



COMMITTEE ON THE ICAC

REVIEW OF THE ICAC STAGE II JURISDICTIONAL ISSUES

November 2001

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STAGE II
JURISDICTIONAL ISSUES**

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Sydney**

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Committee Membership

Legislative Council

The Hon J Hatzistergos MLC
Chairperson

The Hon D Oldfield MLC

The Hon G Pearce MLC

Legislative Assembly

Mr J Price MP
Vice-Chairperson

Mr M Brown MP

Mr A Fraser MP

Mr K Hickey MP

Dr E A Kernohan MP

Mr G Martin MP

Ms A Megarrity MP

Mr M Richardson MP

Secretariat

Ms H Minnican - Committee Manager
Ms H Parker - Committee Officer

Ms Pru Sheaves - Project Officer
Ms P Adam - Assistant Committee Officer

Committee Functions

Independent Commission Against Corruption Act 1988

- “64 (1) The functions of the Joint Committee are as follows:
- (a) to monitor and to review the exercise by the Commission of its functions;
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
 - (c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
 - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Joint Committee -
- (a) to investigate a matter relating to particular conduct; or
 - (b) to reconsider a decision to investigate, not to investigate or to is continue investigation of a particular complaint; or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.”

Chairman's Foreword

In stage II of the review of the Independent Commission Against Corruption, the Committee examined the extent of ICAC's jurisdiction and its appropriateness. Questions considered by the Committee included whether the existing legal definition of corrupt conduct contained within the *Independent Commission Against Corruption Act 1988* is adequate and what conduct should appropriately be regarded as "corrupt conduct". The extent of ICAC's jurisdiction in relation to boards, local government and contracted services also feature in the report.

Through the recommendations contained in this report the Committee has sought to clarify and strengthen the role of the ICAC in investigating and exposing corruption, and ensuring the maintenance of high standards of conduct within the New South Wales public sector. The *ICAC Act* forms the statutory framework through which the ICAC works to achieve these goals and the Committee's report is aimed at greater clarity about the exact meaning of corrupt conduct, the role of the ICAC and the application of the Act.

I would like to thank all the witnesses who have given evidence at the Committee's hearings and those who supplied written submissions. In particular, I am grateful for the frank evidence and cooperative participation of Commissioner Moss and her executive officers. I also would like to thank the Members of the Committee for their contribution and bi-partisan support, Ms Tanya Bosch for her work on a large part of the inquiry and the initial draft of the report, and the Secretariat for its assistance.

The Hon John Hatzistergos MLC
Chairman

November 2001

Executive Summary

Stage II of the Committee's review of the ICAC focuses on jurisdictional issues. In particular, questions such as whether the definition of corrupt conduct and the extent of the ICAC's jurisdiction are appropriate. Some of these issues had emerged in an earlier review of the ICAC conducted by the previous parliamentary committee in 1997 and remain ongoing concerns for the current Commissioner of the ICAC. For instance, questions had arisen concerning exclusions from the ICAC's jurisdiction, such as boards appointed by the Governor, and the extent of the ICAC's jurisdiction in relation to local government and outsourced government services. One of the main issues for consideration by the Committee was whether the existing legal definition of corrupt conduct contained within the *Independent Commission Against Corruption Act 1988* is adequate and what conduct should appropriately be regarded as 'corrupt conduct'.

The Committee received fourteen submissions and took evidence in a number of public hearings from the ICAC, key practitioners and legal associations. Witnesses to the Committee included:

ICAC representatives

Ms Irene Moss	Commissioner of the ICAC
Mr Kieran Pehm	Deputy Commissioner

NSW Bar Association

Ms Ruth McColl	Barrister
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Police Integrity Commission (PIC)

The Hon. P.D. Urquhart QC	Commissioner of the PIC (at time of hearing)
Mr Andrew Naylor	Solicitor to the PIC

Following the public hearings, the Committee convened a round table conference involving representatives of the ICAC, Department of Local Government, and the Local Government and Shires Associations, to discuss the evidence which had been taken concerning the ICAC's jurisdiction in relation to local councils. The Committee had heard from the Commissioner of the ICAC of problems with the jurisdiction of the Commission in relation to local councils arising from the introduction of the *Local Government Act 1993*. Under that act, local government councillors no longer operate under a disciplinary instrument, although it is mandatory for all Councils to adopt a code of conduct. The lack of a disciplinary instrument meant that only conduct of local councillors which could constitute or involve a criminal offence fell within ICAC's jurisdiction. The round table conference served as a useful mechanism through which the Committee could clarify those particular classes of conduct which were not captured by either the *Independent Commission Against Corruption Act*, or the disciplinary provisions of the *Local Government Act*, and progress a solution to remedy this problem.

Questions concerning the extent to which the conduct of both boards and local councils are covered by the *ICAC Act* turn on the use of codes of conduct as disciplinary instruments on which to base ICAC's jurisdiction. It is the view of the Committee that in relation to local councils the adoption of a code of conduct as a disciplinary instrument is not the most effective mechanism for ensuring the application of the *ICAC Act*. There are a large number of local councils and there is no adherence to a standardised, uniform code of conduct or general adoption of a standard code as a disciplinary instrument. In the case of boards appointed by the Governor, adoption of a standard code of conduct as a disciplinary instrument is further complicated by the disparate functions and operations of such boards, and the frequent absence of any statutory disciplinary provisions to regulate the conduct of board members.

On considering the evidence and submissions to the review, the Committee recommends that in the case of local councils the type of conduct, mostly relating to non-pecuniary conflict of interest and employment matters, identified as being corrupt but falling into a gap between the current ICAC and local government legislative framework, should be the subject of statutory obligations under the *Local Government Act*. The existence of statutory obligations would ensure proper conduct of local councils and that breaches of the obligations would be disciplinary matters which would attract the jurisdiction of the ICAC. In the case of boards, the Committee recommends that statutory disciplinary measures would be the most effective and appropriate way of ensuring ICAC jurisdiction in relation to corrupt conduct by the members of such boards. The Committee recommends that Ministers should ensure that all boards falling within their administration operate under an enforceable code of conduct and that procedures are in place to deal with breaches of the code and that, where the misconduct involves corrupt conduct, the ICAC would be able to investigate.

The Committee further recommends that the *ICAC Act* should be amended to put beyond doubt the jurisdiction of the ICAC with regard to contracted government services. Although the *ICAC Act* would appear to provide for jurisdiction in this area, through the definition of "public official" contained in s.3 of the Act, the exercise of this jurisdiction has produced problems. The Committee considers that this jurisdictional area should be clarified and that the key criterion for establishing ICAC's jurisdiction in relation to contracted services should be that: the services were contracted and tendered out by public sector agencies; they were provided for using public funds and resources; and, they involved the performance of public functions.

Another area of the review concerned the ICAC's powers to make findings and recommendations, on which the Committee heard a wide range of opinion. A number of witnesses to the review expressed concerns about the perception that the use of the term "finding" has connotations of a court determination of guilt or innocence and that it is a term which should be confined to judicial proceedings. The core of the debate revolved around whether the ICAC's power to make "findings" should be retained or replaced with the power to form "assessments" and "opinions". For some witnesses, there was a clear distinction between these terms. From the viewpoint of the Commissioner of the ICAC, the term "findings" has fallen into ordinary use and there would be little to gain from altering its use by the ICAC. The Commissioner could see little difference between the terms and was of the view that, ultimately, the overriding consideration in this question of terminology was that the ICAC should continue to be able to describe and report on corrupt conduct and to exercise a clear jurisdiction.

Overall, the Committee concludes that there should be no major changes made to the ICAC's jurisdiction, powers and functions but it recommends greater clarification and explanation of what is involved in the exercise of ICAC's statutory duties and functions. In relation to the definition of corrupt conduct provided in ss.8 and 9 of the *ICAC Act*, the Committee considers that the two-part test is largely appropriate but agrees with the Commissioner of ICAC that the definition should be re-cast to emphasise the seriousness of the conduct as the key feature of the definition, and the first and primary test to be applied. The Committee also has resolved that the list of conduct which appears at s.8(2) of the *ICAC Act* needs streamlining and reassessment. It concludes that some of the matters listed at s.8(2) of the Act, specifically items (o) to (w) inclusive, cover serious criminal offences, are not really relevant to public administration in New South Wales, and are more appropriately matters which should be dealt with by law enforcement and related authorities specialising in the investigation of such conduct. Consequently, the Committee recommends the removal of these items from the legal definition of corrupt conduct.

The Committee resolves that the ICAC should place greater emphasis on clearly defining the precise meaning and effect of the ICAC's powers to make findings and recommendations. Accordingly, the Committee recommends that in each instance where the ICAC reports on an investigation its report should contain a clear statement of the meaning and effect of an ICAC finding, especially in terms of ss.74A and 74B of the *ICAC Act*. The latter sections, inserted in the Act following amendments in 1990 in response to the High Court's decision in *Balog and Stait v ICAC*, put beyond doubt the scope of what the ICAC can and cannot include in its reports to Parliament and also clarify that a finding by the ICAC is not a finding of guilt and that the ICAC does not have power to recommend prosecution. The Committee finds that there is no mandatory requirement for the ICAC to make a finding of corrupt conduct and observes that a number of Assistant Commissioners have exercised a discretion not to do so. The Committee supports the use of such discretion, where necessary and appropriate, and also notes that the *ICAC Act* provides sufficient scope and flexibility for the ICAC to make findings about conduct of a lesser kind than corrupt conduct (see ss.13(3) and 74A of the Act).

The recommendations contained in this report form part of a wider strategy by the Committee to increase understanding and awareness of the ICAC's role and functions and to make the ICAC more accountable for the exercise of its functions. For instance, the Committee previously has suggested to the ICAC that it should include in its reports a clear statement of the reasons behind its decisions to conduct investigations. Another mechanism through which to achieve improved accountability is for the ICAC to clearly outline the findings of fact in each investigation and to identify the basis on which it has determined to make a finding of corrupt conduct. The Committee notes that the ICAC has begun to incorporate such reasoning into its reports to Parliament and commends this approach. In the view of the Committee such improvements should result in a more transparent exercise of the ICAC's functions and powers.

Introduction

Definition of Corrupt Conduct

The difficulties in defining corruption are evident in the work of academics and commentators, particularly in relation to political corruption. As John Gardiner has noted, “while there is general agreement that the term [corruption] refers to the abuse of public roles and resources, it is much less clear where the boundaries of the concept lie.”¹

Frequently used definitions, such as that provided by US political scientist Joseph S. Nye, are not without limitations. Nye defined corruption as,

*behaviour which deviates from the normal duties of a public role because of private-regarding (family, close private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviour as bribery (use of rewards to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).*²

Gardiner holds that while Nye’s definition appropriately focuses on public roles it does not cover corruption involving non-financial gain. Nor does it accommodate the major variations which occur in laws concerning the ‘normal duties’ of public officials or rules applying to official conduct.³

Legal, social, and public interest definitions of corruption have been formulated but there are problems inherent in each of these approaches. For instance, legally-based definitions contend that the term ‘corruption’ relates to activities that are illegal. Gardiner also notes that legal definitions simplify the issue so that:

*if an official’s act is prohibited by laws established by the government, it is corrupt; if it is not prohibited, it is not corrupt even if it is abusive or unethical.*⁴

Strictly legal definitions of corruption do not encompass the broad range of conduct which, while not illegal, may still be considered corrupt. Peters and Welch argue that

¹ Gardiner, J. *Corruption and Reform*, Vol 7, No 2, (Netherlands: Kluwer Academic Publishers, 1993), pp.111-124.

² *ibid*, p.112.

³ *ibid*.

⁴ *ibid*, p.115.

“all illegal acts are not necessarily corrupt and all corrupt acts are not necessarily illegal”.⁵

Similarly, social definitions also are subject to criticism primarily on the grounds that legal definitions are more precise and superior to those based on public attitudes. A public opinion based definition of corruption poses difficulties because it “rests on standards which are shifting, vague and often contradictory”.⁶ Another view is that public attitudes are a response to corruption not a definition of it.⁷

According to the public interest approach, conduct is considered corrupt if it is contrary to the public interest or is a betrayal of public trust. However, such public interest definitions have been found inadequate on the basis that the public interest is an “arbitrary and culturally insensitive guide to corrupt activity”⁸ and “posits a standard, which in most issues and settings does not exist”.⁹

The issue before the Committee on the ICAC is whether the existing legal definition of corrupt conduct contained within the *ICAC Act* is adequate and what conduct should appropriately be regarded as ‘corrupt conduct’ in New South Wales. ICAC Commissioner, Ms Irene Moss, emphasised the need for a reassessment of the definition of corrupt conduct under the Act to identify clearly and precisely the investigative jurisdiction of the ICAC:

The concept of “corrupt conduct” is central to the Commission’s operations. It forms the basis of findings by hearing Commissioners. Officers throughout the Commission also apply the concept daily in terms of intake and assessment, and subsequent investigative or corruption prevention work. Therefore it is important that the definition be as clear and precise as possible

The current definition of “corrupt conduct” was obviously an effort to be exhaustive, and to ensure that those wanting to avoid scrutiny had no legislative loopholes to exploit.

With the benefit of twelve years of application, it may now be possible to define “corrupt conduct” in such a way as to adequately cover that which is generally regarded to be corrupt, but excludes that conduct that is not ordinarily thought of in that way.”¹⁰

The Committee must consider: whether the definition of corrupt conduct in the *ICAC Act* should reflect the State’s statutory and common law, or whether it is appropriate that broader standards apply; whether individuals should be labelled as corrupt if they have not violated any law; and, if ‘unethical’ is the same as ‘corrupt’.

⁵ Peters, J. and Welch, S. “Political Corruption in America: A Search for Definition and a Theory”, *American Political Science Review*, volume 72, 1978, pp.974-5.

⁶ Johnson, cited in S. Tanner, “Defining ‘political corruption’ in light of the Metherell Inquiry”, *Legislative Studies*, Vol. 9, No. 2, Autumn 1995, p.50.

⁷ See M. Jackson and R. Smith, “Inside Moves and Outside Views: An Australian Case Study of Elite and Public Perceptions of Political Corruption” in Williams, R., Moran, J., Flanary, R. (eds) *The Politics of Corruption, volume 3: Corruption in the Developed World*, Edward Elgar Publishing Ltd., Cheltenham UK, 2000, p.481.

⁸ *ibid.*, p.24; see also C. Friedrich (ed.), *The Public Interest, Nomos V*. New York, Atherton, 1962.

⁹ Johnson, cited in Tanner, p.50.

¹⁰ ICAC final submission, pp.2-3.

In considering such questions, the Committee agrees with the ICAC “that the definition of corrupt conduct should reflect as far as possible a community understanding of ‘corruption’ and ‘corrupt conduct’ and [that] the Parliament is the appropriate forum for this to be determined”.¹¹ However, the Committee found that the debate about jurisdictional issues affecting the ICAC prompted comment that the Committee was contemplating changes to the *ICAC Act* which would weaken the ICAC’s ability to expose and fight corruption. The potential for such criticism was highlighted by Commissioner Moss in evidence:

MS MOSS: . . . As Members of Parliament reviewing this Act you are faced with complex issues made all the more difficult because the ICAC Act covers Members of Parliament. Regardless of how sensible suggested alternatives may be, they will inevitably be accompanied by criticism that they weaken the anti corruption effort. This makes change difficult and demands a clear and compelling case for any proposed change. . . .

*In all of these issues we are, in many senses, captives of our history. If you were to set out today to establish a new anti corruption commission, having the benefit of the lessons of our experience you may well define our terms and jurisdiction very differently. However, with an organisation that has been in operation for 12 years, it is very hard to make changes in these areas without looking like you are weakening the Commission's jurisdiction and its ability to fight corruption. . . .*¹²

It remains the priority of the Committee to thoroughly examine questions pertaining to the ICAC’s jurisdiction and to give balanced consideration to the range of proposals that have been made during the course of this review. The Committee considers such inquiry to be appropriate and necessary given the period of time which has elapsed since the establishment of the ICAC and the significant instances of judicial review which have occurred in relation to the exercise of the ICAC’s jurisdiction during that period.

¹¹ Ibid, p.1

¹² ICAC, Final evidence, p.5.

Chapter 1

1.1 Background

1.1.1 Original Legislation

The Independent Commission Against Corruption Bill was first introduced and read a second time by the then Premier, Mr Greiner, in the Legislative Assembly on 26 May 1988.¹³ The rationale behind the establishment of the ICAC was to counter:

*a general perception that people in high office in this State were susceptible to impropriety and corruption ... from this time forward the people of this State will be confident in the integrity of their Government, and that they will have an institution where they can go to complain of corruption, feeling confident that their grievances will be investigated fearlessly and honestly.*¹⁴

Part 3 of the first Bill provided the following definition of corrupt conduct:

Corrupt conduct

7. (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.
- (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).
- (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could, in the opinion of the Commission, constitute or involve an offence or grounds referred to in that section. [amended in Bill No. 2]

General nature of corrupt conduct

8. (1) Corrupt conduct is—
 - (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or

¹³ NSWPD, Legislative Assembly, 26 May 1988, p.672.

¹⁴ *ibid.*, p.673.

- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters:
- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
 - (b) bribery;
 - (c) blackmail;
 - (d) obtaining or offering secret commissions;
 - (e) fraud;
 - (f) theft;
 - (g) perverting the course of justice;
 - (h) embezzlement;
 - (i) election bribery;
 - (j) election funding offences;
 - (k) election fraud;
 - (l) treating;
 - (m) tax evasion;
 - (n) revenue evasion;
 - (o) currency violations;
 - (p) illegal drug dealings;
 - (q) illegal gambling;
 - (r) obtaining financial benefit by vice engaged in by others;
 - (s) bankruptcy and company violations;
 - (t) harbouring criminals;
 - (u) forgery
 - (v) treason or other offences against the Sovereign;
 - (w) homicide or violence
 - (x) matters of the same or a similar nature to any listed above;
 - (y) any conspiracy or attempt in relation to any of the above;
 - (z) any matter prescribed by the regulations. [omitted in Bill No. 2]

- (3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to—
 - (a) matters arising in the State or matters arising under the law of the State; or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

Limitation on nature of corrupt conduct

- 9. (1) Despite section 8, conduct does not amount to corrupt conduct unless it could, in the opinion of the Commission, constitute or involve—
 - (a) a criminal offence; or
 - (b) a disciplinary offence; or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official. [amended in Bill No. 2]
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section—
 - “criminal offence” means a criminal offence under the law of the State or under any other law relevant to the conduct in question;
 - “disciplinary offence” includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

This original ICAC Bill was debated extensively in the Legislative Assembly and introduced into the Legislative Council. It subsequently lapsed and a second Bill, incorporating various changes resulting from the Parliamentary debate, was introduced.

Independent Commission Against Corruption Bill (No 2)

On 3 June 1988 a new version of the ICAC Bill was introduced and read a second time in the Legislative Assembly.¹⁵ This Bill was substantially the same as the first but ‘incorporated a number of amendments to meet concerns that had been raised with the Government’.¹⁶ The two most significant changes concerned Commission proceedings in relation to matters subject to legal proceedings and the test for corrupt conduct. The latter provided for the test for corrupt conduct to be an objective one, not dependent upon the opinion of the Commission. Conduct would not be corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissal (the words “in the opinion of the Commission” were omitted from clauses 7(3) and 9(1) of the second bill).

While ‘corrupt conduct’ was defined very broadly in ss. 7 to 9, it was intended to enforce only those standards established or recognised by law. Its focus was on conduct of public officials or those who, although not public officials, acted in such a way as to have an impact on public administration. ‘Public official’ also was broadly defined to give the ICAC jurisdiction across the entire ambit of the public sector, including Ministers, Members of Parliament, the judiciary and the Governor (s.3(1)). The ICAC’s jurisdiction would extend to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal (s.9).

