

PART TWO

Assistant/Deputy Commissioners

one side

-7- ASSISTANT/DEPUTY COMMISSIONERS

7.1 Background

7.1.1 As outlined in the introduction, the question of Assistant/Deputy Commissioners arose in the context of the Committee's "Inquiry into Matters Raised by Paul Gibson MP". During the course of that inquiry the Committee sought the assistance of the Hon Adrian Roden QC, Assistant Commissioner of the ICAC. He provided the Committee with a written statement in relation to his responsibilities with the Commission, the Bayeh matter and the management and control of ICAC investigations. Mr Roden also gave evidence before the Committee at a hearing. Mr Roden made two major suggestions to the Committee. Firstly, he recommended that a position of Deputy Commissioner of the ICAC be created. The Committee endorsed this proposal and, in its report of this inquiry, recommended the establishment of such a position. Secondly, Mr Roden suggested that there should be a separation of functions between those responsible for managing the Commission and those heading individual investigations. The Committee published Mr Roden's evidence with a view to encouraging further discussion on these proposals, particularly the latter one.

7.1.2 The Committee received evidence from a number of witnesses in relation to Mr Roden's proposals at a public hearing on 11 February 1992. Mr Mark Le Grand of the Queensland Criminal Justice Commission gave evidence in respect of the CJC's management structure. He suggested that as an alternative to the creation of a position of Deputy Commissioner the Committee should consider the CJC's model, whereby there is a full delegation of the Chairman's powers to appropriate senior officers, which only comes into effect in the Chairman's absence. The Hon Athol Moffitt QC, CMG, raised a number of concerns about Mr Roden's proposals, covering issues such as an expectation of succession for anyone appointed as Deputy Commissioner, and the need for the ICAC to speak with one voice, rather than have individual "Special Commissioners" have total responsibility for their reports. The Hon Michael Helsham QC raised further concerns about the proposals and suggested that there was no need for the establishment of a position of Deputy Commissioner. Mr Helsham emphasised that the Committee should seek the views of Mr Temby and the ICAC on these issues, as they were best placed to advise about the need for the changes suggested by Mr Roden. Mr Phillip

Bradley of the NSW Crime Commission also gave evidence.

- 7.1.3 Mr Roden was provided with a transcript of the evidence taken by the Committee on 11 February and given an opportunity to respond to this evidence at a public hearing on 27 February. Mr Roden provided the Committee with a written statement which clarified his proposals. In his verbal evidence before the Committee Mr Roden responded in some detail to the concerns raised by Mr Moffitt and Mr Helsham. He made a further point about the concentration of the powers of the ICAC in the hands of one person, in support of his proposal for a separation between the role of the Commissioner and persons brought in from outside to control particular investigations.

7.2 *ICAC Response*

- 7.2.1 After the public hearing with Mr Roden on 27 February the Committee was able to enunciate the key issues concerning Assistant/Deputy Commissioners. A number of questions on notice were forwarded to the ICAC in advance of the public hearing with Mr Temby on 31 March. The ICAC provided the Committee with written responses to these questions in advance of the hearing. These written questions and answers are reproduced below.

"Questions on Notice

Deputy Commissioner

- Q: 9.1.1 Does the Commissioner see any merit in Mr Roden's suggestion for the establishment of a position of Deputy Commissioner?
- Q: 9.1.2 What are the Commissioner's present intentions for the appointment of a person to such a position?
- Q: 9.1.3 Does the Commission support Mr Roden's suggested amendment of s6 of the ICAC Act (p.2 of his Statement of 25 February 1992)?
- Q: 9.1.4 Does the Commission feel that the creation of a position of Deputy Commissioner would create any problems in terms of an "expectation of succession"?
- Q: 9.1.5 What is the Commission's response to the evidence of Mark Le Grand that a general delegation to appropriate senior officers of the Commission may be a better option than the creation of a position of Deputy

Commissioner?

A: It is essential that there always be an Assistant Commissioner who holds the necessary range of delegated powers. That has always been the case. Presently there are three of them appointed for specific matters. On occasions when the Commissioner has been away - they have all been relatively brief - they exercise their delegated powers in relation to matters other than those they are respectively handling, eg the issue of statutory notices. On one occasion an investigation was commenced under delegated power while the Commissioner was away. This is of course a distinctly significant step. The system has never failed to work in a proper, and effective, manner.

