



COMMITTEE ON THE ICAC

**REVIEW OF THE ICAC
STAGE III
THE CONDUCT OF ICAC HEARINGS**

JUNE 2002

Report No 8/52nd Parliament

COMMITTEE ON THE ICAC

**REVIEW OF THE ICAC
STAGE III
THE CONDUCT OF ICAC HEARINGS**

JUNE 2002

**Parliament House
Macquarie Street Sydney 2000
Tel: (02) 9230 2737 Fax: (02) 9230 3309
ISBN 0 7347 6892 3**

Table of Contents

Committee Membership	i
Committee Functions	ii
Conduct of the Inquiry	iii
Chairman’s Foreword	iv
Executive Summary	v
CHAPTER ONE	
THE PURPOSE OF ICAC	1
Introduction	1
The Public Exposure of Corruption	1
The Prosecution of Corrupt Individuals	2
CHAPTER TWO	
JUDICIAL MODELS AND ICAC	5
Introduction	5
The Inquisitorial Judicial Model	5
The Adversarial Judicial Model	7
The ICAC Hybrid Judicial Model	8
The McKillop Report	10
CHAPTER THREE	
EARLIER REFORMS OF THE CONDUCT OF ICAC HEARINGS	13
Introduction	13
The Original <i>ICAC Act 1988</i>	13
The Inquiry into Commission Procedures and the Rights of Witnesses	13
The <i>ICAC (Amendment) Act 1991</i>	15
The Decision of the NSW Court of Appeal in <i>ICAC v Chaffey</i> (1993)	16
CHAPTER FOUR	
THE CURRENT CONDUCT OF ICAC HEARINGS	17
Introduction	17
The Decision to Hold a Public or Private Hearing	17
The Trend Away from the Use of Public Hearings	19
The Protection of Individual Reputation in Public Hearings.....	21

CHAPTER FIVE

ALTERNATIVES FOR REFORM OF THE CONDUCT OF ICAC HEARINGS..... 23

Introduction	23
The Hong Kong ICAC Model.....	23
The NSW Bar Association’s Model	24

CHAPTER SIX

THE COMMITTEE’S PREFERRED HEARINGS MODEL..... 29

Introduction	29
Selective Public Exposure of Corrupt Conduct	29
Continued Prosecution of Corrupt Individuals	31
Unchanged Investigative Procedures	33

CHAPTER SEVEN

OTHER MATTERS..... 35

Introduction	35
The Initiation of ICAC Inquiries	35
Jurisdiction over Unsworn NSW Police Officers.....	36
The Availability of Legal Professional Privilege at ICAC Hearings	37
The Availability of ICAC Hearings Transcripts on the Web	39

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS 41

The Purpose of ICAC	41
Judicial Models and ICAC	41
Earlier Reforms of the Conduct of ICAC Hearings	42
The Current Conduct of ICAC Hearings.....	42
Alternatives for Reform of the Conduct of ICAC Hearings	43
The Committee’s Preferred Hearings Model	44
Other Matters	48

APPENDICES 51

Appendix One: List of Submissions	53
Appendix Two: Edited Minutes of Relevant Proceedings.....	55

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 B O'Farrell MP

Secretariat

Ms H Minnican – Committee Manager

Mr S Frappell – Project Officer

Ms J McVeigh – Assistant Committee Officer

Ms P Sheaves – Project Officer

Ms H Parker – 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 discontinue investigation of a particular complaint; or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

Conduct of the Inquiry

The Committee's inquiry into the conduct of ICAC hearings forms the third and final stage of the Committee's current review of ICAC. The Committee previously published its stage I report, *Accounting for Extraordinary Powers* in May 2000, and its stage II report, *Jurisdictional Issues*, in November 2001.

In early December 2001, the Committee wrote to parties potentially interested in the Committee's stage III review of ICAC. In its correspondence, the Committee provided a copy of the stage III Issues Paper, and invited written submissions in response by close of business, Friday 8 February 2002. The Committee also advertised its inquiry in the press. A copy of the Issues Paper is available on the NSW Parliament web site at www.parliament.nsw.gov.au.