The ICAC would be able to investigate corrupt conduct occurring before the commencement of the legislation (s.8(3)). However when deciding whether or not to investigate a matter, the Commission was to take into account whether the conduct occurred at too remote a time to justify the investigation. The Commission would have the discretion to decide what matters to investigate and how to conduct its investigations (s.13(1)(a)). The only matters it had to investigate were those referred to it by resolution of both Houses of Parliament (s.13(1)(b)). The ICAC’s focus was to be public corruption and it was to co-operate with law enforcement agencies in pursuing corruption (s.16).

Having been passed by both Houses of Parliament the second Bill was assented to by the Governor on 6 July 1988 to commence on a date to be proclaimed. The Government had undertaken that certain further amendments would be made to the legislation before it commenced. To this end the ICAC (Amendment) Bill was introduced and read a second time in the Legislative Assembly on 2 August 1988.¹⁷ This Bill was assented to on 9 August 1988 with a commencement date to be proclaimed. Proclamation of both the main legislation and the amending legislation appeared in the Government Gazette No, 30 on 10 March 1989 and they commenced on 13 March 1989.

¹⁵ *NSWPD*, Legislative Assembly, 3 June 1988, pp1548-1550.

¹⁶ *ibid*, p1548.

¹⁷ *NSWPD*, Legislative Assembly, 2 August 1988, pp2271-2273.

1.1.2 Amendments to the *ICAC Act 1988*

The major amendments to the *ICAC Act* that are relevant to consideration of the ICAC's jurisdiction and the definition of corrupt conduct are outlined below.

1990 Amendments

The ICAC (Amendment) Bill was introduced in the Legislative Assembly on 21 November 1990. The main purpose of this Bill was to clarify the Commission's powers in relation to the contents of its reports to Parliament required under s.74. The need for this amendment arose out of the *Balog and Stait v ICAC* case, which was ultimately determined by the High Court.¹⁸

In the original proceedings commenced in the NSW Supreme Court, Mr Balog and Mr Stait, sought a declaration that the ICAC could not make any finding or state any conclusion arising out of an investigation that a person, being substantially and directly interested, was guilty of a criminal offence or of conduct which might constitute a criminal offence. The matter eventually went to the High Court by special leave. On 28 June 1990, the High Court handed down its unanimous decision, which was a restrictive interpretation of ICAC's reporting powers. In essence, the Court held that the Commission was not able to make a finding that a criminal offence may have been committed, or that there had been corrupt conduct on the part of any person involved in an ICAC investigation. All the Commission was legitimately able to do under the section was to state whether there is, or was, any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.

This distinction is very fine and 'even from the legal standpoint, it is not unfairly arguable that the difference is one of words, but not of substance'.¹⁹ To put beyond doubt the scope of what the Commission could and could not include in its report to Parliament, a legislative change was necessary. This Bill gave the Commission 'a clear and wide power to make and report findings and opinions based on the results of its investigations and to make recommendations for the taking of further action'.²⁰ (This was reflected in s.74A). It also clarified in s.74B that the Commission does not have power to recommend prosecution but that it would be able to state its opinion as to whether or not consideration should be given to prosecution for a criminal or disciplinary offence.

Another amendment made in this Bill, which was assented to on 4 December 1990 and commenced on 7 December, included widening the scope of what could be investigated by the Commission by including in its principal functions (s.13) consideration of whether laws, practices and procedures and methods of work have created a situation where there is a potential for corrupt conduct to occur.

¹⁸ (1990) 64 ALJR 400.

¹⁹ 'Current Topics', *Australian Law Journal*, Vol 64, Oct 1990, p.617.

²⁰ *NSWPD*, Legislative Assembly, 21 November 1990, p.10200.

1994 Amendments

The most significant debate concerning the definition of ‘corrupt conduct’ followed the decision by the Court of Appeal in the Greiner and Moore case in August 1992.²¹ The decision by the Court of Appeal in *Greiner v ICAC*²² prompted concerns that the definition of ‘corrupt conduct’ in the *ICAC Act* operated in a manner that resulted in different standards being applied to Ministers of the Crown and Members of Parliament.

The matter of the Metherell resignation and subsequent appointment to a senior public service position was referred to the Commission by the Parliament pursuant to s.73 of the Act. The Report of the first stage of the inquiry, which examined the facts and circumstances to determine whether there was any element of corrupt conduct involved, was made public on 19 June 1992. It contained findings that only the conduct of Mr Greiner and Mr Moore was corrupt within the meaning of sections 8 and 9 of the *ICAC Act*, in that it involved the partial exercise of their official functions and a breach of public trust, and could, in the view of the Commissioner, involve reasonable grounds for dismissing them from their ministerial positions.

After resigning from office on 24 June 1992, Mr Greiner and Mr Moore challenged the findings made by the Commission, and the Court of Appeal handed down its decision on 21 August 1992. In a majority judgment, the Court declared that the finding in the Report that each plaintiff had engaged in ‘corrupt conduct’ within the meaning of the *ICAC Act* was a nullity.

While the Court of Appeal did not criticise Commissioner Temby’s finding that the conduct came within s.8, it did not think behaviour, which was not unlawful, could constitute grounds for the Governor or the Executive Council to reasonably dismiss the Premier or the Minister for the Environment. Following this case both the Commission and the ICAC Committee recommended that the definition of corruption be simplified and clarified. The proposal favoured by both bodies was to repeal s.9, which would narrow the scope of findings of corrupt conduct. Another commentator suggested the deletion of the definition of corruption, replacing it with a short definition such as ‘payment in money or kind to a public servant for benefits which the public servant is able to provide because of his or her public office’.²³

The ICAC Committee at the time conducted a major review of the ICAC legislation in 1992 and released its Report in June 1993. The definition of ‘corrupt conduct’ and the operation of ss. 8 and 9 were one of the ten key issues examined. The Committee found that the definition then in use was overly complex, fraught with difficulties and, in the words of the Court of Appeal, ‘apt to cause injustice’. When looking at how the definition could be improved, the Committee endorsed the view that the ICAC must be able to investigate all public officials, including Ministers, Members of Parliament and judges, and that the ‘great and powerful’ should not be beyond the reach of the ICAC. This sentiment reflected statements made by both the then Premier and Attorney General when the original legislation was introduced.²⁴

²¹ *Greiner and Moore v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

²² [1992] 28 NSWLR 125

²³ Fair P, ‘ICAC under the microscope - the need for reform?’, *Law Society Journal*, Vol 30 No 11, December 1992, pp.38-41.

²⁴ ‘It has an extensive jurisdiction that applies across the entire public sector. No one has been exempted. Minister, Members of Parliament, the judiciary and the Governor will all fall within the jurisdiction of the ICAC’, NSWPD, Legislative Assembly, 26 May 1988, p674 and ‘This body set up by the Government is the

The Committee recommended that s.9 be repealed, and that s.8 should remain largely as it stood. The Committee expressed the view that s.8 gave ICAC jurisdiction over 'corrupt conduct' and that it may be more useful for the section to refer simply to 'conduct' or, if it were necessary to define the conduct in some fashion, then a term like 'relevant conduct' may be more appropriate. The Committee also was of the view that s.8 should be amended to expressly enable the ICAC to investigate possible criminal conduct related to official corruption, including matters where organised crime and official corruption may be linked.

In 1994 amendments were made to s.9 but not along the lines recommended by the Committee. On 22 September the ICAC (Amendment) Bill 1994 was introduced and read a second time. In the Second Reading speech on the ICAC (Amendment) Bill 1994 the Minister for Police and Minister for Emergency Services said:

With the aim of addressing this so-called discriminatory operation of section 9, the Joint Parliamentary Committee on the Independent Commission Against Corruption recommended that section 9 be repealed. The Government has carefully considered this recommendation and examined its ramifications for the operation of the ICAC. It has reached the view that its repeal would have unacceptable consequences. However, the Government acknowledges that the effect of section 9 is that Ministers and Members of Parliament may be less amenable to the jurisdiction of the ICAC than, say, public servants. Moreover, in similar circumstances it may be that a public servant but not a Minister or Member of Parliament could be found corrupt. The Government does not accept that exactly the same standards need to be applied to every class of public official. In particular, there are important distinctions to be drawn between elected and non-elected officials based on the different manner in which they are accountable to the public.

*The Government nevertheless accepts that, for the purposes of the Independent Commission Against Corruption Act at least, a set of standards more analogous to that applying to other public officers should apply to Ministers and Members of Parliament. Public servants and other public sector employees are subject to disciplinary provisions and codes. A breach of such provisions and codes may attract the jurisdiction of the Independent Commission Against Corruption and result in a finding of corrupt conduct. It is proposed, therefore, to put members of Parliament and Ministers on a similar footing to public sector employees by providing that a breach of a code of conduct applicable to them can attract the ICAC's jurisdiction and result in a finding of corrupt conduct when it is found that a substantial breach has occurred.*²⁵

The amendments made by this Bill expanded the ICAC's jurisdiction and placed Members of Parliament and Ministers of the Crown in a similar position to public sector employees by providing that a breach of a code of conduct applicable to them could fall within the jurisdiction of the ICAC, and result in a finding of corrupt conduct if a substantial breach of the code were found to have occurred. Each House of Parliament was allocated the task of

first of its kind. It is unique in that it makes the Government subject to examination', NSWPD, Legislative Assembly, 3 June 1988, p1550.

²⁵ Hon G West MP, Minister for Police and Minister for Emergency Services, NSWPD, Legislative Assembly, 22 September 1994, pp3627-3628.

developing its own code to regulate the conduct of its members by January 1996. This time frame was later extended.²⁶

Draft codes were ultimately released for comment by the Legislative Assembly Standing Ethics Committee in June 1996 and the Legislative Council Standing Committee on Parliamentary Privilege and Ethics in July 1996. Despite meeting on several occasions, the two Committees were unable to achieve consensus on a uniform code for all Members of Parliament. Although both Committee Reports had been tabled by the end of 1997, neither House had adopted a code. In an attempt to progress the matter, the Premier released a draft Code of Conduct for Members of the NSW Parliament at the end of March 1998. The Legislative Assembly voted on 5 May to adopt the Government's code. The Legislative Council agreed to its adoption on 1 July 1998.

1996 Amendments

In 1996 the following legislation impacting on the ICAC's jurisdiction was passed:

- *The Police Integrity Commission Act 1996*: In April 1996 an exposure Bill for a new police oversight body, the Police Corruption Commission, was introduced in the Legislative Assembly. When the Bill was formally introduced on 4 June, the name of the organisation had been changed to the Police Integrity Commission. The creation of this body, whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, removed the responsibility for investigating complaints against police from the jurisdiction of the ICAC. The ICAC retained its role in relation to the Police Service in the area of corruption prevention and education.
- *The Police Legislation Amendment Act 1996*: amended the *ICAC Act* in relation to dealing with complaints about police and made consequential amendments resulting from the establishment of the Police Integrity Commission.

1997 Amendments

In 1997 the passage of the *Environmental Planning and Assessment Amendment Act 1997* provided for a consequential amendment to the definition of 'public official' in s.3 of the *ICAC Act*. The former legislation allowed for accredited certifiers to undertake building inspections and definition of public official in the *ICAC Act* was amended to include "an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*".

1997 ICAC Committee Review

In 1997 the previous Committee on the ICAC resolved to undertake a formal review of the ICAC to determine whether it was still meeting the objectives for which it was established, and whether its statutory charter needed reform to ensure its ongoing efficiency and effectiveness. The terms of reference for the review were framed widely to enable the Committee to consider the full range of issues relevant to the role, functions and general

²⁶ The *Statute Law (Miscellaneous Provisions) Act (No 2) 1995*; the *Statute Law (Miscellaneous Provisions) Act 1996*; and the *Independent Commission Against Corruption Amendment (Codes of Conduct) Act 1996*.

operations of the ICAC. Submissions from the public as well as relevant stakeholders were called for, and a series of hearings were held. An issues paper was publicly release in May 1997 and, following preliminary meetings with ICAC representatives, a program of public hearings commenced on 14 April 1998. Unfortunately, the previous Committee did not report on this inquiry before the prorogation of the Parliament.

1.2 Current definition of corruption under the ICAC Act 1988

Currently, the scope of ICAC's jurisdiction to deal with corrupt conduct as it affects public officials is bound by the two part test set down in ss. 8 and 9 of the *ICAC Act*. These sections provide that:

- 8(1) Corrupt conduct is:
- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his benefit or for the benefit of any other person.
- 8(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:
- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
 - (b) bribery;
 - (c) blackmail;
 - (d) obtaining or offering secret commissions;
 - (e) fraud;
 - (f) theft;
 - (g) perverting the course of justice;

- (h) embezzlement;
- (i) election bribery;
- (j) election funding offences;
- (k) election fraud;
- (l) treating;
- (m) tax evasion;
- (n) revenue evasion;
- (o) currency violations;
- (p) illegal drug dealings;
- (q) illegal gambling;
- (r) obtaining financial benefit by vice engaged in by others;
- (s) bankruptcy and company violations;
- (t) harbouring criminals;
- (u) forgery;
- (v) treason or other offences against the Sovereign;
- (w) homicide or violence;
- (x) matters of the same or similar nature to any listed above;
- (y) any conspiracy or attempt in relation to any of the above.

Section 9 further defines the nature of corrupt conduct as follows:

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
 - (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament - a substantial breach of an applicable code of conduct.

Sections 9(4) and 9(5) provide that conduct specified in s.9(1)(d), which meets the criteria of s.8, breaches an identified law and would cause a reasonable person to believe that it would bring the integrity of the office concerned, or of Parliament, into serious disrepute, also can be the subject of a finding of corrupt conduct.

These provisions create a two step test to determine whether conduct is corrupt. First, the conduct has to fall within s.8. Section 8(2) has not been changed since the enactment of the legislation and contains a long list of proscribed activities, many of which are unlawful and would be described as corrupt on any view, for example, bribery (s.8(2)(b)) and blackmail (s.8(2)(c)). Others, however, are vague and not necessarily unlawful, for example, any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions (s.8(1)(b)). Consequently, **if** the conduct falls within s.8, it is also necessary that it meet the criteria in s.9, that is, that it **could** constitute a criminal or disciplinary offence, or reasonable grounds for dismissing or dispensing with the services of a public official within s.9. Otherwise, the conduct will not be corrupt.

Chapter 2

Problems Identified With The Current Definition Of Corrupt Conduct

2.1 Current Review

Submissions to the review have raised several criticisms about the definition of corrupt conduct which was generally accepted to be very broad. The criticisms are discussed below.

2.1.1 Breadth of the definition

The definition of corrupt conduct contained in ss. 8 and 9 of the *ICAC Act* has been criticised previously as being broader than the commonly understood meaning of corruption. In the Court of Appeal's decision in *Greiner vs ICAC*, the definition of corrupt conduct under the *ICAC Act* was described as:

*... misleading and apt to cause injustice. ... The injustice arises because the Act applies 'corrupt conduct' to conduct which, in the ordinary meaning of the term, is not corrupt.*²⁷

Priestly JA made a similar observation.

The Law Society of NSW has made a submission to the current review in the same terms, stating that:

*the definition of corruption under section 8 should be changed in such a way as to bring it closely into alignment with the Common Law definition of corruption and ordinary community interpretation of corruption. The existing artificial definition catches far too much conduct which right thinking members of the community do not regard as corrupt.*²⁸

The NSW Bar Association concurred:

*We agree with a number of other commentators that the statutory definition(s) of corrupt conduct is far too broad and requires statutory amendment. "Corrupt" conduct should be restricted to conduct that is criminal either under statute or the common law.*²⁹

The Law Society went on to recommend that corrupt conduct should be defined in terms of its ordinary meaning, noting that "the criminal law sets out a comprehensive list of offences relating to corruption as commonly understood".³⁰ These are not detailed in the Society's submission, but presumably refer to Part 4A of the *Crimes Act 1900* and the common law

²⁷ *Greiner vs ICAC* (1992) 28 NSWLR 125, Mahoney J, dissenting

²⁸ Law Society submission, Attachment , p.2.

²⁹ Bar Association submission, p.1.

³⁰ Law Society submission, Attachment 1, p.2.

offences of bribery, extortion and misconduct in office. The latter includes neglect of duty, oppression, fraud, breach of trust and refusal to serve in public office but these are rarely resorted to. The Law Society suggested the following definition of corrupt conduct:

*Corrupt conduct is conduct by any person (whether or not a public official) that adversely affects the exercise of official functions by any public officer, any group or body of public officials or any public authority and involves a criminal offence.*³¹

The NSW Bar Association considered this to be a “reasonable” definition, and suggests that the phrase “to their advantage” could be added at the end. The Bar Association added:

*Not all criminal offences should be included in a definition of “corrupt” conduct. Clearly such offences as treason are inappropriate. Generally we agree [with] the tenor of the Law Society’s submissions and would include those offences under Part 4A Crimes Act.*³²

The ICAC, however, opposed the Law Society and the Bar Association proposals on the following grounds:

*As recognised by those who drafted the original legislation, and those responsible for subsequent amendments, notions of corrupt conduct are wider than the commission of a crime. Whilst the commission of a crime, within the context of ss.8 and 9 of the ICAC Act, will continue to be an important indicator of corrupt conduct, there is other conduct which, although not necessarily amounting to criminal conduct, is nevertheless no less corrupt. For example, the intentional release of confidential information by a public official to a private company which allows that company to gain an unfair advantage over its competitors may not necessarily constitute a criminal offence (particularly if no bribery is involved). Nevertheless, such conduct would likely involve a disciplinary offence or grounds for termination of employment and would be regarded by ordinary members of the community as being “corrupt”. Such conduct is caught by the present definition of the ICAC Act. It is certainly the type of conduct which the Commission should have jurisdiction to investigate and determine.*³³

The Commission confirmed in its final submission that it held that confining corrupt conduct to criminal offences “would exclude a range of serious misconduct generally regarded as ‘corrupt’”. For example:

- *Employment of family or friend in public sector positions where selection on merit has been corrupted;*
- *Improperly awarding tenders or contracts to friends or associates, particularly where there is no associated criminal offence of bribery or similar;*

³¹ *ibid*, p.2.

³² Bar Association submission, pp.1-2.

³³ ICAC submission, p.3.

- *The intentional release of confidential information by a public official to a private company which allows that company to gain an unfair advantage over its competitors may not necessarily constitute a criminal offence, again particularly where no bribery is involved*
- *Abuse of public office to pursue a vendetta against an individual.*³⁴

To support its position that corrupt conduct should define conduct broader than that which is criminal or illegal, the ICAC referred to the comments made by Justice Mahoney in the Greiner judgment, particularly in relation to the partial exercise of office. The Commission cited the following extract:

*Public power may be misused in a way which will involve a criminal act: see, eg, s.8(2)(b) (bribery). But the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved, or, at least, directly involved. It may be used to influence the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that “partial” and similar terms in the Act are essentially directed.*³⁵

In the ICAC’s view, “[t]his line of reasoning points towards a definition of corrupt conduct based on the abuse of office, or dishonest or partial exercise of office, for personal gain or the gain of others”.³⁶ However, the ICAC did recognise that the application of s.9 of the *ICAC Act* and the seriousness of the conduct were essential to avoiding a situation in which the ICAC operated “as a tribunal of morals”.³⁷

The former Commissioner of the Police Integrity Commission, the Hon PD Urquhart QC, also expressed concerns about the broadness of the definition of corrupt conduct:

*My concern about “corrupt conduct” is that it covers a wide range of activities, from something which is not criminally wrong to something which is grossly criminally wrong.*³⁸

However, he believed that re-defining the term in the manner proposed by the Law Society would not be beneficial and noted:

So far as the definition of “corrupt conduct” [is] concerned, I can well understand the concerns expressed by some that there is a stigma of criminality associated with findings of “corrupt conduct” and that this stigma persists despite the fact that the meaning given this expression by the ICAC Act is quite clearly not limited to criminal offences.

³⁴ ICAC, Final submission, June 2001, p.3.

³⁵ *ibid*, p.4.

³⁶ *ibid*.

³⁷ *ibid*.

³⁸ Evidence, 20 February 2001.

