meeting of the senior officers of the Operations Department, along with representatives of the Corruption Prevention and Community Relations Departments. A decision is taken at these meetings whether a matter is to be investigated by the ICAC or referred to another government department.] The ORC is provided with these daily record sheets.

4.3.5 It has occurred to the Committee that this procedure may be capable of adaptation by the NSW ICAC in such a way as to enable the ORC to randomly audit the categorisation of matters by the ICAC. This would involve the ICAC preparing similar daily record sheets which would log all material coming into the ICAC from members of the public. As a matter is categorised as a "complaint" or "information" or "outside jurisdiction", this would be noted on the daily record sheet on which the matter was first recorded. These record sheets would be provided to the ORC with their papers for each monthly meeting. The ORC as a whole or an individual ORC member could then request details from the ICAC about the categorisation of a particular matter identified on the daily record sheets. One advantage would be that ORC members could easily identify and seek information from the Commission on sensitive matters received by the ICAC. If an ORC member disagreed with the categorisation of a matter, this could be dealt with in the same way as other matters considered by the ORC. Such a random audit role could be added to the terms of reference of the ORC agreed to at its first meeting, pursuant to s.59(1)(b) of the ICAC Act.

4.5 ***Hong Kong Model: Other Relevant Issues***

4.5.1 There were two other features of the Hong Kong ORC that the Committee found appealing. The first of these was the fact that the Hong Kong ORC does not just consider reports on paper. Staff of the Operations Department are regularly called before the ORC or its sub-committee to justify the recommendations in their reports to the Committee. This must assist the ORC to thoroughly scrutinise the decisions made by ICAC officers in respect of complaints. The Committee believes it would be advantageous for the NSW ICAC's Operations Review Committee to also be able to call ICAC staff to appear before it to justify the recommendations in their reports.

4.5.2 The other feature of the Hong Kong ORC model with which the Committee was impressed was the formalised structure for the notification of the subjects of ICAC investigations when such an investigation has been discontinued on the ORC's advice. Copies of the form letters sent out by the Hong Kong ICAC were reproduced in the Committee's Report on its Hong Kong Study Tour. Again, the Committee believes this formalised structure could be usefully adopted by the NSW ICAC.

4.6 ***Conclusions***

4.6.1 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.

4.6.2 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.

4.6.3 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.

-5- DISSATISFIED COMPLAINANTS

5.1 *Arguments in Favour of Giving Reasons*

5.1.1 From time to time the Committee receives unsolicited submissions from members of the public. Although small in number, a proportion of these unsolicited submissions are from persons who have made complaints to the ICAC about possible corrupt conduct but whose complaints have not been investigated by the ICAC. These people have approached the Committee because they feel aggrieved by the ICAC's decision not to investigate their complaints. The Committee recognises that in some cases a complainant will never be satisfied unless their complaints are investigated - they will not accept a decision, however rational, not to take up their particular case. Nevertheless, the Committee has felt at times that some of these complainants have felt legitimately aggrieved by the fact that the ICAC has not provided them with reasons for its decisions in relation to their complaints.

5.1.2 Unlike the ICAC, which is not required to provide complainants with reasons for its decision not to investigate a complaint, the Queensland Criminal Justice Commission is under a statutory duty to provide reasons to complainants. Section 2.24(4) of the Criminal Justice Act provides that,

"(4) Where a complaint of official misconduct or of misconduct has been furnished to the Complaints Section of the Division, the Director shall cause a response to be given to the complainant (if his identity and whereabouts are known to the Commission) that states -

(a) if no action has been taken on complaint, the reason for inaction;

(b) if action has been taken on the complaint, what that action is, the reason that action is appropriate in the circumstances of the case and the result of that action, if it be known at the time of making the response."

Explanatory letters are sent to complainants, and where necessary a Complaints Officer meets with the complainant. Whilst, some complainants remain dissatisfied with the CJC's decision, this procedure of debriefing complainants does appear to be working well.

5.2 *ICAC Response*

5.2.1 In the lead up to the public hearing with Mr Temby on 31 March the Committee put a number of questions on notice to the ICAC concerning the ORC. One of these questions sought the Commission's response to the proposition that the ICAC should be required to give reasons to complainants. That response is set out below.