If, as the Chairman has indicated, the Committee is concerned about what would happen in an emergency, such as illness of the Commissioner, then present delegation of powers to Assistant Commissioner(s) is a sufficient answer. They are of course supported in every respect by senior management.

Section 107 of the ICAC Act presently provides that the powers to issue arrest warrants and search warrants, the function of making reports and the power of delegation cannot be delegated. The inability to delegate the power to issue search warrants is immaterial to an emergency absence by the Commissioner, because the Commission always goes to outside justices for search warrants, and will continue to do so. There has only been one occasion on which the Commissioner considered it necessary to issue an arrest warrant pursuant to s36. It is unlikely that brief delay would have irretrievable consequences for an investigation. A delay in furnishing a report to Parliament would be unfortunate; it would be unusual that it would have irretrievable consequences. The risk of that happening always exists, eg with judges. Therefore, without change to s107 the Commission could continue to operate well in an emergency absence of the Commissioner.

If the Parliament were minded to amend s107 so that the powers presently not able to be delegated could be, but only used in emergency absences of the Commissioner, the Commissioner would not be opposed.

If Parliament were inclined to further amendment to permit delegation of powers below Assistant Commissioner level, the Commission would urge caution, because of the serious nature of powers to be exercised, but could not oppose the idea of delegation of powers to the most senior lawyers in the Commission, as the Criminal Justice Commission has done.

The Commission sees no need for amendment to s6 of the ICAC Act. Section 6(3) which requires that "an Assistant Commissioner shall assist the Commissioner, as the Commissioner requires" could not be broader. It allows for the Commissioner to request an Assistant Commissioner to deputise in the Commissioner's brief absence.

The Commission does not feel that the problem of "an expectation of succession" would necessarily arise with a Deputy Commissioner or Assistant Commissioner. That would depend on the people appointed to the positions.

The Commissioner does not appoint Assistant Commissioners. That is done by the Governor in Council, with the concurrence of the Commissioner. There is certainly no opposition to appointment of a suitable person as Assistant Commissioner on a full-time basis. There is no need for that person to be formally designated as Deputy Commissioner, and there is certainly no need for the ICAC Act to enable or require the appointment of a person with that title.

Finally, if the Commissioner was to be away for any significant period - say in excess of a couple of weeks - it would be necessary for an Acting Commissioner to be appointed.

Special Commissioners

- Q: 9.2.1 Does the Commission see any merit in Mr Roden's proposal for the title of Assistant Commissioners to be changed to "Special Commissioner" to more accurately reflect their role?**
- Q: 9.2.2 Does the Commission's present practice of appointing Assistant Commissioners to conduct particular inquiries accord with the intention of s6 of the ICAC Act as it now stands?**

- A:** The Commission does not see a need for the change of title from Assistant Commissioner to Special Commissioner. The Commission would not oppose the change of title if it were thought necessary but it is important that the title chosen does not mislead.

The Act appoints the Commissioner as the person to exercise the Commission's powers and functions, and confers on him the necessary powers to do so. The Act provides for the appointment of Assistant Commissioners, with the concurrence of the Commissioner, to assist the Commissioner as the Commissioner requires. To date, in practice, Assistant Commissioners have mostly been required to assist in the performance of the Commission's investigative function, by presiding over particular investigations.

The Commission's view is that the title Assistant Commissioner conveys the role that the statute contemplates, that is someone assisting the Commission and the Commissioner, on behalf of the Commission. The proposed title Special Commissioner has the potential to mislead, by conveying a sense of independence of the Commission which would not be appropriate, either in theory or in fact. There should be one Commission, not what could amount to several separate Commissions.

The Commission's view is that the present practice of appointing Assistant Commissioners to preside over particular investigations is precisely in accordance with the intention of s6 of the ICAC Act, which, as previously noted, is in quite broad terms. There is no warrant to read it down in any restricted way.