*The suggested need, however, for the definition of “corrupt conduct” to be amended so that it is limited to criminal activity would, in my opinion, seem to diminish significantly if not entirely evaporate were the capacity and obligation of the ICAC to bring in “findings” of corrupt conduct removed. Indeed, with respect, it seems to place the cart before the horse for the definition of “corrupt conduct” to be amended to limit it to criminal activity. Such an amendment would likely enhance rather than diminish the stigma that may attach to findings of corrupt conduct”.*³⁹

Judge Urquhart’s submission as it relates to the removal of ICAC’s ability to make findings is discussed further below.

Others have suggested that the label of “corrupt conduct” could be altered to avoid the inappropriate classification of more minor forms of misconduct. One proposal is to allow for several categories to be created for different degrees of misconduct. For example, the definition of corrupt conduct could incorporate more serious misconduct or be restricted to criminal conduct. Conduct of a less serious nature could be termed “misconduct”, or “improper conduct”. Alternatively, as the previous Committee noted, “the conduct ... could be called “relevant conduct” if it needs to be defined at all”.⁴⁰

Commissioner Temby considered this issue in the Second Report on Investigation into the Metherell Resignation and Appointment, and suggested:

Perhaps what should be done is to examine the conduct the definition does cover and to ask whether it should be labelled “corrupt”? If not, should there be some lesser appellation such as “improper” applied to it?

If a distinction were to be made in the Act between “corrupt” and “improper”, perhaps the element of benefit or advantage ought to be the determining factor.

... any such change merits serious philosophical attention. Does the community benefit more by retaining old notions of corruption, or does it benefit by the expansion of these notions to explicitly cover partiality and dishonesty that nonetheless involves no benefit to the public official? In other words, what is achieved by labelling such conduct “corrupt” rather than “improper”? One argument in favour of such labelling is that “corrupt” implies a perversion of the system, something more than a mere personal lapse. It must be remembered that the partial, dishonest or wrongful exercise of public office can be equally dangerous and harmful to the community, irrespective of whether the public official concerned gets a kickback. The argument against seems to be that it is an extreme thing to label “corrupt” someone who does something wrong with no intent to benefit personally thereby.⁴¹

³⁹ Judge Urquhart’s submission, p.8.

⁴⁰ Committee on the ICAC, *Review of the ICAC*, May 1993, p.25.

⁴¹ ICAC, *Second Report on Investigation into the Metherell Investigation*, 1992, p.14.

The Law Society of NSW submitted to the current review that it would be appropriate to have more than one category of conduct:

*As the definition of corrupt conduct stands it may apply to both relatively trivial and extremely serious matters. ... The wide range of conduct which is less than criminal conduct should not, in our view, be stigmatised by application of a single pejorative phrase.*⁴²

To remedy this, the Law Society proposed that the Act be redrafted:

*to include a definition of “unsatisfactory official conduct” covering this broad range of behaviour.*⁴³

Likewise, the NSW Bar Association submitted that additional categories of conduct would be useful:

*... since a great deal of conduct which is not criminal may still cause great harm to the fabric of our society, we are of the view that it would make good sense to have other categories to reflect the seriousness of the conduct. It seems to us that under a general heading of “Serious Misconduct” there could be “Corrupt Conduct”, “Improper Conduct”, “Misconduct”.*⁴⁴

Definitions suggested by the Bar Association were:

“Improper Conduct”:

As defined under the Queensland CJC Act as “official misconduct” with the element of “to their advantage”.

“Misconduct”:

As for the definition of “improper conduct” but without the element of advantage.⁴⁵

In evidence, the President of the NSW Bar Association, Ms Ruth McColl QC, noted that having additional categories of misconduct could be advantageous for the ICAC because:

*... conduct which comes before the Commission can still be conduct which the community would proscribe but which it does not regard as of the level of venality of corrupt conduct, and it does seem to us that, if the Commission was to play a beneficial role in the community by ensuring maximum honesty and proper conduct ... then the community can only be benefited if the Commission can deal with all levels of conduct as much as possible.*⁴⁶

⁴² Law Society submission, Attachment 1, p.5.

⁴³ *ibid*

⁴⁴ Bar Association submission, p.1.

⁴⁵ *ibid*, p.2.

⁴⁶ R. McColl, Evidence, 20 February 2001.

The same issue was considered previously in Western Australia where the definitions of improper and corrupt conduct were addressed by the West Australian Commission on Government in its Second Report (1995). The report noted that the 1992 West Australian Royal Commission drew a distinction between corrupt conduct, which was conduct that would attract criminal sanctions, and improper conduct. The Royal Commission defined improper conduct to include conduct that was a 'breach of public trust', even if not a breach of the law or a disciplinary offence. The Royal Commission's rationale for this was that such conduct:

*should not remain undetected. The public are entitled to know when the trust they have invested in public officials has been breached and by whom.*⁴⁷

The WA Commission on Government favoured the term 'improper conduct', and recommended it be broadly defined:

After considering the WA Royal Commission's definition of the phrases corrupt conduct and improper conduct respectively, we are of the opinion little may be achieved, and may in fact become a source of confusion, if we were to provide separate definitions for the phrases impropriety (or improper conduct) and corruption (or corrupt conduct). Our inquiries have indicated that the public strongly supports the exposure and especially the prevention of a whole range of conduct. We are of the view that a single definition should be drawn from that range of conduct. Accordingly, impropriety (or improper conduct) and corruption (or corrupt conduct) should be defined under the one phrase – improper conduct. The phrase improper conduct would then encompass all of the following conduct:

- *corrupt conduct, as defined by reference to the Criminal Code ...*
- *improper conduct, as defined by the WA Royal Commission ...*
- *breaches of discipline under s.80 of the Public Sector Management Act, and*
- *where the person or body is not subject to the PSM Act, disobeying or disregarding a lawful order, contravening any Act governing their conduct, contravening any applicable standards, codes of ethics or codes of conduct, committing an act of misconduct, or being negligent or careless.*

*In our opinion, ... it is important that all departures from the standards of administration which the public is entitled to expect, and not just those departures that could be considered as being gross, should fall within a definition of the phrase improper conduct. It was consistently put to us that it is not only the serious instances of improper conduct that need to be prevented and exposed. Appropriate efforts should be made to prevent and expose all departures from generally accepted standards of public administration. We agree with that view.*⁴⁸

⁴⁷ W.A. Commission on Government, Second Report, December 1995, p.51.

⁴⁸ *ibid*, pp. 53-4.

In the early stages of the current review, Commissioner Moss considered that a “two-tier” approach could have some benefits:

... the Commission submits that there may be merit in considering the utility of a “secondary” finding for application in certain circumstances. For the purpose of discussion it is proposed to canvas that in addition to “corrupt conduct”, there be a possible formal finding of “serious misconduct”.

... A finding of “serious misconduct” might assist the work of the ICAC to the extent that a finding short of “corrupt conduct” could be made when on the evidence available to the Commission the type of conduct in question is not so serious as to warrant the description of “corrupt conduct”.⁴⁹

Commissioner Moss submitted that the distinction between ‘serious misconduct’ and ‘corrupt conduct’ should not be based upon whether the conduct may constitute a criminal offence. She noted that some conduct, which might not be a criminal offence, may have a more widespread impact than other conduct that constitutes a criminal offence.⁵⁰

The Commissioner argued that allowing a secondary finding would not lead to an expansion of the Commission’s jurisdiction, so long as ‘corrupt conduct’ remained the threshold for commencing an investigation:

In effect, it is submitted that “serious misconduct” may assist the ICAC to formally express disquiet about certain misconduct that, while serious, falls short of meriting characterisation as “corrupt conduct”. However such a finding should only be made in the course of an investigation that has been commenced for the express purpose of determining whether there has been corrupt conduct. The ICAC would not seek any change to the circumstances in which an investigation can be commenced.⁵¹

In its final submission to the review, the ICAC recognised the concerns expressed about the breadth of the definition of “corrupt conduct” and acknowledged the importance of the definition being “as clear and precise as possible.”⁵² The Commission conceded that after twelve years of application the current definition of ‘corrupt conduct’ was open to being redefined “in such a way as to adequately cover that which is generally regarded to be corrupt, but [to exclude] that conduct that is not ordinarily thought of in that way.” It was the Commission’s view that “as far as possible, the definition should capture only the more serious allegations of wrongdoing that may currently fall within the parameters of ‘corrupt conduct’.”⁵³

To this end the Commission suggested that the seriousness of the conduct should be “the key feature of the definition of corrupt conduct, and that it should be the first test applied to determine if wrong conduct is ‘corrupt’”. It proposed:

⁴⁹ ICAC submission, July 2000, p. 4.

⁵⁰ *ibid.*

⁵¹ *ibid.*, p. 5

⁵² ICAC final submission, June 2001, p 3.

⁵³ *ibid.*

In redefining “corrupt conduct” to ensure that the seriousness of the conduct is established as the primary consideration, it may be worth considering a reformulation of ss 8 and 9 to provide for a single section definition of corruption along the lines of:

“Corrupt conduct is conduct that if proved, could constitute or involve a criminal offence, a disciplinary offence, grounds for dismissal, or a [serious⁵⁴] breach of a relevant code of conduct; and

- is conduct of any person that adversely affects (or could do so) the honest or impartial exercise of official functions by any public official(s) or public authority or*
- is conduct of a public official that is dishonest or partial exercise of official functions or*
- is a breach of public trust or misuse of information by an official or*
- is conduct of any person that adversely affects (or could do so) the exercise of official functions by any public official(s) or public authority, involving [conduct of the type presently listed in s.8(2)].*

The re-definition proposed by the ICAC was offered as an illustration of the way in which it might be possible to re-cast the definition of corrupt conduct to emphasise certain features. The ICAC proposal placed s.9 at the front of the definition before moving to the specifics of matters contained within s.8 of the Act.

In this suggested formula, originally drafted by consultants to the ICAC, the ICAC determines first whether the conduct meets the higher threshold contained in s.9 of criminality, disciplinary offence, grounds for dismissal, or breach of a code of conduct, before considering the question of whether the conduct is corrupt.⁵⁵ The ICAC thought this option might help to ensure that the “seriousness of the conduct is considered as the first test, with subsequent hurdles relating to the precise nature of the conduct”. In addition, it may provide an opportunity to re-assess and streamline the various types of conduct listed at s. 8(2).⁵⁶ The ICAC also indicated that it would be necessary to examine the drafting of any legislative amendment to ensure that it suitably captured the relevant conduct sought to be covered.⁵⁷

In final evidence, Commissioner Moss explored possible drafting options to meet the proposed revision:

Mr BROWN: . . . *I was particularly interested in your, I suppose, proposed new definition of "corrupt conduct"—or the suggested talking point of a definition that you referred to in paragraph 1.16 of your submission [reproduced on previous page]. If we are going to discuss any further a slight amendment to that, I would merely state that you have discussed the issue of seriousness of the offence, yet the word "serious" is not contained in the draft definition.*

⁵⁴ The Commissioner clarified in evidence on 18 June that the word serious should be included here.

⁵⁵ ICAC final submission, p.5.

⁵⁶ *ibid.*

⁵⁷ *ibid.*, pp.4-5.

Ms MOSS: Yes, I noted that. We were basically copying that straight from the example that was given to us by our functional review, who looked at this matter. It is only given as an example, and if you were to use this as a basis for a redraft, you would probably have to rework it quite carefully. In fact, I would have included, "or a serious breach of the relevant code of conduct," for example.

Mr BROWN: Section 9 (1) (d) refers to a substantial breach of the applicable code, so it is in the legislation.

Ms MOSS: It is in the legislation. That was given as an example of how one could reorganise it so that you work through the seriousness issue first, before working through the others. At the moment it is a two-stage step where people may lose the appreciation that we are talking about serious misconduct that could amount to corrupt conduct.⁵⁸

The main consideration for the ICAC in view of any redefining of corrupt conduct was to ensure it retained the powers to expose corruption and that they would be able to describe such conduct in ordinary language including use of the word "corrupt". Commissioner Moss stated that:

Ms MOSS: I would consider the suggestion that we made of reorganising the definition, perhaps, into the one section rather than it being divided into the present sections 8 and 9. I would review all the other bodies that handle similar issues and how they approach the definition. I mean, the problem I think we do face is the words "corrupt conduct" are extremely heavily laden with stigma. It is very hard in many instances not to misinterpret the situation from those words that are, even in perhaps less serious matters, stigmatised. I think it is important that whatever the legislation does allow, the main thing is that the Commission be endowed with powers to expose that misbehaviour, so the powers that we have are very important.

Secondary to that I think we should be given the ability to describe in ordinary language what that behaviour is and should that include the word "corrupt". A lot of people might say it would be very strange to set up a corruption fighting body and not allow that body to use the words "corrupt conduct". The only reason you may not want to use it is because it has been misused in the past. You could consider how the Police Integrity Commission [PIC] handles its matters. I understand, for example, the Criminal Justice Commission [CJC] is not bound to make findings of corrupt conduct.⁵⁹

The ICAC also submitted that addressing the "mental element" of corrupt conduct may be useful to ensure that "it is clear that inadvertent or innocent error is not seen or alleged to be corrupt". In light of the Supreme Court decision in the Greiner case, Commissioner Moss considered the mental element issue to be very important. She explained the term to mean:

⁵⁸ ICAC, final evidence, p.6.

⁵⁹ *ibid.*, p8.

That mental element involves a person understanding that what he or she has done constitutes conduct which is unacceptable. In that regard it brings into our administration the need to consider intent. I am not aware that we have done surveys to glean the public perception of what that means, except to say that I think the public has a very broad understanding of what it means. I believe the thing [is] to realise that the term is quite laden with emotion and stigma, and the very use of it probably does constitute something we understand to be very serious⁶⁰.

In practice, when considering s.8, the ICAC already takes into account the state of mind of the person whose conduct is in question and whether the conduct was carried out for an unacceptable reason.⁶¹ The way in which the Commission does so was explained by the Commissioner in evidence:

Ms MOSS: It is a very difficult thing but it is done on all the facts we can glean from investigating the matter. So, it would consist of statements taken in the course of the investigation. It would consist of examining written material, correspondence, that we would have at hand. It could consist of testing their credibility in the witness box. It really is a combination of taking everything at hand to determine whether the mental element existed. The mere fact that the person might say, "I was not aware I was conducting corrupt conduct at the time" or, "I did not intend it," is not the definitive statement. That was shown by Justice Gleeson in the Greiner matter. So, a mere statement by a person that he or she did not think it was corrupt conduct is not definitive. It would be taking all the evidence we have and then drawing a conclusion about the mental element. Quite obviously, if the act of corrupt conduct concerned a crime, the onus of proof would need to be higher, from the Briginshaw test.⁶²

If necessary the ICAC may involve expert opinions in this task.

2.2.2 Conditional Wording

The ICAC has in the past indicated concerns with the conditional nature of the definition of corrupt conduct. In its *Second Report on Investigation into the Metherell Resignation and Appointment*, Commissioner Temby noted:

The real difficulty arises under s9(1), in particular its conditional nature – ‘could constitute or involve’ dismissal and so on. The Commission has from time to time made clear its difficulties with the definition, which arose in stark form in the Metherell matter ... Gleeson CJ at 4 said ... that the conclusion a person has engaged in “corrupt conduct” is unconditional in form, but is based upon a conditional premise as it can suffice that s.8 conduct “could” constitute or involve a criminal or disciplinary offence or reasonable grounds for dismissal⁶³.

⁶⁰ *ibid*, p.6.

⁶¹ *ibid*, pp.5-6.

⁶² Evidence, 18 June 2001, p.7.

⁶³ ICAC, *Second Report on Investigation into the Metherell Resignation and Appointment*, 1992, p. 12.

The ICAC's submission to the Parliamentary Committee Review in 1992 elaborated on the problems associated with the conditional wording of this section:

The Commission is troubled by s.9. Apart from the difficulties adverted to in Greiner vs ICAC (which arise when conduct is being classified) it is inappropriate to define jurisdiction in a way which requires a judgment to be made of the quality of the conduct when seeking to assess whether to accept the allegation. After all the formation of this judgment is an essential part of the investigation. A sound judgement will often be possible only when the investigation is at least partially completed.

The Hon Athol Moffitt QC raised similar concerns in his submission to the 1992 Review, noting that the definition applied subjective and conditional criteria:

S.7 accepts that conduct to be corrupt must fall within both s.8 and s.9. It accepts, as must be so, that merely to fall within s.8 does not make conduct corrupt. S.8 objectively refers to conduct. This is not so with s.9(1)(a),(b) or (c). It depends on what others external to ICAC 'could' do, but may not do. Thus, whether conduct is corrupt depends on s.9(1), which does not itself objectively describe the nature of the conduct or quantify its seriousness. As Gleeson CJ pointed out, it introduces a conditional element into the definition.⁶⁴

Criticisms of this nature have been raised in the current review by the Law Society of NSW, which argued that s.9 is "drafted in terms of possibilities":

The repeated use of the word "could" and the word "may" within sections 8 and 9 renders the definition unreasonably wide and uncertain. This is a serious matter when it is considered that the Act empowers the ICAC to make findings against individuals that their conduct has been corrupt when it merely "could" have adversely affected the impartial exercise of functions by a public office and "could" involve any irregularity that "may" constitute grounds for disciplinary action under law.⁶⁵

In response, the ICAC has submitted that the provisions of s.9 are applied in accordance with the approach of Priestly JA, outlined in *Greiner*, whereby the word "could" is construed as meaning "would, if proved". The ICAC further noted that:

in relation to 9(1) the approach would be to consider whether, in the case of a criminal charge which would be tried before a jury, the facts found by the ICAC as constituting corrupt conduct would, if the jury were to accept them as proved beyond reasonable doubt, constitute the offence charged. The approaches required in relation to s.9(1)(b) and s.9(1)(c) are similar.⁶⁶

⁶⁴ Committee on the ICAC, op.cit., p. 17

⁶⁵ Law Society submission, Attachment 1, p. 2.

⁶⁶ ICAC, Submission to 1992 Review, October 1997, p. 5

2.3 Comparative definitions in other jurisdictions

Several investigative agencies with similar functions to the ICAC operate under legislation which does not define corruption and instead uses terms such as “misconduct” to establish their jurisdiction.

2.3.1 Police Integrity Commission (PIC), New South Wales

The *Police Integrity Commission Act 1996* identifies the PIC’s principal functions as including preventing, detecting and investigating **serious police misconduct** and **other police misconduct**. The following definition of police misconduct is provided:

5 Police misconduct:

(2) *Examples*

Police misconduct can involve (but is not limited to) any of the following:

- (a) *police corruption,*
- (b) *the commission of a criminal offence by a police officer,*
- (b1) *misconduct in respect of which the Commissioner of Police may take action under Part 9 of the Police Service Act 1990,*
- (c) *corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a police officer,*
- (d) *any other matters about which a complaint can be made under the Police Service Act 1990.*

(4) *Serious and other misconduct*

References in provisions of this Act to “serious” police misconduct and “other” police misconduct are intended for general guidance and are not intended to indicate a precise distinction between the two concepts.

The definition of misconduct under the *Police Integrity Commission Act 1996* is somewhat broader than the definition of corrupt conduct in the *ICAC Act*. As can be seen, the police misconduct definition incorporates the *ICAC Act*’s corruption definition and adds further provisions.

2.3.2 Criminal Justice Commission, Queensland

The CJC’s investigative role involves identifying and reporting on “official misconduct” in the public service, and investigating allegations of “misconduct” by members of the Queensland Police Service.