"A: To give reasons to complainants would change the Commission to a grievance resolution body, from a body with an investigative function given clear legislative power to decide what it will or will not investigate (ss10, 20). When this was discussed with the ORC the view was expressed that the ICAC was not established to be, and should not be, a grievance resolution body.

The Commission is preparing a brochure for complainants which will explain how information received from members of the public is used, for example, as the basis of an investigation, incorporated into a larger investigation, as the subject of corruption prevention work, or to provide a focus for education work.

There are some bases on which the Commission can decide to not investigate a complaint, being that the complaint is trivial, too old, frivolous, vexatious or not made in good faith, which if given to complainants would cause them dissatisfaction and would likely lead to some degree of protest and correspondence. Depending on extent, that could adversely affect the Commission's efficiency in dealing with complaints of substance or require an increase in resources.

Complainants will often not accept reasons for why their complaint is not worthy of investigation. The Commission has had complaints made about the reasons given by other agencies for not investigating their original complaint.

The Operations Review Committee, not the complainant, is better able to objectively consider whether the Commission's reasons for not investigating a complaint are proper and

principled. They do that in the interests of the public of the state as a whole, not individual complainants. They have a broader perspective than individual complainants and are better able to make the required judgement.

If the ORC is satisfied that the Commission has properly examined complaints and enquiries have not revealed evidence of corrupt conduct, there should be no need for the Commission or the ORC to expend further resources trying to so satisfy individual complainants. This view is shared by the ORC."

5.2.2 The Committee pressed Mr Temby further on this issue at the hearing.

"CHAIRMAN:

Q: I take you to 8.5(b)(i). The answer to that question seems to reject the idea, giving reasons to complainants on some grounds of efficiency. Am I right in saying that that is the substance of it?

A: That is right. It has to be stressed that when people come back to us with more information the file is re-opened. I have on occasions taken complaints to the ORC when people are dissatisfied. We do not want to be placed under the obligation of having to persuade complainants that our decision not to proceed is a correct decision. With a whole lot of them you will never persuade them, and the resources that would be involved in doing that would be very considerable indeed.

Q: The purport of my question was going to be that the Criminal Justice Commission in Queensland gives reasons to complainants, and it appears to work, and it may be that giving reasons would lead to greater accountability and sensitivity to the public?

A: The accountability mechanism is the Operations Review Committee. That is a group which is representative of the community. We provide our reasons to them, and they have to be satisfied. If they are not satisfied the first time around they will send the matter back to us, and it would be a bold Commissioner who rejected their considered advice that the matter should be investigated. We have to provide reasons sufficient to persuade them. We can persuade them, because

they have a broad view of the matter. It is an awfully difficult matter to persuade particular complainants, because they know what the answer is."

- 5.2.3 The ICAC's position on this question seems to have hardened over time. In June 1990 the ICAC provided the Committee with a report on the ORC.² Included as an appendix to this report was a document entitled "Procedural Statement on the Handling of Protests Against Commission Decisions", dated October 1989. Whilst the document noted that dealing with dissatisfied complainants can be resource intensive and that some complainants will abuse schemes for making complaints, it emphasised that the proportion of complainants who protest against Commission decisions will not be large. The document stated that, "the Commission should be publicly accountable and should therefore: be responsive to complainants; and consider and respond to their expressions of dissatisfaction, bearing in mind considerations of fairness and finality." The document stated that where a protest was received in respect of a complaint which had gone before the ORC, and where additional information was received, then matter would go back to the ORC before a final decision was made. The complainant would then be advised of the final decision. Significantly, the document stated that, "consideration should be given to providing reasons. It will usually be appropriate to provide reasons in such cases."

5.3 *Conclusions*

- 5.3.1 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.
- 5.3.2 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.
- 5.3.3 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

² This was reproduced in the Collation of Evidence of the Commissioner before the Committee on 15 October 1990, pp 14-18.

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.

6.1 *Need for Operations Review Committee to Report*

6.1.1 The ICAC currently includes a section on the ORC in its Annual Reports. The information provided, whilst useful, is limited to the Committee's membership, functions and some statistics on the number of reports considered.

6.1.2 The need for the ORC to report on its activities was put to the Committee most succinctly by Michael Bersten when he appeared before the Committee on 11 February.