Reports

- Q: 9.3.1** What is the present position with regard to reports prepared by Assistant Commissioners - do they have total responsibility for these reports or does the Commissioner have a hand in the final report?
- Q: 9.3.2** If the Commissioner does have a hand in final reports, what has been the experience to date. Which reports have been amended, if any, and what was the nature of the amendments?

Q: 9.3.3 What is the Commission's response to the concerns raised by Mr Moffitt about the need for the ICAC to speak with one voice?

A: Assistant Commissioners have substantial responsibility for preparation of the reports of investigations over which they preside. Final responsibility rests with the Commission, as the statute requires. In practice this means Assistant Commissioners present the reports they prepare to the Commissioner for consideration, discussion and comment.

Most, if not all, reports prepared by Assistant Commissioners have had amendments, with the consent of the authors, in the nature of editorial amendments, not to findings of fact, assessments of evidence or witnesses, or statutory findings.

In considering reports, and whether they need to "speak with one voice", one must keep in mind that the Commission has broader functions of education and corruption prevention, in the performance of which investigative reports are useful illustrative tools; the Commission is not merely a series of investigative Royal Commissions. In order to achieve the change in systems and attitudes which the Parliament requires of the Commission the Commission must sell the messages illustrated by reports. Consistency in reports is therefore desirable.

To the extent practicable the reports should speak, and be regarded as, Commission reports, not as reports by individuals.

Substantial Corruption Investigations/Functions of Commissioner

Q: 9.4.1 Does the Commission see any merit in Mr Roden's proposal that substantial corruption investigations should be presided over by persons brought in from outside the Commission?

Q: 9.4.2 Is it possible and/or appropriate for one person to fulfil the roles of both manager of the Commission and head of substantial corruption investigations?

Q: 9.4.3 What is the Commission's response to the concerns raised by Mr Roden on 27 February about the dangers of the same person making a decision about whether a

matter should be investigated and then also heading an investigation into that matter?

- A:** It cannot be said that substantial corruption investigation should be presided over only by persons brought in from outside the Commission or only by the Commissioner; it depends on the investigation.

It is possible for the Commissioner to both manage the Commission and head substantial corruption investigations. To do that requires reliance on, and assistance from, senior management.

It is appropriate for the Commissioner to preside over substantial corruption investigations for all the reasons advanced by the witnesses the Committee heard from on 11 February. The current Commissioner has presided over two substantial corruption investigations, in relation to driver licensing and prison informers, and twelve smaller investigations, whilst running the Commission. It can be done. It depends on having a good senior management team and a good investigation team, and working efficiently on the investigation to get the best results from the right amount of work.

The suggestion that there is a danger that if the person who makes a decision to investigate a matter then conducts the investigation he will be tempted to make adverse findings to justify the decision to investigate, lacks substance. A reading of Commission reports will give the lie of the suggestion, since many contain findings of no corruption, or findings which differ markedly from the allegations made at the commencement of an investigation. Public hearings and public reports are accountability mechanisms to ensure that investigations are not conducted in a way to prove a predetermined view."

7.3 ***Conclusions***

- 7.3.1 The Committee believes that, through the written answers to the questions on notice from the 31 March public hearing, the ICAC has effectively addressed the concerns raised by Mr Roden concerning Assistant/Deputy Commissioners.
- 7.3.2 The Committee notes Mr Temby's advice that he is not opposed to the idea of an Assistant Commissioner being appointed to effectively act as his deputy and that he

would be surprised if such a person was not appointed at some point during the next few years. The Committee welcomes this advice and reaffirms the desirability of there being a person fulfilling a role as deputy to the Commissioner of the ICAC.

7.3.3

The Committee notes the ICAC's advice that the delegation provisions contained in s.107 of the ICAC Act, which enable the delegation of powers to Assistant Commissioners, are presently broad enough and do not require expansion. The Committee notes the ICAC's advice that the provisions of s.6(3) of the ICAC Act setting out the functions of Assistant Commissioners are sufficiently broad and enable an Assistant Commissioner to deputise for the Commissioner. The Committee also notes the ICAC's advice that the title "Assistant Commissioner" conveys the role that they are required to play under the ICAC Act, and that there is no need for a change in this title.