The definition of “official misconduct” is defined under the Act as:

32. (1) *Official misconduct is:*

- (a) *conduct of a person, whether or not the person holds an appointment in a unit of public administration, that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of powers or authority of a unit of public administration or of any person holding an appointment in a unit of public administration; or*
- (b) *conduct of a person while the person holds or held an appointment in a unit of public administration –*
 - (i) *that constitutes or involves the discharge of the person’s functions or exercise of his or her powers or authority, as the holder of the appointment, in a manner that is not honest or is not impartial; or*
 - (ii) *that constitutes or involves a breach of the trust placed in the person by reason of his or her holding the appointment in a unit of public administration; or*
- (c) *conduct that involves the misuse by any person of information or material that the person has acquired in or in connection with the discharge of his or her functions or exercise of his or her powers or authority as the holder of an appointment in a unit of public administration, whether the misuse is for the benefit of the person or another person;*

and in any such case, constitutes or could constitute –

- (d) *in the case of conduct of a person who is the holder of an appointment in the unit of public administration – a criminal offence, or a disciplinary breach that provides reasonable grounds for termination of the person’s services in the unit of public administration; or*
 - (e) *in the case of any other person – a criminal offence.*
- (2) *It is irrelevant that proceedings or action in respect of an offence to which the conduct is relevant can no longer be brought or continued or that action for termination of services on account of the conduct can no longer be taken.*
 - (3) *A conspiracy or an attempt to engage in conduct, such as is referred to in subsection (1) is not excluded by that subsection from being official misconduct if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in subsection (1).*

The definition of official misconduct applying to the CJC is very similar in content to the definition of corruption in sections 8 and 9 of the *ICAC Act*. Sections 31(1)(a) – (c) of the *CJC Act* mirror s.8 of the *ICAC Act*, while ss 32(1)(d) and (e) reflect s.9 of the *ICAC Act*.

In using the term “official misconduct”, the concerns that arise over the breadth of the definition of “corrupt conduct” do not arise. However, the Queensland definition does share the difficulties connected with the use of conditional wording in the corrupt conduct definition in New South Wales legislation.

2.3.3 Anti-Corruption Commission, Western Australia

The Anti-Corruption Commission is required to undertake investigative or other action in relation to allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers (s.12(1) of the *Anti-Corruption Commission Act 1988*). These terms are to a large extent linked back to the West Australian Criminal Code.

The Western Australian definition seeks to categorise conduct according to the nature of the misconduct involved. Four categories are created: “corrupt conduct”, “criminal conduct”, “criminal involvement” and “serious improper conduct”. The “serious improper conduct” category incorporates conduct which is not criminal or corrupt, but which would usually lead to dismissal.

The Act provides the following definitions:

"corrupt conduct" means conduct referred to in section 13 (1) (a) (i) or (ii);
"criminal conduct" means conduct referred to in section 13 (1) (a) (iii), (iv),
(v) or (vi);

"criminal involvement" means involvement referred to in section 13 (1) (b);
"serious improper conduct" means conduct referred to in section 13 (1) (c);

13. (1) Subject to subsection (3), the Commission shall --
- (a) receive information furnished to it by any person who alleges that a public officer has --
 - (i) corruptly acted or corruptly failed to act in the performance of the functions of his or her office or employment; or
 - (ii) corruptly taken advantage of his or her office or employment as a public officer to obtain any benefit for himself or herself or for another person; or
 - (iii) committed a scheduled offence whilst acting or purporting to act in his or her official capacity; or
 - (iv) committed an offence under section 552 of *The Criminal Code* by attempting, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence; or
 - (v) committed an offence under section 553 of *The Criminal Code* by inciting, whilst acting or purporting to act in his or her official capacity, the commission of a scheduled offence; or
 - (vi) committed an offence under section 558 of *The Criminal Code* by conspiring, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence;

- (b) *receive information furnished to it by any person who alleges that another person has been involved in criminal conduct engaged in by a public officer in such a manner that the other person could be regarded, under Chapter II of The Criminal Code, as having taken part in committing an offence, or as having committed an offence or as being an accessory after the fact to an offence;*
- (c) *receive information furnished to it by any person who alleges that a public officer has engaged in conduct (other than corrupt conduct or criminal conduct) that --*
 - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public body or public officer; or*
 - (ii) *constitutes or involves the performance of the public officer's functions in a manner that is not honest or is not impartial; or*
 - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
 - (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or another person,*
and constitutes or could constitute --
- (v) *an offence against the Statutory Corporations (Liability of Directors) Act 1996 _4 or any other written law; or*
- (vi) *a disciplinary breach providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct);*

2.3.4 Independent Commission Against Corruption, Hong Kong

Under the Independent Commission Against Corruption Ordinance (Hong Kong: Cap. 204), the Hong Kong ICAC's investigations are focused on breaches of the *Prevention of Bribery Ordinance* (Hong Kong: Cap. 201) and the *Corrupt and Illegal Practices Ordinance* (Hong Kong: Cap. 288). Crown employees suspected of blackmail may also be investigated.

The *Prevention of Bribery Ordinance*, as its title suggests, targets bribery and attempted bribery of public officials. The *Corrupt and Illegal Practices Ordinance* details offences relating to election fraud, and includes practices such as personation, treating, bribery and intimidation in respect of elections. The jurisdiction of the Hong Kong ICAC is clearly more specific and focussed than agencies in Australia.

Chapter 3

The Extent of The ICAC's Jurisdiction

3.1 Legislative intent re the ICAC's Jurisdiction

The ICAC's jurisdiction is focused on public officials and public authorities. These are defined in the following terms in s.3 of the Act:

Public authority includes the following:

- (a) a Government Department, Administrative Office or Teaching Service,
- (b) a statutory body representing the Crown,
- (c) a declared authority under the Public Service Act 1979,
- (d) a person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:
 - (i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or
 - (ii) is required by or under any Act to be audited by the Auditor-General, or
 - (iii) is an account with respect to which the Auditor-General has powers under any law, or
 - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) a local government authority,
- (f) the Police Force,
- (g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.

Public official means an individual having public official functions or acting in a public official capacity, and includes any of the following:

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,
- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly,

- (f) *a judge, a magistrate, or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),*
- (g) *an officer or temporary employee of the Public Service or a Teaching Service,*
- (h) *an individual who constitutes or is a member of a public authority,*
- (i) *a person in the service of the Crown or of a public authority,*
- (j) *an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of public authority is kept, of attending meetings or carrying out the business of any body constituted by an Act*
- (k) *a member of the Police Force*
- (k1) *an accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,*
- (l) *the holder of an office declared by the regulations to be an officer within this definition,*
- (m) *an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.*

Mr Greiner's Second Reading speech on the *ICAC Bill* noted that the Government aimed to have as broad a jurisdiction for the Commission as possible:

*The Commission's jurisdiction will cover all public officials. The term public official has been very widely defined to include members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of departments and authorities. Local government members and employees are also included. In short, the definition in the legislation has been framed to include everyone who is conceivably in a position of public trust. There are no exceptions and there are no exemptions.*⁶⁷

3.2 Exclusions from the Commission's jurisdiction

3.2.1 Boards appointed by the Governor

The Audit Office has identified the following seven types of NSW public sector organisations which are governed or advised by a board or committee: universities; budget sector companies; statutory, regulatory authorities; company State Owned Corporations (SOCs); statutory SOC; non-corporatised Government Trading Enterprises; and other statutory and non-statutory bodies and authorities. There are in excess of 600 such organisations in New South Wales established under various statutory regimes which govern their operation.⁶⁸

⁶⁷ NSW Legislative Assembly Hansard, 26 May 1988, p. 676

⁶⁸ NSW Audit Office, *On board: guide to better practice for public sector governing and advisory boards*, 1998, p.1.

The question of whether ICAC's jurisdiction should be extended to include boards appointed by the Governor was raised by the former Commissioner of the ICAC, the Hon. Barry O'Keefe, in evidence to the previous Committee. He advised that:

*... at this time persons who are appointed by His Excellency the Governor to various boards do not fall within the ambit of our jurisdiction because they fall outside the ambit of the definition of "public official". There are a number of such boards, some of which deal with nature reserves, forest areas and the like. Substantial budgetary provisions are made in respect of those agencies.*⁶⁹

In its submission to the second stage of the Review, the ICAC reiterated this concern about officials and authorities which fall outside its jurisdiction because they are not subject to a disciplinary instrument. It confirmed that amendments to the Act by the *ICAC Amendment Act 1994* only partly resolved these difficulties and identified the absence of jurisdiction in relation to certain office holders, not covered by the amendment, as an outstanding issue. Boards appointed by the Governor, which are not subject to any disciplinary instrument and, therefore, are excluded from the Commission's jurisdiction under s.9(b), were cited as an example.⁷⁰

In practical terms the issue of ICAC's jurisdiction over boards has not proven to be a significant issue. Commissioner Moss confirmed that the ICAC had received few matters relating to boards. The following evidence illustrates the extent of this problem as a real issue for the ICAC:

Mr PRICE: *My concern is that, to invite people to accept public appointments at the level at which some of these boards operate, the last thing they need are accusations, that may be false, that are even considered by Independent Commission Against Corruption. To actually write them into the system at this stage without pretty good reason would concern me. It is extremely difficult to get people to serve on quite a number of boards. The further you get from the metropolitan area the more difficult it becomes.*

Ms MOSS: *I put it for consideration, because they do exercise a public official function and they do not appear to be covered by the legislation.*

CHAIR: *Not that it creates a specific problem that you feel needs immediate attention.*

Ms MOSS: *I do not think that practically we deal with that many of those issues.*

Mr BROWN: *Have you received many complaints about members of boards acting inappropriately?*

Mr PEHM: *No, not in the time I have been there.*

⁶⁹ Evidence, 31 October 1997

⁷⁰ ICAC, Final submission, p.13.

*Ms MOSS: We probably have. I really do not know. I would have to take that question on notice. Again, in the time I have been there I have not noticed that there are so many. My recollection is you would have the occasional matter concerning a board member, say, on a management committee—or the occasional board. No, we do not have it a lot.*⁷¹

In subsequent correspondence in response to matters taken on notice during evidence, the ICAC advised that:

*In relation to members of Boards and Committees, the Commission's submission is based again on the situation that unless there are criminal offences, then it may not be possible to find corrupt conduct. This is because in some instances there are no legislative provisions for the dismissal or disciplining of such members*⁷².

Although the Commission could not identify all instances where this had been an issue it did provide two illustrations of the potential problems. The first relates to the Lord Howe Island Board and the ICAC's recent discussion paper on governance issues in small communities, entitled "*Trouble in Paradise*". The Commissioner advised that:

*. . . it should be noted that the Minister cannot remove the Islander members of the Board, and there are no disciplinary provisions in the Lord Howe Island Act. Accordingly, in the absence of any criminal offence, no finding of corrupt conduct could be made against Islander members of the Board even if there were conduct that fell within section 8.*⁷³

Another example given by the Commissioner related to the *Fisheries Management (General) Regulation 1995* which "originally made no provision for the Minister to remove a member of the Management Advisory Committees". Consequently, unless the conduct was a criminal offence corrupt conduct could not be established and the Commission's handling of a least one matter was affected by this situation. Despite later amendments to the regulation, industry members of Management Advisory Councils can only be removed for criminal offences and specific breaches of fisheries legislation. Industry members of such committees engaging in corrupt conduct that is not criminal are excluded from the ICAC's jurisdiction. The Commissioner identified the central problem as follows:

*In essence, the issue with Boards of this nature, is that unless the conduct in question is a possible criminal offence, then there is the risk that if the legislation does not enable the Minister to remove a member from the Board, or is silent on the issue, then the person and their conduct may fall outside the Commission's jurisdiction.*⁷⁴

Ascertaining the extent of the problem was made more difficult because the enacting legislation for each statutory Board and Committee would have to be examined. There are

⁷¹ ICAC, Final evidence: 18 June 2001, p.18

⁷² Letter from Commissioner Moss, dated 20 August 2001.

⁷³ *ibid.*

⁷⁴ *ibid.*

over 600 governing boards or advisory boards/committees in the NSW sector⁷⁵ but no central recording of their number or nature. The Commission indicated that in the future it would be examining the lack of central recording and undertaking corruption prevention work in relation to committees and boards.⁷⁶

The ICAC also noted that the Local Government and Shires Associations indicated that they do not support ICAC involvement in investigating complaints about boards in cases where the boards concerned relate to areas of primary concern to local government (such as waste management boards).⁷⁷ The submission from the Local Government and Shires Association advocated that:

*In circumstances where persons have been appointed to a Board by the Governor, the Associations consider that the Code of Conduct, Regulation and complaint handling procedure set out in the response to Issue One [ie for local councils], is fully able to resolve breaches, if the purpose of the Board relates to a local Government activity.*⁷⁸

The complaint handling procedure favoured by the Associations involved the issuing of a minimum code of conduct by regulation and the establishment of a Local Government Professional Standards Board to deal with complaints about issues contrary to the regulation which have not been effectively resolved.⁷⁹

The Associations identified Waste boards as a long-standing function of Local Government with membership mostly comprising Local Government executives/councillors. However, the Associations considered that if a Board was not an area of primary concern to Local Government, then jurisdiction under the ICAC Act may be reasonable.

The Committee canvassed a number of options, other than conferring jurisdiction on the ICAC, with Commissioner Moss who agreed on the potential for possible corruption prevention and education initiatives about boards.⁸⁰ The Commission had already begun recent corruption education and prevention initiatives in the Local Government area.

The Committee notes that a number of initiatives to regulate various aspects of boards have been undertaken by other oversight bodies. For example, the New South Wales Audit Office conducted a performance audit of corporate governance in 1997⁸¹ and has since published guidelines for the operation of boards. Entitled *On board: guide to better practice for public sector governing and advisory boards*, the guidelines cover key factors affecting board efficiency and effectiveness including: the role of the board, Chair and CEO, board committees, appointments, induction and training, board meetings, standards, risk management and liability, and reporting and evaluation. Better practice principles are outlined for each of these key factors by the Audit Office based on the findings arising from

⁷⁵ NSW Audit Office, *On board: guide to better practice for public sector governing and advisory boards*, 1988, p. 1

⁷⁶ *ibid.*

⁷⁷ Local Government and Shires Association of NSW submission, p. 3

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Moss, Final evidence, p.19.

⁸¹ See also *Corporate Governance in Principle*, *Corporate Governance in Practice*, and *Supplement: Survey Findings* all published in June 1997.

its performance audit. Such principles include: appointment on merit; transparent appointment processes; public advertising of positions; adoption of a code of conduct, a register of related party transactions and a register of pecuniary interests.⁸² In some instances, for example SOCs, there are statutory requirements for board members to disclose their interests.⁸³

The Committee also notes the resource implications for the ICAC of conferring such additional jurisdictional, a factor acknowledged by Commissioner Moss in evidence:

***Mr PRICE:** If you took it to another conclusion you could go to park trusts and to boards, which would get quite out of hand administratively and you could not physically finance the Commission. It would be like the Fair Legal Practices Corporation of California, which is unbelievably complicated.*

***Ms MOSS:** I hear what you say.⁸⁴*

3.2.2 Local Government

Since the passage of the *Local Government Act 1993*, local government councillors no longer operate under a disciplinary instrument although it is mandatory for all Councils to adopt a code of conduct and to review the code after each election. Section 440(1) requires every council to prepare or adopt a code of conduct to be observed by councillors, members of staff, and delegates of the council. Section 440(3) further requires that a council, within 12 months after each ordinary election, review its code of conduct and make such changes to it as it considers appropriate.⁸⁵

However, the extent of the ICAC's jurisdiction in relation to local government turns on whether or not a council has adopted its code of conduct as a disciplinary instrument. If a council has not done so, conduct of local councillors or a local council will only fall within the ICAC's jurisdiction if it "could constitute or involve" a criminal offence. The percentage of councils which have adopted their code of conduct as a disciplinary instrument is not clear.

During the previous Committee's 1997 inquiry, Commissioner O'Keefe highlighted this area as a jurisdictional problem for the ICAC. He told the Committee:

In cases where no disciplinary instrument has been adopted, it is necessary for the ICAC when examining conduct to bring it within section 9(1) – that is, criminal conduct – there being no disciplinary matter that can be conjured up. That is something we would invite the Committee's attention to. This is something that should be mandatory for councils and perhaps there should be a time limit within which they should be required to adopt such an instrument. Many councils have done so, but a number have not.⁸⁶

⁸² NSW Audit Office, *On board: guide to better practice for public sector governing and advisory bodies*, 1998, pp. 11, 18.

⁸³ *ibid*, p.18.

⁸⁴ ICAC Commissioner, Final evidence, 18 June 2001, p.19.

⁸⁵ Submission from the Department of Local Government, dated 7 August 2000.

⁸⁶ Evidence, 31 October 1997

This proposal had support from the NSW Bar Association during the current review. The Bar Association submitted:

*There is an obvious gap where the Council has not adopted a code of conduct as their disciplinary instrument. It should be mandatory for Councils to do so, alternatively there could be some code of conduct drawn up and a deeming provision for tardy Councils.*⁸⁷

However, the Department of Local Government opposes any amendment that would bring breaches of a Council code of conduct into s.9 of the *ICAC Act*. The Department submitted that a number of factors made it unnecessary for council codes of conduct to be included in s.9 and argued that there already are sufficient disciplinary controls on local government, including the mandatory code of conduct.⁸⁸ Further disciplinary provisions under the *Local Government Act 1993* include the pecuniary interest provisions, meetings regulation, departmental investigations, and dismissals or disqualifications from civic office under ss.234, 275, and 329 of the *Local Government Act 1993*.

The submission received from the Local Government and Shires Associations similarly expressed opposition to including Council codes of conduct in s.9 of the *ICAC Act*:

While the Associations maintain that councils must remain independent of Governmental regulations, the need for strengthening of current arrangements is acknowledged.

However, the Associations submit that the Local Government Act, or supporting regulations, are the only appropriate vehicles to provide strengthened procedures.

*Amendment of the ICAC Act 1988 to provide for councillor conduct examination is not supported.*⁸⁹

Instead, the Associations argue that “Section 440 of the Local Government Act provides sufficient framework for development of appropriate codes of Conduct”.⁹⁰ They made an alternative proposal to improve accountability of Councils through a strengthened code of conduct mechanism combined with a new Professional Standards Board.

On 9 February 2001, the Committee convened a round table discussion, involving representatives of the ICAC, the Department of Local Government and the Local Government and Shires Associations, to clarify their exact positions and reach agreement on the most appropriate solution to this jurisdictional issue. Negotiations continued between the ICAC, the Department and the Associations following the conference and the ICAC’s final submission indicates that it will work with the Department and Associations to resolve the outstanding issues identified through the talks.

⁸⁷ NSW Bar Association submission, p. 3

⁸⁸ Minister for Local Government submission, p. 2

⁸⁹ Local Government and Shires Association of NSW submission, p. 1

⁹⁰ *ibid.*, p.2

The ICAC submitted that the objections of the Department of Local Government and the Local Government and Shires Association seem to be “based on the premise that ICAC was seeking to extend its jurisdiction to cover all breaches of a local Council’s code of conduct.” The Commission clarified that this was not its intention but that it did “seek to cover those instances where the conduct falls within s.8 of the ICAC Act and is also a substantial breach of the code . . . consistent with the regime in place for Ministers and Members of Parliament.”⁹¹

Following the round table discussions, the ICAC “examined possible instances where to establish corrupt conduct within the current meaning of the [ICAC] Act it would be necessary to make reference to a code of conduct in the absence of an applicable criminal or disciplinary offence”. The Commission considered that “[t]he matters not presently covered by criminal or disciplinary offences that would be of the greatest concern to [it] are in the areas of non-pecuniary conflicts of interest, and improper involvement or interference in employment within the council.”⁹² The ICAC submitted that:

While the Local Government Act has a regime in place for dealing with pecuniary conflicts of interest, there is nothing in place that would enable the ICAC to consider corrupt conduct that might arise from non-pecuniary conflicts of interest. Such a situation might occur with a vote on a question of zoning or development approval that favours the interests of a friend or supporter. ICAC may want for jurisdiction on such matters because it would not be a criminal offence. However, it may represent a significant and substantial breach of the council’s code of conduct.

*The other area of concern is to do with employment matters. Examples of the type of corrupt conduct that would be of concern to the Commission might involve a councillor improperly influencing or interfering with the employment decisions of Council staff to ensure an outcome sought by the Councillor. Again there may be no criminal offence, and no disciplinary offence covering the Councillor, leaving the misconduct outside the scope of the Commission’s jurisdiction.*⁹³

The ICAC indicated that it considered these matters to be of concern and wished to work with the Department of Local Government and the Local Government and Shires Associations to arrive at ensuring the establishment of a suitable regime that would capture only those matters that should be regarded as corruption. The ICAC confirmed that:

[it] has no interest in, or desire to establish a general jurisdiction over breaches of local government codes of conduct – only those instances where there is corrupt conduct, within the meaning of section 8 and where there is a substantial and significant breach of the applicable code of conduct.