In response, the Committee received 12 written submissions from a range of individuals and organisations such as ICAC, members of the public, other commissions of inquiry, legal associations and the NSW Police. A full list of submissions is at Appendix One.

Subsequently, the Committee held two public hearings. The first was with Commissioner Moss and Assistant Commissioner Pehm from ICAC on 20 March 2002. The second was with Mr Gormly from the NSW Bar Association on 21 March.

Following the conduct of these hearings, the Committee received ICAC's response to questions on notice on 17 April 2002. In addition, the Committee received a supplementary written submission from Mr Gormly on behalf of the NSW Bar Association on 7 April 2002.

Finally, the Committee also raised two matters arising from its inquiry with the Police Integrity Commission (PIC) Commissioner and his staff through the annual General Meeting of the PIC Commissioner with the Parliamentary Committee on the Ombudsman and PIC on 16 May 2002. In addition, the Committee also received a supplementary written submission from ICAC on 24 May 2002.

The minutes of relevant Committee meetings are provided in Appendix Two.

Chairman's Foreword

The Committee's stage III review of the Independent Commission Against Corruption focuses on the conduct of hearings by ICAC.

Since its inception in 1988, ICAC has been informed by the basic proposition that it is best to conduct hearings in public wherever possible, although in recent years this proposition has been gradually changing in favour of some initial investigations and hearings in private.

The conduct of public hearings by ICAC raises several significant issues. Public hearings encourage high standards of public behaviour, they change community attitude towards corruption and fraud, and they increase the accountability of ICAC for its actions. At the same time, public hearings have the potential to cause great inequity to individuals appearing before the Commission through the placing of erroneous allegations on the public record. In addition, the use of public hearings can prevent ICAC from gathering admissible evidence which may be the subject of consideration for prosecution by the Director of Public Prosecutions.

In its recommendations in this report, the Committee seeks to establish a model for the conduct of future ICAC hearings which strikes a balance between these potentially competing issues. Whilst the Committee recommends that the discretion currently vested in ICAC should remain, it believes that wherever possible, initial investigations, including hearings, should be in private, and ICAC should only go public where it has gathered sufficient evidence to justify the making of an adverse finding. This is in accordance with the evidence presented to the Committee by Commissioner Moss during hearings, and is consistent with the current practice of ICAC itself.

Other recommendations are made in the report with a view to enhancing procedural fairness, communications and the accessibility of information about ICAC public hearings.

I would like to thank all the witnesses who have given evidence at the Committee's hearings and those who have supplied the Committee with written submissions. In particular, I am grateful for the frank evidence and assistance of Commissioner Moss and her executive officers, and Mr Jeremy Gormly from the NSW Bar Association. I would also like to thank the Members of the Committee for their contribution and bi-partisan support, and the Secretariat for its assistance.

The Hon John Hatzistergos MLC
Chairman

June 2002

Executive Summary

This report examines opportunities for reform of ICAC's conduct of public and private hearings. While the conduct of ICAC hearings, particularly public hearings, has attracted considerable attention since the Commission's inception, it has not been the subject of substantive legislative investigation and amendment since 1991.

The report is in eight chapters.

Chapter One examines the differing purposes of commissions of inquiry in Australia and internationally. Significantly, ICAC is the only permanent commission of inquiry in Australia that regularly conducts hearings in public. ICAC is further distinguished by the fact that it continues to use those public hearings both as an educative tool for exposing corrupt conduct and encouraging high standards of behaviour in public officials, but also as an investigative tool in their own right. This is an important distinction in the context of this report.

By contrast, the majority of commissions of inquiry in Australia are focused principally or solely on the prevention of corruption through private investigations, including private hearings, leading to the compilation of admissible evidence and subsequent prosecution by the relevant public prosecutor.