"I find the whole Operations Review Committee to be a rather peculiar creature in that it is governed by a secrecy provision and appears to report to no one. As a member of the general public, one would generally ask what sort of accountability it has if we do not know what it does or achieves save for being told the numerical side of its work. Assertions have been made in the annual reports of ICAC that ICAC tends to follow its recommendation. I find that to be cold comfort as a means of accountability. ...

I have earlier recommended that the Operations Review Committee should be required to report to somebody, probably to this parliamentary committee or to the Parliament, and in those reports I would not be suggesting that it ought to be able to release sensitive material. ...

Opening up the process as far as possible would seem to be a desirable matter. It increases public accountability, and I think it is well recognised. Agencies with special powers lose the confidence of the public in circumstances where people do not know what they are doing. It is perhaps through greater accountability that they win greater public support and thereby achieve their ultimate goals more effectively. ..."

6.1.3 The Committee put a question on notice to the ICAC, for the 31 March public hearing with Mr Temby, on this issue. The Committee sought the ICAC's response to a suggestion that the ORC should report to the Parliamentary Joint Committee "when a problem arises, and annually in any case". The Commission's response is set out below.

"The ORC, or any member of the Committee, like any member of the public, could approach the Parliamentary Committee if concerned about some matter relating to the exercise by the Commission of its functions. Since this procedure is available it is unnecessary that the ORC be required to report to the PJC. The ORC would see some benefit in meeting with the Parliamentary Committee on an informal basis annually.

Each of the PJC and the ORC is an accountability mechanism. Each is most important. Their areas of responsibility differ. They should remain separate, not in a hierarchy."

6.1.4 It should also be noted that as a result of this inquiry procedures are being developed for regular meetings between the Operations Review Committee and Parliamentary Joint Committee. This should assist each Committee to better understand the respective functions and operations of the other Committee. However, these meetings should not be seen as addressing the concerns put forward by Michael Bersten about the need for both Committee's to be publicly accountable for the exercise of their functions.

6.2 *Dotted-Line*

6.2.1 When Professor Brent Fisse appeared before the Committee on 11 February, he put forward a proposal for the development of a "dotted-line" relationship between ICAC staff and the ORC. Under this proposal ICAC staff would have the opportunity to take complaints about internal corruption/fraud etc. to the ORC. ICAC staff would particularly be able to refer to the ORC any concerns about "matters either under investigation, at some stage of investigation, or which had been discontinued, if they are not happy with the way in which those matters had been handled by the Commission."

6.2.2 Mr Hatton took this matter up with Mr Temby at the public hearing on 31 March.

"Why should not an ICAC staff be given whistle-blower status, given confidentiality and so on, if you want to put that proviso in there, as would any other organisation? As you know, I have a special interest in that area, and I cannot see any reason why a person within the Commission, and I am

referring to item 8.4 on page 2, could not have that status?

A: I have a special interest in that area also, not perhaps less than your own. We have no difficulty with our staff, where it is justified, blowing the whistle. If staff wanted to come here, we would not stand in the way of him or her; but you have to have an understanding of the function of the Operations Review Committee. The ORC is there for a defined statutory purpose. It is not there as a staff grievance resolution body. I do not know how they are an appropriate recipient of information from somebody who wants to blow a whistle.

Q: What I thought was interesting is that you could easily put that aside and say that they are not a staff grievance body, and that I accept, but a complaint from within the Commission would have a very real effect on how the Commission operates, and therefore is vital to the Operations Review Committee as to how the Commission functions and whether corruption has crept into the Commission or malpractice or something of that nature. There has to be some sort of safety-valve there. This dotted-line relationship suggested by Professor Fisse appealed to me for that reason?

A: I think it is a dotted-line in the wrong direction. There are dotted lines at present in place. If any staff member felt that there was criminality within the Commission, it is his or her duty to take it to the police, and nobody would ever wish to stand in the way of that. As I said before, they could come here. I do not think the Operations Review Committee is the right group to receive those complaints. One other point, coming back to complaints under our Act, it should perhaps be said that the material which the ORC receives is a report from the particular action officer who has the carriage of the matter, and on the handful of occasions when there is some difference that cannot be resolved between that action officer and some checking officer, if there are differing views, they are both taken to the ORC."

6.3 *Conclusions*

6.3.1 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.

- 6.3.2 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.
- 6.3.3 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.