⁹¹ ICAC, Final submission, p.14.

⁹² *ibid.*

⁹³ *ibid.*, pp.14-15.

*The Commission and the Department of Local Government propose to progress the questions arising from staff employment and significant conflicts of interest in the context of the Department of Local Government review of the Code of Conduct and councillor behaviour matters already before the Department.*⁹⁴

Commissioner Moss explained further the nature of ICAC's interest in the local government jurisdiction particularly in terms of s.8 of the *ICAC Act* which aims at capturing abusive office for personal gain:

*Ms MOSS: Personal gain, or perhaps gain even if it was not personal but was inappropriate unacceptable gain for someone that was not a legitimate social or group issue. If, say, an elected councillor stood on either a development or non-development platform, one could understand many of the decisions that that person would make, albeit they would obviously take into account the work of the general manager's staff on it. You can understand the leaning that that person would have. I am talking more about where it is clearer that we are referring to something inappropriate—an abuse of office; a partial view that is more than just partial; when it is for an unacceptable motive or unacceptable reason.*⁹⁵

To date the ICAC had not received a lot of cases of this nature.⁹⁶ However, it was able to identify a number of recent matters concerning the conduct of local council officials which raised the possibility of conduct that might be considered to be corrupt but which would not constitute a criminal or disciplinary offence for the purposes of s.9 of the *ICAC Act*.⁹⁷ The examples included:

1. *An allegation that a Mayor and Councillor improperly established a position and interfered in the recruitment process so as to employ their campaign manager.*
2. *An allegation that the Mayor of another Council overrode the recommendation of a selection panel, and instead appointed the Mayor's campaign manager to the position.*
3. *An allegation that a Mayor recalled the General Manager's performance review to downgrade the assessment after the General Manager had complied with s.11 of the *ICAC Act* and notified the ICAC of an allegation of corruption concerning the Council.*
4. *An allegation that Councillors resolved to resume a property did not meet the program's guidelines.*
5. *An allegation that Councillors voted in favour of a particular senior manager's development applications to keep in the manager's "good books".*⁹⁸

⁹⁴ *ibid.*

⁹⁵ ICAC, Final evidence, p.17.

⁹⁶ *ibid.*, p.16.

⁹⁷ Letter from the ICAC Commissioner, dated 20 August 2001.

⁹⁸ *ibid.*

3.3 Outsourced Government Services

The current trend for contracting and tendering out government services, and for privatising or corporatising government enterprises raises general questions about the continuing accountability for those services. In respect of the ICAC, the issue that arises is: do (and should) privatised or contracted out services remain within the Commission's jurisdiction?

Under the *ICAC Act*, the Commission may investigate any person (whether a public official or not) whose conduct may adversely affect the exercise of official functions of a public official or public authority, providing that conduct falls within the definition of corrupt conduct in ss 8 and 9. The ICAC recently reported that 56% of its public investigation reports from 1988 – 1998 “dealt with non-officials in conjunction with public and elected officials”⁹⁹.

The ICAC's jurisdiction, in terms of investigations and findings, in relation to contracted services is less clear. It is arguable that an individual performing services on a contract basis would be captured in the definition of “public official” in s.3 of the *ICAC Act*. Subsection (m) identifies a public official as:

an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.

A number of sources have discussed these accountability-related issues in recent times and it has been argued that the use of public funds for the performance of services is a key consideration in determining the appropriate level of oversight to be applied.

In 1996 the Industry Commission completed an inquiry into *Competitive Tendering and Contracting by Public Sector Agencies*. A key finding of the inquiry was that agencies cannot transfer their responsibility for accountability in the provision of services:

*... irrespective of whether an agency delivers the service itself or contracts out all or parts of the service, it remains accountable for ensuring that the required service is actually delivered. Public money is being spent for the provision of the service and the contracting agency is responsible for ensuring that this money is spent effectively and with propriety.*¹⁰⁰

In a similar vein, the former NSW Ombudsman supported the view that:

*The fact that expenditure is directed towards the **private** sector does not alter the **public** nature of the source of the funds. It is the source of the funds, not their destination, which is of paramount concern in the question of accountability.*¹⁰¹

⁹⁹ ICAC, *Private contractors' perceptions of working for the NSW public sector*, January 1999, p. 1.

¹⁰⁰ Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies* 1996, p. 86.

¹⁰¹ See also A. Freiberg, “Commercial Confidentiality, Criminal Justice and the Public Interest”, *Current Issues in Criminal Justice*, Vol 9, No 2, November 1997

Consideration of the public source of funding for contracted services has been the main criterion used by the ICAC to date to determine its jurisdiction. Commissioner Moss advised:

***Ms MOSS:** We would want to take a broad reading of the legislation. Indeed, we attempted basically to follow the public funds. Where the public funding allows a carrying out of a public function, albeit that function is now contracted out—we took the view in that motor vehicle case that those Authorised Unregistered Vehicle Inspection Station inspectors, although not employed by the public sector, were carrying out a public function or business and were therefore covered by our Act. Much would depend on following the public money and then seeing how they would carry out for the public sector their public official functions. Indeed, when you look at the legislation, it is sufficiently broad to allow us to do that. Looking at section 3, the definition of "public official" is "an individual having public official functions or acting in a public official capacity". However, there may very well be situations where there would be doubt. For example, an accounting firm doing accounting work for the public sector for fees paid by the public sector. It would be arguable that that particular body would not be carrying out a public official function, although the fact that the body is doing business with a public official would probably mean that the body is covered.¹⁰²*

The ICAC Report on *Private contractors' perceptions of working for the NSW Public Sector* made the following observation about the Commission's jurisdiction:

Section 3 of the [ICAC Act] ... defines a public official as an individual having public official functions or acting in an official capacity. This includes a person engaged by a public authority. In other words, private contractors and consultants can be defined as public officials when they contract for public money and hence may come under the jurisdiction of the ICAC"¹⁰³.

A broad range of service providers may conceivably be included in this definition as 'acting on behalf of, or in place of' a public authority, including 'pink slip' inspectors, community or disabled service providers, private auditors, security officers and waste collectors.

The contrary view is that aspects of the definition of 'public official' in the Act suggest that there is no automatic inclusion in the ICAC's jurisdiction of contracted-out services. In particular, (k1) of the definition provides for inclusion of "an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*". This amendment was made to the *ICAC Act* as a consequence of the *Environmental Planning and Assessment Amendment Act 1997*, which allowed for accredited certifiers to undertake building inspections. It might be argued that the amendment to the definition to specifically include one out-sourced service implies that out-sourced services generally are not included in the definition. That is, other contracted out or privatised services must also be specifically included if they are to fall within the ICAC's jurisdiction. In further support of this argument is the provision at (l) for regulations to declare an office holder to be a public official.

¹⁰² ICAC, Final evidence, p.13.

¹⁰³ ICAC, *Private contractors' perceptions of working for the NSW Public Sector*, January 1999, p. 43.

In the case of Junee Correctional Centre, which is privately managed pursuant to Part 12 of the *Crimes (Administration of Sentences) Act 1999*, the prison and its officers remain within the ICAC's jurisdiction under s.245 of the *Crimes (Administration of Sentences) Act 1999*. Section 245 provides that the *ICAC Act* continues to apply to correctional centres privately managed under contract, and its officers and employees are considered 'public officials' within the meaning of the *ICAC Act*. This provides a precedent for the continued oversight of Government services that are being performed under contract by the private sector, and is a further example of the Parliament explicitly providing for the continued authority of the ICAC over an outsourced service.

The ICAC gave consideration to this issue in both its initial and final submissions to the review and concluded:

In considering ICAC jurisdiction over contracted-out government services, care needs to be taken to ensure that there remains a nexus between the conduct being investigated and public official functions. It is not, and should not be, the role of the ICAC to investigate corrupt conduct in the private sector where such conduct has no such nexus with the exercise of public official functions.

In this context it is also important to note that the meaning of "public official functions" is changing. Some services which were traditionally seen as the province of government are being or have been completely privatised. For example, previously the government controlled the State Bank of New South Wales. At that time there was no doubt that the State Bank was a public authority within the meaning of the ICAC Act and accordingly the ICAC had relevant jurisdiction. Since its sale by the Government, however, the State Bank has ceased to be a public authority and accordingly and appropriately the ICAC no longer has jurisdiction.

In other cases, however, the position will be less clear. This is particularly the case where a government agency remains responsible for the provision of services to the public but elects to contract out to the private sector the provision of those services. In these instances the provision of the service remains a public function.

Corruption in the provision of such services is likely to undermine confidence not only in the private sector provider of the service, but more importantly in the public sector agency responsible for the service and may have a flow-on detrimental effect on the confidence of the community in the processes of the public sector and government as a whole. Given that public money is being paid to private sector organisations to provide public services, it is important that the State have a role in overseeing how the money is utilised and that appropriate corruption prevention and investigation mechanisms are in place. ICAC should continue to have a role in this area.

*Arguably, contracted out services are likely to fall within the ICAC's jurisdiction given the definition of public official in s.3 of the ICAC Act.*¹⁰⁴

¹⁰⁴ ICAC, Final submission, pp.15-16.

The ICAC advised that its jurisdiction in the case of contracted-out services became an issue in the investigation into the registration of motor vehicles by the RTA:

In particular, the question arose as to whether the ICAC had jurisdiction over the conduct of Authorised Unregistered Vehicle Inspection Station (AUVIS) inspectors who are licensed by the RTA to examine and record motor vehicle identifiers.

The RTA submitted that the AUVIS inspectors were not public officials within the meaning of the ICAC Act. The RTA submitted that the function performed by an AUVIS inspector is merely the provision to the RTA of expert advice concerning the physical suitability of a motor vehicle for the establishment of registration. It was submitted that AUVIS are private enterprise service stations and mechanical repair facilities and that, accordingly, it would be inappropriate to regard their proprietors and examiners as “public officials”. Although the RTA accepted that it relied on AUVIS inspectors in the discharge of its public function, it claimed that the inspection and report of the examiners was not, in itself, the exercise of any relevant public function.

In this matter, ICAC took the view that AUVIS inspectors were public officials within the meaning of the ICAC Act as, after reviewing their function and the legislative provisions in relation to registration and inspection of motor vehicles, it was clear that the identity checks carried out by AUVIS inspectors were undertaken on behalf of the RTA and the supervision of AUVIS inspectors by the RTA indicated the connection between them and the RTA.

It was clear, in particular, that the RTA would not be able to perform its public official function of registering vehicles without the inspection process undertaken by the AUVIS inspectors. In the event that their activities standing alone could not be characterised as “public official functions” within the meaning of the ICAC Act then they would be persons “engaged by or acting for or on behalf of, or in the place or as ... delegate of” the RTA within the definition of s.3 of the ICAC Act.

Whilst this is a view reached by the ICAC in the present case, and which may have applicability to the way in which such matters are considered in the future, the finding remains open to challenge.¹⁰⁵

In these circumstances the ICAC submitted that consideration should be given to amending the ICAC Act to clarify that functions or services for which a public sector agency is responsible but which are contracted out to a private sector organisation nevertheless attract the jurisdiction of the ICAC in relation to the performance of those services or functions by that private sector organisation.¹⁰⁶

¹⁰⁵ *ibid.*, pp.16-17.

¹⁰⁶ *ibid.*, p.17.

3.4 Corporatised Government Enterprises

In the case of corporatised government service providers (such as water and electricity providers, and rail services), the enabling legislation makes clear that the State Owned Corporations (listed at schedule 1 of the *State Owned Corporations Act 1989*) remain within the ICAC's jurisdiction. Section 36(2) of the *State Owned Corporations Act 1989* (SOC Act) provides:

For the purposes of the *Independent Commission Against Corruption Act 1988*:

- (a) *State Owned Corporations and their subsidiaries are public authorities, and*
- (b) *directors, officers and employees of State Owned Corporations or their subsidiaries are public officials.*

However, the SOC Act also provides that s.23 of the ICAC Act, that is the power to enter public premises, does not apply in respect of Company State Owned Corporations or any of its subsidiaries or to persons who are public officials by virtue of their connection with a Company State Owned Corporation or any of its subsidiaries.

The ICAC cited the Auditor General's powers in respect of State Owned Corporations in support of its claim for jurisdiction in relation to such bodies:

The Auditor General also has certain powers in respect to State Owned Corporations (e.g. ss.24 and 24A of the State Owned Corporations Act) which, irrespective of s.36, would bring State Owned Corporations within the definition of public authority in s.3 of the ICAC Act.

Although set up as corporations, these organisations remain in public ownership and are accountable to the public, through the State Government, for the way in which they exercise their functions and utilise their resources. Whilst these organisations continue to be in public ownership, it is argued that it is appropriate that the ICAC continue to have jurisdiction.¹⁰⁷

At present, there do not appear to be any Company State Owned Corporations.

¹⁰⁷ *ibid.*, pp.17-18.

Chapter 4

The Commission's powers to make findings and recommendations

4.1 The current scope of findings and recommendations

The Commission's powers relating to findings and recommendations are founded on its principal functions. Section 13(3) stipulates that:

The principal functions of the Commission also include:

- (a) *the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and*
- (b) *the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.*

The powers are clarified in ss 13(4) and (5):

13(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).

13(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

- (a) *findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,*
- (b) *opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons,*
- (c) *findings of fact.*

Sections 74A and 74B of the ICAC Act relate to the content of the Commission's reports to Parliament, including the reporting of Commission findings. They provide:

74A Content of reports to Parliament

- (1) *The Commission is authorised to include in a report under section 74:*
 - (a) *statements as to any of its findings, opinions and recommendations, and*

- (b) *statements as to the Commission's reasons for any of its findings, opinions and recommendations*
- (2) *The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*
 - (a) *the prosecution of the person for a specified criminal offence,*
 - (b) *the taking of action against the person for a specified disciplinary offence,*
 - (c) *the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.*

74B Report not to include findings etc of guilt or recommending prosecution

- (1) *The Commission is not authorised to include in a report under section 74 a statement as to:*
 - (a) *a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*
 - (b) *a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*
- (2) *A finding or opinion that a person has engaged, is engaging or is about to engage:*
 - (a) *in corrupt conduct (whether or not specified corrupt conduct)*
 - (b) *in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),*
is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.

These sections were incorporated in the *ICAC Act* in response to the High Court's *Balog*¹⁰⁸ decision, which found that the ICAC's reporting powers did not include the power to make findings of guilt or of corrupt conduct. Rather, the Court found that the only finding the Commission could make under s.74 (in addition to reporting the results of its investigation) was a finding whether there is any evidence warranting consideration of prosecution of a person for a specified offence.

The High Court's decision canvassed a number of dangers associated with a power to make findings of corrupt conduct. In particular, the Court noted the potential damage to reputations and possible prejudice to any subsequent trial. Such disadvantages had been identified previously by the ICAC. During the 1992 Review of the ICAC, former Commissioner, Ian Temby QC, addressed the issue of findings of corrupt conduct and identified some of the benefits and disadvantages of the 'labelling' power:

As to a power to make findings as to corrupt conduct, it is obvious that there is significant justification for it. It is strongest in the case of a person who has been wrongly accused of corruption. A power in the Commission to dispel the allegation in terms may be important.

*But there are significant factors weighing against such a power. For many, a finding of corrupt conduct is akin to a finding that a criminal offence has been committed. Its consequences may be for many just as devastating: loss of reputation and loss of employment. It also forces the Commission in any report to seek to classify conduct by reference to complicated and difficult legal concepts*¹⁰⁹.

Mr Temby commented in a similar vein in the *Second Report on Investigation into the Metherell Resignation and Appointment*:

The witnesses who are "affected" persons ... should expect that clear statements will be made about them. As such people typically see it, the finger has been pointed at them in evidence, and they are entitled to a statement as to the Commission's concluded views one way or the other.

*The best option may be to enable the Commission to make such findings and recommendations, but not require it to do so. There would then be a clear discretion in marginal cases*¹¹⁰.

The Hon Adrian Roden QC, previously an Assistant Commissioner at the ICAC, considered the term corrupt conduct to be relevant to establishing the ICAC's jurisdiction but to be of little value in making findings against individuals. He made the following comments in the ICAC's *Report on Investigation into North Coast Land Development*¹¹¹:

¹⁰⁸ *Balog vs ICAC* (1990) 169 CLR 625.

¹⁰⁹ Committee on the ICAC, *Review of the ICAC*, 1993, p. 41

¹¹⁰ ICAC, *Second Report on Investigation into the Metherell Resignation and Appointment*, 1992, p. 16.

¹¹¹ July 1990, pp. xiv – xviii.

‘Corrupt conduct’ is a term used and defined in the ICAC Act. It has a technical meaning given to it by the Act. From the outset, I was of the opinion that no useful purpose would be served by determining whether any conduct of any person, disclosed in the course of the investigation, amounted to corrupt conduct as defined in the Act. ... Whether alleged conduct does or does not amount technically to corrupt conduct, is relevant for purposes of jurisdiction only. It determines whether the Commission can properly embark upon an investigation¹¹².

Mr Roden proposed that the ICAC be limited in its findings to making findings of fact, without including labels of corrupt conduct, for example:

Y released the Prospect County Council information which he corruptly sold to X without authority and in breach of his duty as a public official¹¹³.

Also on this issue, the Hon Athol Moffitt QC, CMG, submitted to the 1992 ICAC Committee Review that the Commission’s power to make findings and label individuals had the potential to cause serious injustice. He argued that the ICAC:

... should not have a power to report any opinions or findings of corrupt conduct (however defined) or any judgemental opinion concerning a named or identifiable person¹¹⁴.

Mr Moffitt considered that only findings of primary facts should be made by the Commission “where findings or opinions would be adverse to a named or identifiable person”¹¹⁵. He defined the term primary facts in the following way:

Primary facts shall include the fact of the occurrence of any event, including any conversation or the existence of any state of mind, including the intention of any person, whether such fact is established by direct evidence or is inferred from other evidence and a finding of primary fact shall include a finding that any fact did not exist, but shall not include any finding or opinion concerning the quality of the conduct, conversation, state of mind or intention of any person¹¹⁶.

The ICAC’s response to Mr Moffitt’s proposal was that:

... many matters could not be brought to finality if ICAC findings were limited to primary facts. The ICAC drew on a number of its investigations and suggested that in these cases a limitation of ICAC findings to primary facts would have meant that the Commission could add little value to the raw transcript of evidence¹¹⁷.

¹¹² Committee on the ICAC, op. cit., p. 30.

¹¹³ *ibid.*, p. 43.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*, pp. 43, 49.

¹¹⁶ *ibid.*, p. 51.

¹¹⁷ *ibid.* p. 50.

The ICAC submitted to the current review that it recognises the potential seriousness of a finding of “corrupt conduct” and stated concerns that the impact of the label differs according to the public prominence of the individual so labelled. However, the ICAC did not consider that the impact and consequences of such labelling as something to be remedied by the Commission.¹¹⁸

The ICAC also outlined the different effects of making a corrupt conduct finding:

In the first instance, where the Commission does make findings of “corrupt conduct”, the term itself is so laden with implications and potential stigma, that it is pretty much incapable of usefully communicating any distinction between the impropriety of the conduct in different instances. The label of “corrupt conduct” may be applied equally to a small fraud committed once or to a large enterprise undertaken over many years. In each case, the label “corrupt conduct” is applied, but that label makes no distinction between the respective misconduct. The stigma of the label and the associated “public pillory” (as described by The Hon. Athol Moffitt QC, CMG during the 1992 Review of the Act) come into play regardless of the relative seriousness of the particular misconduct.

In the other situation, where the Commission does not make a finding of corrupt conduct, again the picture is often oversimplified so that the absence of a finding appears to be an exoneration, even if there are adverse conclusions drawn. Less interest is taken in the substance of the findings if no overall conclusion that there was “corrupt conduct” is drawn.

The Commission attributed this effect to the fact that the legislation allows for a corrupt conduct finding to be applied and the consequent expectation which has developed that the ICAC will report substantially in those terms. It suggested an option in which the Commission made critical or adverse comment but did not apply the corrupt conduct label. According to the ICAC this might draw and focus attention on the substance of any findings and critical comment and may assist in situations where the person subject to criticism is not labelled as corrupt and uses the absence of such a finding to mean they have been exonerated.¹¹⁹

During the 1997 review, former ICAC Commissioner, the Hon. Barry O’Keefe, claimed that the ability to make findings is essential to the ICAC’s functions¹²⁰:

... If the ICAC is to conduct its investigations with a view to determining whether any corrupt conduct has occurred, is occurring or is about to occur, it would indeed be strange if the ICAC could not, at the end of its investigation, state whether or not corrupt conduct had actually occurred.

The ability to make findings of corrupt conduct also have a useful deterrent and educative role in the work undertaken by the ICAC¹²¹.

¹¹⁸ ICAC, Final submission, p.10.

¹¹⁹ *ibid.*, p.10-11.

¹²⁰ ICAC submission, October 1997, p. 48.

¹²¹ *ibid.*

He gave evidence that a label of corrupt conduct was a useful tool:

The shock of the finding and its characterisation as corrupt conduct are often the necessary things to cause the relevant agency to want to change ... Without you being able to point to specific things, there are many agencies that say, “We don’t have a problem and if we don’t have a problem we don’t need to change anything.” The ability to find and characterise facts as involving corrupt conduct concentrates the attention of agencies on that¹²².

The current Commissioner, Ms Irene Moss, is of the same opinion and submitted that:

Whatever view is taken regarding it applying the label of “corrupt conduct”, ICAC considers it necessary that it be able to present established facts and draw conclusions regarding disputed facts arising from investigations it has conducted. In reporting these conclusions, it is desirable that the Commission be able to use ordinary language to clearly and precisely describe particular conduct.¹²³

Commissioner Moss noted that making statements about “affected” persons under section 74A(2) was of “substantial value” for a number of reasons:

Firstly, the requirement is important because it requires the ICAC to examine the evidence before it in respect to each “affected” person to assess whether it is sufficient to warrant consideration of criminal or disciplinary action or dismissal. This ensures that prosecution or disciplinary outcomes of an ICAC investigation are not overlooked. Secondly, those in respect of whom a positive statement is made are placed on notice that evidence will be referred to the DPP or relevant agency with a view towards further action being taken against them. On the other hand, where a statement is made that consideration should not be given to prosecution, disciplinary action or dismissal, then the subject of that statement has a clear statement that the evidence does not warrant such a referral. A positive statement also serves to demonstrate an outcome from an investigation and acts as assurance to the public that further action will be considered¹²⁴.

Other submissions supported Commissioner Moss’s view. For example, the NSW Bar Association favoured the retention of the ICAC’s power to make findings of corrupt conduct, or findings of lesser conduct if other categories are made available. President of the Bar Association, Ms Ruth McColl, gave evidence that it is important to the functioning of the ICAC that it be able to form opinions and make findings:

If you do not ... make those findings of fact or form opinions based on those findings of fact ... it has a very limiting effect on the way the Commission can report on investigations for all the various purposes for which it reports, not just making findings about individuals but also making recommendations concerning various bodies about guidelines ...¹²⁵.

¹²² Evidence, 31 October 1997

¹²³ ICAC, Final submission, p.7.

¹²⁴ ICAC submission, July 2000, p. 7

¹²⁵ Evidence, 20 February 2001.

The Law Society of NSW holds philosophical concerns with the ICAC's power to make findings of corrupt conduct against individuals. It argued:

... the role of investigator should not be confused with the role of judge. The separation of the function of investigation and prosecution from the role of decision making ensures that the zeal of the investigating body is checked by an independent mind. The process of a court hearing ensures that misleading and unreliable evidence is placed under appropriate scrutiny and the civil rights of the persons potentially affected by an adverse finding to know what is alleged against them and to answer those allegations before an independent party are observed. Section 74A and 74B constitute ICAC as a quasi judicial body exercising some of the functions of a court with no appropriate safeguards¹²⁶.

The Law Society was of the view that unfairness could arise because “adverse findings about identifiable persons are too easily confused with criminal convictions”, and could cause damage to reputations¹²⁷. It favoured the removal of the ICAC's power to draw conclusions, express opinions and make findings about individuals, and concluded:

Section 74B should be retained in its current form. Section 74A should be amended to provide that the Commission is authorised to include in its report under section 74:

- (a) a description of the matters which it has investigated in the preceding year; and*
- (b) an outline of the events which the investigation revealed as having occurred; and*
- (c) whether or not evidence obtained as a result of any inquiry has been referred to the Director of Public Prosecutions for consideration¹²⁸.*

If the ICAC's power to make findings is retained, and the additional category of unsatisfactory official conduct adopted, the Law Society submitted that the Commission should only be empowered to forward its findings to the relevant public authority and the Auditor General¹²⁹.

Then Commissioner of the Police Integrity Commission, the Hon PD Urquhart QC, gave evidence to the Committee that emphasised his belief that using the term “finding” creates the undesirable impression of a court determination of guilt or innocence. He submitted:

The notion of “findings” was touched upon by the High Court of Australia in Balog v Independent Commission Against Corruption ... and, later, by the New south Wales Court of Appeal in Greiner Without going into detail about those decisions, it is apparent that a concern was held by some members of these courts that the power to make “findings” is apt to be confused with the exercise of a judicial function by a court of law to make determinations such as whether a person is guilty of a criminal offence...

¹²⁶ NSW Law Society submission, Attachment 1, p. 6

¹²⁷ *ibid.*, Attachment 2, p. 4

¹²⁸ *ibid.*, Attachment 1, p. 6

¹²⁹ *ibid.*, Attachment 1, p. 5

This Commission [the PIC] is not required nor is it able to make findings in the same way as the ICAC. It therefore does not suffer from the difficulty that its determinations may have the appearance of, and consequently be confused with, conclusions of fact and law expected of criminal and disciplinary tribunals. These limitations on the Commission's powers are appropriate and the Commission does not feel constrained in any way by not having a power to make findings. Indeed, it seems entirely unnecessary that the Commission be able to make findings as to whether police misconduct has or has not occurred. What is necessary so that the Commission can pursue its statutory functions is ... for an assessment to be made of the evidence collected during the course of an investigation and for this assessment to inform opinions as to whether evidence is probative of specific conduct. ... Nothing seems to be added by the obligation or the legal capacity to draw what is, in effect, a conclusion of law about these facts¹³⁰.

In Judge Urquhart's view, commissions of inquiry such as the ICAC and the PIC should not be empowered to make "findings", but rather, should be authorised only to form "assessments" and "opinions":

What I am endeavouring to focus your attention to is the use or the absence of the word "finding" because ... it is courts and tribunals, properly given the jurisdiction to apply law to facts and to come up with findings, which should have that power confined to them.

... I do not consider that there ought to be any commission that is able to make a finding of corrupt conduct when that finding could be read as being equivalent to what a court would do ...¹³¹.

According to Judge Urquhart, such a limitation on the Police Integrity Commission has not reduced the deterrence of police misconduct:

Judge Urquhart: The holding of an inquiry at which evidence that has been obtained is made public indicates to those at large that they may suffer the same fate, that is to have their payments for corrupt acts discovered. That is the deterrent factor.

Chair: So ... you do not necessarily see the ability to make a finding of corrupt conduct as necessarily being a useful deterrent?

Judge Urquhart: ... If we came out and made "a finding" that would, in my view, not add to the dimension of deterrence¹³².

Judge Urquhart questioned whether it was necessary for the ICAC to make findings in order to fulfil its functions:

¹³⁰ PIC submission, p. 7

¹³¹ Evidence, 20 February 2001

¹³² *ibid.*

Why does it need to make a finding of corruption? Does the Independent Commission Against Corruption need to make a finding of corruption or does it need simply to discover conduct in respect of which there is a prima facie case to pass on, if it is a potential crime, to a prosecutor; if it is a disciplinary matter, to pass on to those charged with disciplinary proceedings and, if it is something less than that, to make a recommendation to the particular government department or agency or whatever it is that practices and procedures may need to be changed. I do not know why we start with ‘it must make a finding of corruption because it is a commission against corruption’ ...¹³³.

He argued further that a “finding” by a commission may have the impact of a court ruling without the usual protections of the criminal justice system applying to the individual:

... It must be understood that people who come and give evidence before the Police Integrity Commission and ICAC cannot refuse, as they can in a court to give an answer where that answer may tend to incriminate them, and so because of that inquisitorial power that commissions have – I do not want to use the word “unfair”, because that means many things to many people, but I use it with that caveat anyway – it would be unfair, that person not having gone through the trial process that we are fortunate enough to have here, and to be labelled by some finding, whatever it is, to be in the eyes of many a criminal¹³⁴.

Judge Urquhart added that if a commission is able to make findings, there should be an appeal or review process available to those the subject of an adverse finding:

Any tribunal, any court that makes a finding that somebody has done something wrong, whether it be criminal, whether it be disciplinary or of that nature, is subject to have that finding looked at in an appropriate appellate process. Why should not a commission that makes a finding and does nothing in consequence of it, such as making a recommendation that consideration be given to the prosecution of that person, not have its finding capable of being challenged?¹³⁵.

Similarly, the Law Society of NSW believes that if the ICAC’s power to make findings is retained, it is incumbent that there be a review process:

A formal process of review should be built into the ICAC Act. A formal process of review would, by reason only of its existence, impose a discipline on ICAC in the manner of its investigation and the care with which it conducts its inquiries and makes its findings. ICAC in its present form is virtually unaccountable for the quality and contents of individual reports¹³⁶.

Another reason posed against continuing ICAC’s ability to make findings was the possibility that the DPP may decide not to adopt recommendations by the ICAC.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ NSW Law Society submission, Attachment 1, p. 7

In response to Judge Urquhart’s comments concerning the ICAC’s ability to make findings compared with the PIC’s ability to make “assessments” and offer “opinions”, the ICAC held:

The PIC Commissioner’s argument is that the word “finding” is a term of art, and that it should be confined to judicial proceedings. Judge Urquhart submits that referring to ICAC’s conclusions as “findings” has the potential to confuse the public as to the nature of ICAC’s operations, and the consequences of those conclusions.

ICAC does not consider “findings” to be a term of art. They are simply a statement of what is “found” by the hearing Commissioner in the course of an investigation.

No justification for the use of “assessments and opinions” in preference to “findings” was given in the Interim Report or Final Report of the Royal Commission into the NSW Police Service. Nor was there any substantial distinction made between “findings” and “assessments and opinions” in the second reading speeches for the Police Corruption Commission/Police Integrity Commission Bills. In fact, in the Interim Report, Justice Wood uses the word “findings” to refer to the prospective outcomes of the proposed Police Corruption Commission.¹³⁷

The ICAC referred to the ability of a wide range of non-judicial bodies in New South Wales to make findings relevant to their jurisdiction following an inquiry, for example, the Crime Commission, Ombudsman, Health Care Complaints Commission, Casino Control Authority, and Commissions of Inquiry, and the Pool Fencing Advisory Committee (pursuant to the *Swimming Pool Act 1992*). The ICAC considered that “[i]t would be difficult to suggest that findings from these bodies, or from ICAC, could be mistaken for the findings of a court”.¹³⁸ It pointed out that consistent with the statutory provisions concerning the PIC, the ICAC is prevented from making findings that a person has committed a crime or a disciplinary offence. As the ICAC indicated, such findings “are properly findings for the courts and the relevant disciplinary tribunals”.¹³⁹

The ICAC further submitted that:

. . . altering ICAC’s ability to make “findings” will not alter the public use of that term to describe any opinions expressed by the Commission. A simple search of Parliamentary debates and newspaper articles has revealed a number of instances of the use of the term “findings” in relation to PIC by the Minister for Police, the Shadow Minister for Police, and the media.

It seems that “findings” has fallen into ordinary use, and it would appear that little would be gained from altering its use by the Commission, particularly given its long standing usage.

¹³⁷ ICAC, Final submission, p.7.

¹³⁸ *ibid.*

¹³⁹ *ibid.*, p.8.

In reviewing the impact of judicial review on investigative tribunals, Associate Professor Margaret Allars has made the point that distinction between “findings” and “opinions” appears “absurd”. She says that such a distinction can be seen as “precious”, and “only serve the purpose of hampering ... the issue of reports which are clear and compelling in their language and logic. It will not protect reputations.”¹⁴⁰

Commissioner Moss’s final evidence to the Committee indicated that she did not consider there to be a lot of difference between “findings” as compared with “opinions” or “assessments”, and that the ICAC would be comfortable working with whatever Parliament resolved to be the most appropriate form of wording. This view is clearly expressed in the following discussion:

CHAIR: . . . Some witnesses have told us that there is not a great deal of difference between the two terms. In fact, you have pointed out in your submission that, notwithstanding what terminology you use, you may still end up having people expressing the conclusions in terms of “findings”. Do I take it that, notwithstanding that, you are comfortable with the use of one set of words as opposed to the other, but it will not make a great deal of difference?

Ms MOSS: I am comfortable with whatever Parliament would decide on that. The point that we are making here is that I think it probably does not matter if you do change the word from “findings” to “opinions” or “assessments” because that is how the public is going to perceive it anyway; that is how it probably will be described in the press, “ICAC makes findings”. So you could probably change it and it will not make a lot of difference. I, on the other hand, do not see this as a term of art. I do not think it has any particular judicial meaning that is ascribed to it by many other people. I do not think it takes on the same gravamen as say some of the others would ascribe to it. I mentioned other organisations such as the Ombudsman and the Health Care Complaints Commission, and even the Pool Fencing Advisory Committee makes findings. I would not think that it really matters a great deal. But if Parliament felt there should be another term to use, we would live with that quite easily.¹⁴¹

The Commissioner also acknowledged that the other bodies referred to in the submission with the capacity to make findings largely did not do so in relation to matters as serious as those involving recommendations to the DPP for consideration of criminal prosecution.¹⁴²

Ultimately, the overriding consideration in this question of terminology was that the ICAC should be able to describe and report on corrupt conduct and to exercise a clear jurisdiction. Commissioner Moss told the Committee:

¹⁴⁰ M.Allars. “Reputation, Power and Fairness: A Review of the Impact of Judicial Review Upon Investigative Tribunals”, *Federal Law Review*, Vol 24, No.2.

Accessed at <http://law.anu.edu.au/publications/flr/vol24no2/Allars.htm> on 22 February 2001.

¹⁴¹ ICAC, Final evidence.

¹⁴² *ibid.*

Ms MOSS: . . . Ultimately, the defined jurisdiction of the Commission must achieve two things: It must clearly describe the misconduct we, as a community, want to address and prevent; and it must provide the Commission with clarity and certainty regarding the nature and extent of our responsibility. The Committee's job is to determine whether change is needed to bring about these outcomes.¹⁴³

The Commissioner clarified her position later in evidence:

Ms MOSS: . . . I am saying that I think "findings" is quite appropriate. But if Parliament saw fit to say that this is almost similar to a judicial finding, even though it is not a term of art, we would certainly still be able to do our work in much the same way. The main thing is that we have the full charter to be able to investigate such behaviour, that such behaviour is properly and well defined, and that we are given appropriate discretions to deal with it and the power and resources to deal with it.¹⁴⁴

Commissioner Moss did not consider that the effectiveness of the ICAC would be weakened if changes were made so that it reported on corrupt conduct in ordinary language rather than in terms of findings. She advised:

CHAIR: If ICAC did not have the power to make findings of corrupt conduct per se but, instead, had powers to use ordinary language, as you use it, to describe the conduct that constitutes corrupt conduct or may constitute some other form of improper conduct, you say there may be a perception that it would be weakened. In your view would it in fact be weakened, if it was able to more fully describe the conduct?

Ms MOSS: I think not necessarily. There may indeed be a perception and people would argue that, but if your powers were maintained and you were properly resourced to uncover this type of conduct, I think that is the main thing. . .¹⁴⁵

With regard to its ability to make recommendations the ICAC supported the status quo as the most appropriate scheme for making findings:

*The current situation of having the Commission make recommendations to the appropriate authorities to consider whether charges should be laid in respect of a criminal or disciplinary offence appears to remain the best option for dealing with judicial commentary on what should be the extent of the Commission's jurisdiction with respect to possible criminal or disciplinary offences.*¹⁴⁶

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

On the issue of whether formal findings should be graded to distinguish between various levels of seriousness, eg “official misconduct” and “relevant conduct”, the ICAC initially expressed attraction to such terms as “serious misconduct” but later declared opposition to the proposal. The ICAC anticipated that there would be difficulties in dividing conduct to clearly distinguish each grade resulting in a potential risk of increased appeals against ICAC findings.¹⁴⁷

According to the ICAC, the use of terms such as “official misconduct” or “relevant conduct” are not without problems and can create confusion. For example, official misconduct “despite any definition that might be placed in the ICAC Act, [is] a criminal offence at common law”.¹⁴⁸ The ICAC considered that this could prove confusing, especially in view of the statutory limitation which prevents the ICAC from making a finding that a person has committed a criminal offence. The ICAC also considered it might be confusing for it to be responsible for making a finding that conduct was “corrupt, but not criminal”.¹⁴⁹

The Commission advised that the *ICAC Act* already offered some flexibility in terms of the types of findings it could make. For instance, the Act makes provision at ss.13(3) and 74A for the ICAC to make findings about conduct of a lesser kind than corrupt conduct. These sections provide for any findings to be made short of a finding that a person has committed a criminal or disciplinary offence. The Commission submitted:

*Section 13(3) of the ICAC Act allows the Commission to make findings and form opinions “on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, **whether or not the findings or opinions relate to corrupt conduct**” (Emphasis added).*

Section 74A states that the Commission is authorised to report any of its findings, opinions and recommendations, and does not limit the statements that may be made about “affected” persons or any other person, subject to the qualification of section 74B. Section 74B prevents the Commission from making findings of guilt in respect of possible criminal and disciplinary offences, or recommending prosecution for any criminal or disciplinary offence.¹⁵⁰

The question of the Commission’s discretion not to make findings of “corrupt conduct”, even though such a finding is capable of being made within the statutory definition, is relevant here. The discretion arises from the lack of a mandatory requirement within ss. 74A and 74B of the Act for the ICAC to make a finding that a person has engaged in corrupt conduct. The ICAC referred to three investigations which raised the question of whether it is bound to make findings of corrupt conduct where such a conclusion could be drawn.¹⁵¹ The three investigations concerned the State Rail Authority (Trackfast Division), the State Rail Authority (Northern region) and the Public Employment Office and the comments of the Assistant Commissioners involved are referred to in the ICAC’s final submission:

¹⁴⁷ ICAC, Final submission, p.8.

¹⁴⁸ *ibid*, p.9; final evidence.

¹⁴⁹ ICAC, Final submission, p. 9.

¹⁵⁰ *ibid*.

¹⁵¹ *ibid*, p.11.

In the ICAC's Report on Investigation into State Rail Authority – Trackfast Division, (September 1992, p. 15), the hearing Commissioner raised the question of whether the Commission was bound to "characterise the conduct of each "affected person" as "corrupt conduct" if the statutory definition of that term is satisfied."

Assistant Commissioner Sackville (as he then was) said:

On one view the Act, which requires the Commission to conduct its investigations with a view to determining whether "corrupt conduct" has occurred (s.13(2)(a), imposes an obligation upon the Commission to make a finding of corrupt conduct in relation to each affected person whose conduct satisfies the statutory definition. The contrary argument is that the Act does not specifically state that the Commission is obliged to make such a finding, although it does impose certain other duties on the Commission in relation to the contents of the report (s.74A(2)). If this argument is correct, the Commission, unless compelled to do so by the terms of reference for a particular inquiry, would not necessarily have to make a finding of corrupt conduct for each affected person even if the statutory definitions were satisfied in a particular case.

However, in the ICAC's Report on Investigation into the State Rail Authority – Northern Region (March 1993 – p.110), Assistant Commissioner Sackville reported that he did not consider himself bound to consider making a finding of corrupt conduct against a named individual, given the limited role of the individual concerned.

The question of a discretion was again considered in the course of the Report on Public Employment Office Evaluation of the Position of Director-General, Department of Community Services (November 1996), Assistant Commissioner Hall stated:

Although the question has not previously fallen for the decision of a court, I am of the opinion that it is open to the ICAC in an appropriate matter not to make formal corrupt conduct findings against a particular public official even though the necessary factual findings would enable such a finding to be made. It must be made clear that it is only in limited circumstances that the ICAC would exercise its discretion against the making of such a finding.

After citing Assistant Commissioner Sackville's views (see above), Assistant Commissioner Hall went on to state:

The scope and purpose of the present investigation [...] does not preclude the exercise of any discretion otherwise available to the ICAC. I find [Assistant Commissioner Sackville's] line of reasoning appealing. It serves the purpose of avoiding an unduly severe finding if the circumstances warrant such a course.¹⁵²

¹⁵² *ibid.*, pp.12-13.

The ICAC concluded that while it is not beyond doubt that it possesses such a discretion, it seems unlikely that the use of the discretion would be judicially reviewed as it would be unlikely that a person to whom the discretion was applied would seek to have a finding of “corrupt conduct” made instead. The ICAC went on to suggest that consideration may be given as to whether the *ICAC Act* should be amended to explicitly provide for such a discretion.¹⁵³ It noted that in the few instances in which the discretion had been exercised were appropriate and avoided unduly harsh findings being made.¹⁵⁴

In her final evidence, Commissioner Moss emphasised the importance of a discretion not to make findings:

CHAIR: *On the question of discretion, should you make a finding of corrupt conduct, I think, if I read this correctly, you are not disagreeing with the way in which the discretion was exercised in the cases set out in the paper. But, looking at the question broadly, is it important that there be a discretion, in your view?*

Ms MOSS: *I do, because I think that that possibly could be an answer to some of the more difficult issues of the use of those words. I mean, if we are faced with that public pillory issue—and I think there is a public pillory to it—the fact that that discretion exists may allow a case where all the legislative elements are fulfilled, but when the hearing commissioner sits back and he or she feels, “Having gone through this case, I’m of the opinion that the behaviour should not be given that public pillory,” I think it allows that to occur, and then at the same time allows all the facts to be described and set out. So the main thing is that, should the matter go into a public report, and all the acts uncovered are pursuant to the investigation, then the person is not labelled with those particular words. That discretion allows that to occur.”¹⁵⁵*

4.2 Findings and Recommendations in other Jurisdictions

4.2.1 Police Integrity Commission, New South Wales

Unlike the ICAC, the principal functions of the Police Integrity Commission do not include making findings and recommendations. There are provisions for the PIC to make assessments and recommendations, and to form opinions. These provisions are found in s.16 of the *Police Integrity Commission Act 1996*:

(1) *The Commission may:*

- (a) *make assessments and form opinions on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct:*

¹⁵³ ICAC, Final evidence.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

- *has or may have occurred, or*
 - *is or may be occurring, or*
 - *is or may be about to occur, or*
 - *is likely to occur, and*
- (b) *make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of other disciplinary action against particular persons, and*
- (c) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.*

Like the ICAC, the PIC is prohibited from making findings or forming opinions of guilt of a criminal or disciplinary offence, and may not recommend that a person be prosecuted for a criminal or disciplinary offence. However, the PIC must include in its reports a statement as to whether consideration should be given to the prosecution or taking of disciplinary action against each “affected” person.

Pursuant to s.97, the PIC may include any of its assessments, opinions and recommendations in its reports to Parliament. The PIC’s assessments and opinions are not reported in terms of “findings”. Instead, the PIC usually expresses its assessments and opinions in the following terms:

The Commission heard evidence that:

- *[listing of details of facts and assessment of information]*

The Commission considers that:

- *[listing of opinions as to the facts and information]*
- *An example from page 62 of the PIC Report on Operation Warsaw is “Despite the concerns raised by persons involved with this matter, there is no evidence that [X] or any other person engaged in the subornment of witnesses, improper approaches, or the victimisation or harassment of witnesses in that investigation”.*

On the basis of the information presented in this Report, the Commission recommends that:

- *[Recommendations listed]*

4.2.2 Criminal Justice Commission, Queensland

Section 93 of the *Criminal Justice Act* relates to the reporting powers of the Criminal Justice Commission. It states:

- (1) *The Commission must include in each of its reports –*
- (a) *its recommendations; and*
 - (b) *an objective summary of all matters of which it is aware that support, oppose or are otherwise relevant to its recommendations.*

- (2) *The Commission may also include in a report any comments it may have on the matters mentioned in subsection 1(b).*

The Criminal Justice Commission may not make findings about an individual's conduct. At the conclusion of an investigation, the relevant information is forwarded to the appropriate prosecuting or disciplinary authority.

At the time of the previous Review of the ICAC, the Committee heard evidence from Mr Mark Le Grand, who was then Director of the CJC's Official Misconduct Division. Mr Le Grand informed the Committee that the CJC largely did not seek to label individuals:

The CJC, at least as far as the Official Misconduct Division is concerned, has largely been able to avoid the debate about labelling which has bedevilled the ICAC in recent times. The end product of its consideration of matters has been whether there is sufficient evidence to enliven the jurisdiction of the courts, the misconduct tribunals or the disciplinary processes of the public sector. ... Thus it can be seen that the CJC, in other than its research capacity, has not made ultimate findings adverse to the interests of concerned persons. Its ultimate findings, where they have been made, have been findings that a complaint has not been substantiated, or occasionally positive findings that alleged misconduct did not occur where this is available on the state of the evidence...¹⁵⁶.

4.2.3 Anti-Corruption Commission, Western Australia

The Anti-Corruption Commission's powers in relation to findings about individuals have been the subject of court action in recent years. In *Parker v ACC*¹⁵⁷ the Supreme Court of Western Australia upheld the ACC's power to express opinions, make findings or draw conclusions. The applicants had sought to quash the ACC's report on the grounds that the Commission had exceeded its powers when it went beyond a purely investigative function. A previous case (*Parker vs Miller*)¹⁵⁸ had established that the ACC is not authorised to make findings of guilt. The Court's judgment in *Parker vs ACC* clarified the Anti-Corruption Commission's reporting powers:

Parker v Miller and Balog v ICAC are authority for the proposition that the reporting power of the ACC may not be properly exercised so as to make findings or express conclusions about the guilt of any person of criminal or improper conduct, and the recommendations, if any, made in such a report, may not properly be as to the particular action which should be taken by way of prosecution or disciplinary action, or what should occur in relation to the employment of any person, because all those matters are matters to be considered and decided upon by the appropriate authority or independent agency to which the report is made. Such a report goes beyond the statutory power ...

¹⁵⁶ Committee on the ICAC, *Review of the ICAC*, op.cit., p. 48.

¹⁵⁷ *Parker vs ACC* (unreported decision of the Full Court, Supreme Court of Western Australia, 31 March 1999)

¹⁵⁸ *Parker and Others vs Miller and Others* (unreported decision of the Full Court, Supreme Court of Western Australia, 8 May 1998).

It seems to me that the language used in the relevant sections of the Act carries the necessary implication that to report on an allegation, and the outcome of the investigation by the ACC, may involve an account of the process, evaluation of, comment upon, the outcome of the investigation and the evidence assembled, if thought to be helpful, including the presentation of a summary of what has been discovered and a discussion of the perceived merit or lack of merit in the allegation¹⁵⁹.

Wheeler J concurred, and noted:

So far as its own functions are concerned, the ACC must evaluate the evidence to the extent necessary to decide whether to report, and to whom. Provided that this evaluation goes no further, and is not directed to the issues of what view should be formed or what action should be taken by the authority to whom the report is made, the ACC would not have exceeded its power¹⁶⁰.

4.2.4 Independent Commission Against Corruption, Hong Kong

The Hong Kong ICAC does not make findings. Its recommendations are restricted to recommendations for prosecution for particular offences. In this respect, the ICAC in Hong Kong is more like a police force than an investigatory agency familiar in Australia.

¹⁵⁹ Murray J: at 11 and 15.

¹⁶⁰ (at 3).

Chapter 5

Conclusions and Recommendations

Thirteen years have elapsed since the creation of the ICAC, during which time there has been both judicial and parliamentary consideration of the ICAC's jurisdiction, and a number of amendments have accordingly been made to the *ICAC Act*. However, a range of potential jurisdictional reforms have not been addressed. One factor acknowledged by Commissioner Moss is that to some extent the ICAC is a captive of its history — proposals for changes to its jurisdiction draw the criticism that the ICAC's ability to fight corruption is being weakened. Nevertheless, it is the opinion of this Committee that certain reforms to aspects of the ICAC's jurisdiction at this stage of its development are desirable and appropriate. The envisaged reforms focus on the statutory definition of corrupt conduct, jurisdictional issues and on the nature of the outcome of ICAC investigations.

5.1 Redefining corrupt conduct

The original definition of corrupt conduct was made very broad to capture a wide range of conduct that may be considered corrupt, including conduct other than that which is illegal or criminal. As the ICAC has recognised with the benefit of years of application of this definition, the term “corrupt conduct” is open to being redefined in order to make it as precise and clear as possible.

In support of its position that the definition of corrupt conduct should encompass conduct which is broader than that which is criminal or illegal, the ICAC quoted Justice Mahoney's comments about the proscription of partiality (which may not be either criminal or illegal, but would often be viewed as improper). However, some suggest that these views are somewhat theoretical and unrealistic. They do not fully encompass the nature of a modern democratic system, with its necessary political trade-offs and compromises. The remedy for objectionable or unacceptable partiality, at least at the political level, should be political and electoral, rather than a matter for the ICAC.

The Commission itself acknowledged the undesirability of functioning as a ‘tribunal of morals’, and the corresponding need to further define corrupt conduct in terms of s.9 of the *ICAC Act*. Whether the broader components of s.9 are sufficiently precise is a matter of some uncertainty. Without the objective element of criminal conduct being used to define corrupt conduct, the application of less tangible concepts of abuse of office or improper use of power can be highly subjective. Standards could well differ according to perspective and political experience.

A range of options for redefining corrupt conduct were considered by the Committee but the proposal made by the ICAC, based on a draft by independent consultants to the Commission, is that which is most favoured. The Committee does not consider proposals which advocate various categories of conduct, for example, serious misconduct and improper misconduct, to be adequate and is of the view that they would result in unnecessary complexity and uncertainty of definition.

The ICAC proposal involved recasting the definition “in such a way as to adequately cover that which is generally regarded to be corrupt, but [to exclude] that conduct that is not ordinarily thought of in that way”¹⁶¹. In other words, the definition should be recast to emphasise the seriousness of the conduct as the key feature of the definition and the first (and primary) test to be applied. The Committee supports this approach and the single section definition suggested by the ICAC, which places s.9 first and the specific matters found in s.8 second, as follows:

“Corrupt conduct is conduct that if proved, could constitute or involve a criminal offence, a disciplinary offence, grounds for dismissal, or a serious breach of a relevant code of conduct; and

- is conduct of any person that adversely affects (or could do so) the honest or impartial exercise of official functions by any public official(s) or public authority or*
- is conduct of a public official that is dishonest or partial exercise of official functions or*
- is a breach of public trust or misuse of information by an official or is conduct of any person that adversely affects (or could do so) the exercise of official functions by any public official(s) or public authority, involving [conduct of the type presently listed in s.8(2)].*

As the ICAC indicated, this proposal also would offer an opportunity to reassess and streamline the types of conduct listed at s.8(2) of the ICAC Act. The latter provision, which specifies certain conduct, has not been changed since the enactment of the legislation. In the Committee’s opinion amendment is warranted. The ICAC did not specifically advocate amendment in relation to s.8(1).

Although the ICAC’s functions are concerned with official conduct, some of the matters listed at s.8(2) of the Act, specifically items (o) to (w) inclusive, seem highly unlikely to be relevant to public administration in New South Wales. These provisions cover serious criminal offences but it has to be recognised that such matters as treason are not directly related to the honest and impartial exercise of New South Wales public sector functions. Moreover, they are all matters which will clearly attract the attention of other law enforcement and related authorities which have more specialised responsibilities in the relevant areas.

The Committee considers that the ICAC’s proposed single section definition places the correct emphasis on s.9 as the most significant threshold in the current two-part test to establish conduct as corrupt. Section 8, in particular, s.8(2) serves more as a descriptive provision and is of lesser importance. The Committee agrees with the ICAC that redefining corrupt conduct presents an opportunity to streamline the list of conduct enumerated in s.8(2) and recommends that items (o) to (w) should be removed from the list.

¹⁶¹ ICAC final submission, June 2001, p.3.

In addition, the ICAC sought to have any proposed definition of corrupt conduct state that certain requisite mental elements of the misconduct need to be established to show that the misconduct is carried out knowingly or by design. It is the view of the Committee that the *ICAC Act* provides sufficient discretion not to pursue matters that involve inadvertent or innocent error, and that such an amendment to the legislation would result in unnecessary complexity.

With regard to criticism of the conditional element of the definition in ss. 8 and 9, the Committee notes that the ICAC has applied the provisions of s.9 in accordance with the approach of Priestly JA in *Greiner*. In this approach the word “‘could’ is construed as meaning ‘would’, if proved”. The Committee considers this to be a reasonable and appropriate approach to the application of this section and does not propose any amendments in relation to the conditional wording of the definition.

Recommendation1

The Committee recommends that the term “corrupt conduct”, as defined by the *ICAC Act*, be amended so as to provide for a single section definition, along the lines suggested by the ICAC, with the aim of emphasising the seriousness of the conduct involved as the key feature of the definition and both the first and primary test to be applied in determining the application of the definition. For this purpose the terms of the existing s.9 of the Act should be transposed with s.8 so that it forms the first part of a single section definition as follows:

“Corrupt conduct is conduct that if proved, would constitute or involve a criminal offence, a disciplinary offence, grounds for dismissal, or a serious breach of a relevant code of conduct; and

- *is conduct of any person that adversely affects (or could do so) the honest or impartial exercise of official functions by any public official(s) or public authority or*
- *is conduct of a public official that is dishonest or partial exercise of official functions or*
- *is a breach of public trust or misuse of information by an official or is conduct of any person that adversely affects (or could do so) the exercise of official functions by any public official(s) or public authority, involving [conduct of the type presently listed in s.8(2)].*

The Committee further recommends that the conduct specified at items (o) to (w) inclusive of s.8(2) of the Act should be deleted from the definition of corrupt conduct and not included in the proposed new definition.

5.2 Jurisdiction

Local Government

The extent to which the ICAC’s jurisdiction applies in relation to local government turns on whether or not a council has adopted its code of conduct as a disciplinary instrument, thereby bringing s.9 into play. While the *Local Government Act 1993* requires all councils to adopt a code of conduct, local councils do not operate under a disciplinary instrument. This was originally raised by the ICAC as a potential jurisdictional problem and it was suggested that it should be made mandatory for local councils to adopt a disciplinary instrument.

The Department of Local Government opposed the proposal as it is unnecessary for council codes to be included in s.9 of the *ICAC Act*. The Department considered the existing disciplinary controls under the *Local Government Act* including pecuniary interest provisions, meeting regulations, departmental investigations, and dismissals or disqualifications from civic office under ss. 234, 275 and 329 of the *Local Government Act*, to be sufficient mechanisms for dealing with misconduct. Both the Local Government Association and the Shires Association held a similar view.

The ICAC stated that it was not seeking to extend its jurisdiction to cover all breaches of a local council's code of conduct. Rather, it intended to cover those instances where the conduct falls within s.8 of the *ICAC Act* and is also a substantial breach of the code consistent with the regime for Ministers and Members of Parliament.

Subsequent discussions between representatives of the ICAC, Department for Local Government, and Local Government and Shires Associations, at a round table convened by the Committee on 9 February 2001, indicated potential areas of agreement between the major parties on this issue.

Following the discussions, the ICAC advised that the matters not presently covered by criminal or disciplinary offences in which it was interested to establish jurisdiction fell in the areas of non-pecuniary conflicts of interest, and improper involvement or interference in employment within the council. In correspondence to the Committee in August 2001, the ICAC provided examples of the type of conduct involving local councillors that may fall outside the Commission's jurisdiction. The examples related to improper conduct and interference in recruitment and selection processes, classification and grading of staff positions and inappropriate handling of development applications.

The ICAC advised that it wanted to work with the Department of Local Government and the Local Government and Shires Associations to arrive at a structure which would capture only those matters pertaining to local councils that should appropriately be regarded as corruption. The Committee has noted the cooperative approach which has been adopted by the ICAC, Department for Local Government, and Local Government and Shires Associations to resolve this matter and fully supports their efforts. The Committee considers it essential that a satisfactory resolution is achieved and intends to monitor developments in this area.

In the Committee's opinion the standards of conduct for elected representatives at local government level should be consistent with those for other elected representatives. Ultimately, the Committee is of the view that it is impractical and problematic to base ICAC's jurisdiction in relation to local councils on the adoption by all local councils of codes of conduct as disciplinary instruments. Standardisation of a code across councils would rely on the adoption by all councils of a uniform code of conduct as a disciplinary instrument. Instead, the Committee believes it is preferable for the *Local Government Act* to be amended to create statutory obligations for local councils to act properly in relation to the type of conduct which has been identified in relation to local councils as being corrupt, but which does not currently fall within the jurisdiction of the ICAC. A breach of these statutory obligations would be a disciplinary matter such as to attract the jurisdiction of the ICAC.

Recommendation 2

The Committee recommends that:

- (a) the *Local Government Act* be amended to create statutory obligations for local councils to act properly in relation to the class of conduct which has been identified in this report by the ICAC as being corrupt, but which does not currently fall within its jurisdiction;
- (b) a breach of these statutory obligations be made a disciplinary matter, such as to attract the jurisdiction of the ICAC.

Boards

The ICAC submitted to the Committee that boards appointed by the Governor, which are not subject to any disciplinary instrument, are excluded from the ICAC's jurisdiction under s.9(b). In practical terms this lack of jurisdiction has not proven to be a significant issue and the ICAC has received few matters relating to boards. Unfortunately, the ICAC was unable to confirm the exact number of allegations it had received concerning boards. In correspondence to the Committee, dated 20 August 2001, Commissioner Moss advised that the ICAC was unable to provide a specific breakdown of the number of allegations regarding Mayors, Councillors and Boards as the ICS (ICAC Corporate System) does not allow the records to be broken down into allegations against a particular agency and then against whether it is an elected or appointed official of that agency. The Committee considers that, as a matter of priority, the ICAC should ensure that its information technology system is modified to enable it to record and collate such data.

The Committee did not receive any submissions raising this issue apart from that of the ICAC. However, the Local Government and Shires Associations is opposed to ICAC involvement in investigating complaints about boards in cases where the boards concerned relate to areas of primary concern to local government eg waste management boards. This view is based on the argument that existing disciplinary and statutory provisions would cover dealing with any misconduct by local council officials participating on boards of primary concern to Local Government. In the case of other boards, not primarily related to local government, the Association considered jurisdiction for the ICAC to be appropriate.

The Committee canvassed options, other than conferring jurisdiction on the ICAC, with Commissioner Moss who agreed that there was potential for corruption prevention and education initiatives in relation to boards. The ICAC had already commenced such initiatives in the Local Government area. The Committee also notes that the NSW Audit Office has published guidelines for better practice for public sector governing and advisory boards. These guidelines cover key factors affecting the efficiency and effectiveness of boards, including: the role of the board, chair and CEO; board committees; appointments; induction and training, board meetings, standards; risk management and liability; and reporting and evaluation. Better practice principles advocated by the Audit Office for boards are: appointment on merit; transparent appointment processes; public advertising of positions; adoption of a code of conduct, a register of related party transactions and a register of pecuniary interests.

Extending the ICAC's jurisdiction to cover boards appears to be a proposal involving a fair degree of complexity as boards are established under numerous pieces of legislation for various purposes. In the view of the Committee, the proposal made by the ICAC is not a simple, straightforward one and there would be some difficulty in applying a blanket provision to such a disparate group of bodies.

The appropriateness of such a measure also needs to be questioned. For example, is it really necessary to bring boards which operate on a part-time basis with generalised strategic responsibilities within the purview of the ICAC? The ICAC holds that boards perform public official functions and therefore warrant coverage by the *ICAC Act*. On the other hand, it could be argued that boards operate under a different rationale to public sector agencies. The process of selecting members of boards is often done with the expectation that members will represent particular interests and constituencies. The usual public sector standards of impartiality and disinterestedness may be of less applicability. In practical terms, conferring additional jurisdiction, in relation to boards, on the ICAC also would hold significant resource implications for the effective operation of the ICAC: a point conceded by Commissioner Moss.

While there may be some scope for boards to adopt a standard code of conduct, using the adoption of such a code to establish jurisdiction for the ICAC should not be relied upon. It seems unrealistic to the Committee to expect one code of conduct to be appropriate for boards, totalling over 600 in number, often with different functions and methods of operating. The Committee fully supports the Audit Office's guidelines for boards and the development by the ICAC of complementary corruption education and prevention initiatives.

However, the Committee has concluded that it would be appropriate for the ICAC to base its jurisdiction in relation to boards on the statutory disciplinary provisions available to each relevant Minister. In the case of corrupt conduct by board members, the Committee considers that the ICAC should be able to exercise its jurisdiction. Consequently, the Committee is of the view that Ministers should ensure that all boards falling within their administration operate under an enforceable code of conduct and that procedures are in place to deal with breaches of the code. Where the misconduct involves corrupt conduct, the ICAC would be able to investigate. The Committee notes that the Audit Office recommends the adoption of codes of conduct by all boards and that a number of model codes of conduct for public sector agencies are available for consideration and that some boards have developed codes of conduct with the assistance of the ICAC.¹⁶²

Recommendation 3

The Committee recommends that Ministers should ensure that all boards falling within their administration operate under an enforceable code of conduct and that procedures are in place to deal with breaches of the code and that, where the misconduct involves corrupt conduct, the ICAC would be able to investigate.

¹⁶² The Audit Office of New South Wales, *Guide to better practice for public sector governing and advisory boards*, 1998.

Contracted Services

In view of the increasing trend towards contracting and tendering out of government services, and for the corporatisation and privatisation of government entities, the ICAC has proposed changes to the *ICAC Act* to improve accountability in this area. The ICAC has suggested amending the *ICAC Act* to make it clear that functions or services for which a public sector agency is responsible, but which are contracted out to a private sector organisation, nevertheless attract the jurisdiction of the ICAC in relation to the performance of those services or functions by the private sector organisation.

Consideration of the source of public funding for contracted services had been the main criterion used by the ICAC to date to determine its jurisdiction in this area. The Committee notes that the definition of public official in s.3 of the Act does include:

- (m) *an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.*

This provision has been broadly interpreted by the ICAC and would appear to capture those individuals, or organisations, that provide contracted services on behalf of public sector agencies using public funds. It could apply to a broad range of service providers including ‘pink slip’ inspectors, community or disabled service providers, private auditors, security officers and waste collectors.

The ICAC has identified a number of instances where legislation was enacted in order to confer jurisdiction on certain contracted services. For example, the *Environmental Planning and Assessment Act 1979* amended the definition of public official in the *ICAC Act* to include accredited certifiers undertaking building inspections. Legislation also was enacted so that Junee Correctional Centre would fall within the ICAC’s jurisdiction. These instances, combined with the provision for regulations to declare an officer holder to be a public official, have been interpreted to support the position that there is no automatic inclusion of contracted-out services within the ICAC’s jurisdiction. Another interpretation could be that the Parliament wanted to put the ICAC’s jurisdiction in these particular cases beyond doubt.

The Committee has concluded that it is neither reasonable nor practical to maintain that legislative amendments or regulations are necessary, on a case by case basis, to specifically provide for ICAC’s jurisdiction with respect to contracted out services. The practice of public sector agencies contracting and tendering out services has continued to increase since the enactment of the *ICAC Act* and this trend has significant implications for the way in which the ICAC’s jurisdiction is interpreted and applied. Increased accountability measures also have been introduced for private sector agencies interfacing with the public sector. Under these measures certain private sector agencies have become subject to the same accountability and oversight mechanisms which traditionally have applied to only public sector agencies. For instance, the NSW Ombudsman has been given jurisdiction over a range of private sector bodies which provide services to children and young people.

The Committee makes a further distinction with respect to contracted services. It considers that not all contracted services should fall within the ICAC's jurisdiction. While the use of public funds is a key criterion for establishing jurisdiction for the ICAC, the Committee believes that the performance of public functions is another key criterion. For instance, business functions which are contracted to the private sector using public funds but which do not involve the performance of public functions, may not be appropriate for inclusion in ICAC's jurisdiction. In the case of contracted services lacking any public function, it is appropriate for accountability to lie between the contractor and the Government and, if a contract is breached, the remedy is through action for breach of contract.

For these reasons, the Committee recommends that the *ICAC Act* be amended to clarify and put beyond doubt that the ICAC in general should have jurisdiction in relation to services that are: contracted and tendered out by public sector agencies, provided for using public funds and resources, and also involve the performance of public functions. Whether the contracted service involves the performance of a public function should be one of the key considerations in establishing jurisdiction for the ICAC. Such public functions would include those with a regulatory and authorising focus, for example, certification, inspecting, licensing and registration.

The Committee is of the view that the *ICAC Act* should be clarified to put its jurisdiction in relation to contracted services beyond doubt. The Committee further considers that the *ICAC Act* should be amended to provide that any exemptions to the ICAC's jurisdiction in relation to contracted services should be established through amendment to the Act or by regulation.

Recommendation 4

The Committee recommends that the *ICAC Act* be amended to clarify that the ICAC in general has jurisdiction in relation to services that are contracted and tendered out by public sector agencies, and are provided for through the use of public funds and resources, and which involve the performance of public functions.

The Committee further recommends that the *ICAC Act* be amended to provide that any exemptions to the ICAC's jurisdiction in this area be established through amendment to the Act or by regulation.

5.3 Outcomes

The ICAC's capacity to make findings and recommendations is outlined at ss.3(4) and (5), and ss.74A and 74B of the *ICAC Act* and derives from the principal functions of the ICAC, set out in s.13(3) of the Act. Section 13(3) provides that:

The principal functions of the Commission also include:

- (a) *the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and*
- (b) *the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.*

The Committee agrees with the ICAC's opinion that the legislation empowers a finding of corrupt conduct to be made and that consequently an expectation has arisen that the ICAC will report substantially in those terms.

A survey of relevant legislation for bodies with comparative jurisdictions showed that the ICAC stands out as the only investigative authority with the power to make findings. For example, the Police Integrity Commission makes assessments and forms opinions, and may make recommendations for consideration of prosecution, disciplinary or other action. Similarly, the Queensland Criminal Justice Commission (CJC) does not make findings about an individual's conduct and provides relevant information to the appropriate prosecuting or disciplinary authority. The reporting provisions which apply to the Anti-Corruption Commission (ACC) of Western Australia have been the subject of judicial examination and were interpreted to mean that the outcome of an ACC investigation may involve an account of the process, and evaluation of, and comment upon, the outcome of the investigation and the evidence assembled. If helpful, it could also include a summary of what was discovered and a discussion of the perceived merit or lack of merit in the allegation. The Hong Kong ICAC does not make findings and is restricted to making recommendations for prosecution for particular offences: a reflection of its similarity to a law enforcement agency rather than an investigative authority.

The Committee acknowledges that the investigation outcomes for each of the aforementioned bodies must be considered in terms of their differing principal functions. However, the Committee considers that it has been clearly recognised, including by the courts, that the role of an investigative authority should primarily concern the detection and exposure of misconduct. Input into any action to be taken against individuals should be limited to making recommendations to the appropriate authority for consideration of prosecution, disciplinary or other action.

The ICAC took the position that the word "findings" has fallen into ordinary usage and that little would be gained from replacing it at this stage. It pointed out that the ICAC is prevented from making findings that a person has committed a crime or disciplinary offence, and noted that such findings are properly made by the courts and relevant tribunals. The ICAC referred to the opinion of Associate Professor Margaret Allars that the distinction between "findings" and "opinions" appeared absurd and that removing findings as an outcome would not protect reputations. However, in her final evidence, Commissioner Moss stated that she did not consider there to be a lot of difference between "findings" as compared with "opinions" or "assessments". Moreover, the ICAC did not believe its effectiveness would be weakened if legislative changes were made so that the ICAC reported on corrupt conduct in ordinary language rather than in terms of findings. ICAC's continued effectiveness relied more upon maintaining its powers and proper resources.

According to Commissioner Moss, the ICAC would still be able to do its work in much the same way as at present even if Parliament were to recommend against the use of "findings" by the ICAC. She indicated that the overriding factors were that: the ICAC would retain its full charter to investigate corrupt conduct; corrupt conduct would be properly and well defined; and, the ICAC would have appropriate discretions, powers and resources to deal with such conduct. The Committee notes the ICAC's view, indicated in its final submission, that the existing arrangement for making recommendations for prosecution, disciplinary or other action against individuals is the most appropriate scheme.

Although the distinction between “findings”, “opinions” and “assessments” may be a question of semantics, the Committee remains concerned that the findings made by the ICAC may be easily confused with those made by a court and that it may be perceived that they represent a conclusive legal outcome. The Committee notes evidence taken that a “finding” by a commission may have the impact of a court ruling without the usual protections of the criminal justice system which apply to the individual. The use of findings also raises questions about rights of appeal. The Committee received submissions and took evidence proposing that an appeal or review process should be implemented if the ICAC were to continue to make findings.

On the basis of the material which has been put before it, the Committee has arrived at the view that ss.74A and 74B of the *ICAC Act* specifying the ICAC’s power to make findings are the clearest pronouncements on what a finding by ICAC means. Incorporated in light of the High Court’s Balog decision, these two sections explain the ICAC’s power to make findings in a way which should be reiterated and made clear each time the ICAC makes such a finding. It is the view of the Committee that the ICAC’s powers to make findings and opinions are appropriate. The fundamental objective should be an educative one, involving better understanding and appreciation of the meaning and effect of the ICAC’s findings and opinions as expressed in its reports, rather than legislative amendment. Given the apparent lack of real difference between the terms “findings”, “opinions” and “assessments”, the Committee can see little purpose in making amendments to the *ICAC Act* in relation to the outcome of ICAC investigations. The Act provides the ICAC with sufficient scope to report findings of fact, opinions and recommendations and the Committee considers that recent reports, such as *Garbage, drains and other things* (July 2001), show the full use which the ICAC can make of these provisions. This particular report contains: the reasons which led to the decision by ICAC to investigate; findings of fact; an explanation of the definition of corrupt conduct and how it is determined by the ICAC; and reference to various levels of misconduct eg conduct which is improper. The mental element of corrupt conduct is addressed, reasons are given for ICAC findings, and a description of systemic deficiencies and integrated corruption prevention strategies is provided.

The Committee notes that the *ICAC Act* affords scope for a certain degree of flexibility in how the ICAC reports on the outcomes of its investigations. The Act makes provision for the ICAC to make findings about conduct of a lesser kind than corrupt conduct and does not limit the statements that may be made about individuals, subject to the qualification of s.74B. The *ICAC Act* also offers scope for a discretion not to make a finding of corrupt conduct, even though such a finding may be capable of being made.

The Committee examined the opinions of Assistant Commissioners in three ICAC investigations in relation to the question of whether the ICAC is bound to make a finding of corrupt conduct, where such a conclusion could be drawn. It has been argued that the lack of a mandatory requirement within ss.74A and 74B means the ICAC is not compelled to make a finding that a person has engaged in corrupt conduct and, in effect, affords the ICAC a discretion not to make such a finding. The Committee notes that Assistant Commissioners Sackville and Hall both supported such a discretion and that Assistant Commissioner Sackville chose to exercise discretion in not making a finding of corrupt conduct in relation to the 1993 report on the investigation into the State Rail Authority (Northern Region).

The Committee supports greater emphasis on use of discretion by the ICAC not to make a finding of corrupt conduct, despite such a finding being possible. This would seem particularly appropriate in circumstances where a finding of corrupt conduct would be inappropriate or excessively harsh.

Recommendation 5

The Committee recommends that in every instance where the ICAC reports on an investigation, the report should contain a clear statement of the meaning and effect of a finding by the ICAC, especially in terms of ss.74A and 74B of the *ICAC Act*. Each report should specify the exact nature of a finding by the ICAC, clarifying that it is statement of opinion, not a finding of guilt, from which no legal consequences flow. The Committee further recommends that ICAC reports should indicate that any action taken against an individual subsequent to a finding by the ICAC is a separate step.

The Committee concurs with the ICAC's view that the adoption of a system of graded findings is undesirable and would create confusion. For instance, use of the term "official misconduct", which is a criminal offence at common law, could lead to confusion given the statutory limitation preventing the ICAC from making a finding that a person has committed a criminal offence. The ICAC anticipated that attempting to distinguish between various levels of seriousness would result in difficulties of delineation or create a potential risk of increased appeals against ICAC findings. The Committee agrees with the ICAC's position.

While the measures recommended by the Committee will not completely eliminate the potential for reputations to be adversely affected and for subsequent legal proceedings to be prejudiced, the Committee believes that the measures it is advocating will go some way towards reducing these negative aspects of present arrangements.

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Appendices

Appendix 1: List of submissions

Appendix 2: Edited minutes of relevant proceedings

Appendix 1

Committee on the ICAC

Submissions to Review II

Stage II

Jurisdictional Issues

List of Submissions

1. Fiona Murphy
2. Carol O'Donnell
3. Brendan Mills
4. Name withheld
5. Morris Forbes
6. Evan Whitton
7. Local Government & Shires Assoc
8. The NSW Bar Association (as amended)
9. Minister for Local Government
10. Independent Commission Against Corruption (July 2000)
11. Independent Commission Against Corruption (final submission)
12. Law Society of NSW (September 1999)
13. Police Integrity Commission

Appendix 2

Edited minutes of relevant proceedings

No. 18

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

THURSDAY 15 JUNE 2000
NATIONAL PARTY ROOM
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon D Oldfield
The Hon J Ryan

Legislative Assembly

Mr Brown
Mr Hickey
Ms Megarrity
Mr Price (public hearing only)

Apologies: Mr Fraser, Dr Kernohan, Mr Martin, Mr Richardson

Also in attendance: Ms Helen Minnican (Director); Ms Tanya van den Bosch (Research Officer), Ms Hilary Parker (Committee Officer) , Ms Natasha O'Connor (Assistant Committee Officer)

The deliberative meeting commenced at 10.20am.

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3. General business

Second Stage of the Review – The Commission's Jurisdiction

Resolved on the motion of Mr Brown, seconded Ms Megarrity, that the issues paper be tabled and distributed to the Commissioner and interested parties, and placed on the Committee web site.

Resolved on the motion of Mr Ryan, seconded Mr Brown, that a call for submissions for the second stage of the review inquiry be advertised in the press with a closing date three weeks from publication, that Committee members be given a copy of the advertisement and that they advise of any further issues and witnesses.

PARLIAMENT OF NEW SOUTH WALES
MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

WEDNESDAY 30 AUGUST 2000
ROOM 1136
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon J Ryan (at 10.15am)

Legislative Assembly

Mr Brown
Mr Fraser
Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr Price
Mr Richardson

Also in attendance: Ms Helen Minnican, Ms Tanya van den Bosch, Ms Hilary Parker, Ms Natasha O'Connor

The deliberative meeting commenced at 10.05am.

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4. General Business

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ii Second Stage of the Review – The Commission's Jurisdiction

Resolved on the motion of Mr Price, seconded Mr Hickey, that Submission Nos 1-10 be tabled.

The Chairman briefed the Committee on the inquiry program and the submissions. The Committee discussed the list of witnesses and agreed to a draft report being distributed before the next meeting.

The meeting closed at 10.45am.

PARLIAMENT OF NEW SOUTH WALES
MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

TUESDAY 20 FEBRUARY 2001
NATIONAL PARTY ROOM
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon D Oldfield
The Hon G Pearce

Legislative Assembly

Mr Brown
Mr Fraser
Mr Hickey
Dr Kernohan
Ms Megarrity
Mr Price
Mr Richardson

Apologies: Mr Martin

Also in attendance: Ms Helen Minnican, Ms Tanya van den Bosch, Ms Hilary Parker

The public hearing commenced at 9:40am.

Ms Ruth McColl SC, President, NSW Bar Association, took the affirmation and acknowledged receipt of summons. Ms McColl then made an opening statement.

The Chairman questioned the witness followed by other Committee members.

The Chairman thanked the witness and the witness withdrew.

Deliberative session

The meeting opened at 10.25am.

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3. General Business

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iii. *Meeting with ICAC and Local Government and Shires Association*

The Chairman briefed the Committee on the meeting which was held to resolve problems with their submissions to Stage II of the ICAC Review. The submissions will be resubmitted.

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v. *Review II – Jurisdictional issues*

The Committee discussed the Key Performance Indicators Functional Review by the ICAC.

Resolved on the motion of Mr Hickey, seconded Dr Kernohan, that the Chairman write to the Queensland Criminal Justice Commission to seek a submission to the Review.

The deliberative meeting concluded at 10.50am.

Public hearing

The public hearing resumed at 11.00am.

Judge Paul Urquhart QC, Commissioner, and Mr Andrew Naylor, Solicitor, Police Integrity Commission, took the oath and acknowledged receipt of summons.

The Commissioner made an opening statement and tabled a submission.

The Chairman questioned the witnesses followed by other Committee members.

The Chairman thanked the witnesses and the witnesses withdrew.

The meeting adjourned at 12.10pm *sine die*.

PARLIAMENT OF NEW SOUTH WALES
MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

WEDNESDAY 6 JUNE 2001
ROOM 1043
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)

Legislative Assembly

Mr Brown
Mr Fraser
Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr Price
Mr Richardson

Apologies: The Hon D Oldfield, the Hon G Pearce

Also in attendance: Ms Helen Minnican, Ms Pru Sheaves, Ms Hilary Parker

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4. General Business

A. INQUIRIES

i. Review II – Jurisdictional Issues

The Chairman advised the Committee that the Commissioner would be attending the public hearing on Monday 18 June 2001 at 2.00pm.

PARLIAMENT OF NEW SOUTH WALES
MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

THURSDAY 18 JUNE 2001
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon D Oldfield
The Hon G Pearce

Legislative Assembly

Mr Brown
Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr Price
Mr Richardson

Apologies: Mr Fraser

Also in attendance: Ms Helen Minnican, Ms Pru Sheaves, Ms Hilary Parker, Ms Patricia Adam

PUBLIC HEARING: Jubilee Room, 2.10pm

Ms Irene Moss, Commissioner, Independent Commission Against Corruption, and Mr Kieran Pehm, Deputy Commissioner, took the affirmation and acknowledged receipt of summons.

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The ICAC Commissioner made an opening statement.

The Chairman questioned the witnesses followed by other Committee members.

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The Chairman thanked the witnesses and the witnesses withdrew.

The hearing concluded at 4.16pm.

PARLIAMENT OF NEW SOUTH WALES
MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

THURSDAY 20 SEPTEMBER 2001
ROOM 1254
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)

Legislative Assembly

Mr Brown
Mr Fraser
Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr Price
Mr Richardson

Apologies: The Hon D Oldfield, the Hon G Pearce

Also in attendance: Ms Helen Minnican, Ms Pru Sheaves, Ms Hilary Parker, Ms Angela Dinos

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2. Correspondence received

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Item 4: Letter from ICAC Commissioner in response to questions taken on notice at the Review Stage II public hearing held on 18 June 2001.

Distributed for information and considered in relation to the draft report on Stage II.

4. General Business

ii. Review II – Jurisdictional Issues

The Committee discussed the draft report and agreed to resume deliberating on the draft at the next deliberative meeting.