ICAC's use of public hearings raises two significant issues in the context of this report. First, the use of public hearings as an investigative tool can potentially cause irreparable damage to the reputation of the individuals that are investigated through the placing of erroneous allegations on the public record, and sensationalist media reporting of those allegations. Second, the use of public hearings as an educative tool to expose corruption can potentially hinder ICAC from pursuing its additional function under the *ICAC Act*, that of compiling evidence for the prosecution of corrupt individuals.

Leading on from this discussion of the purpose of ICAC, Chapter Two examines the adversarial and inquisitorial judicial models, and argues that ICAC straddles the two in its conduct of investigations and hearings. In keeping with the inquisitorial judicial model, ICAC aims to establish the factual truth largely through private investigations, and to expose it in public. At the same time, however, ICAC's use of public hearings as an investigative tool in their own right derives from the adversarial judicial model used in common law countries.

On the basis of this conceptual understanding of the purpose and operation of ICAC, Chapter Three considers previous reforms of the conduct of ICAC hearings. In particular, it considers the findings of the Inquiry into Commission Procedures and the Rights of Witnesses in 1990, and the subsequent amendments to the *ICAC Act* in late 1991.

Chapter Four discusses the current conduct of ICAC hearings, primarily based on ICAC's submission to this inquiry and evidence provided by the ICAC Commissioner during hearings. It notes ICAC's belief that private hearings have greater value as an

investigative tool than public hearings, and that accordingly, ICAC is increasingly using private hearings in preference to public hearings as investigative tools.

Chapters Five and Six are the central chapters of this report. Chapter Five presents two alternative models for reform of the conduct of hearings by ICAC, based on submissions and evidence received during the conduct of this inquiry:

1. ICAC should only conduct private hearings with a view to compiling evidence for prosecution of misconduct by the Director of Public Prosecutions (DPP). This is in line with the operation of other commissions of inquiry in Australia and the Hong Kong ICAC, and moves away from ICAC's current focus on public exposure of corruption.
2. ICAC should conduct all initial investigations in private, but maintain the ability to conduct public hearings subsequently if it is in the public good to expose the evidence before the public and media. This would move ICAC closer to the inquisitorial judicial model as practised in Continental Europe, while maintaining ICAC's primary focus on public exposure (although the Committee is concerned that ICAC should continue to support prosecutions where appropriate).

In Chapter Six, the Committee presents its preferred model for reform of ICAC's hearing process: ICAC should conduct all investigative hearings in private, but should maintain the ability to conduct public hearings subsequently if it is in the public good to expose the evidence before the public and media.

Fundamentally, this second option preserves the use of public hearings for exposure of corrupt conduct, thereby encouraging high standards of behaviour in public officials, while enforcing on ICAC a higher standard of public accountability. At the same time, it improves the protection of individuals' reputations, and maintains many of the benefits associated with the Hong Kong ICAC model.

The Committee also discusses in Chapter Six other possible reforms related to its preferred model for reform of ICAC's hearing process. In particular, the Committee considers but rejects the insertion of a new Division 2A (Compulsory Interviews) into the *ICAC Act*.

Chapter Seven includes a brief discussion of various issues of importance raised in submissions or arising from the Issues Paper, but not specifically related to the conduct of hearings by ICAC.

The Committee's conclusions and recommendations are presented in Chapter Eight. Fundamentally, the Committee believes that ICAC's current use of public hearings as investigative tools requires reform, but that expositive-type public hearings remain an important mechanism for exposing corrupt conduct and maintaining the public integrity of ICAC. In the Committee's view, effective investigations, and the protection of individuals' reputations, are most likely to be achieved where there is a clear division between private investigations on the one hand, and public exposition of properly investigated material on the other.

Chapter One

The Purpose of ICAC

Introduction

This chapter compares the conduct of investigations by the NSW ICAC and the conduct of investigations by a number of other commissions of inquiry in Australia and internationally. In general terms, the primary purpose of ICAC is to engage in investigations leading to public exposure of systemic corruption. By contrast, the other commissions of inquiry discussed in this chapter aim principally or solely to reduce corruption through private or confidential investigations leading to the prosecution of corrupt individuals.

Reflecting ICAC's role to publicly expose corruption, ICAC is the only commission of inquiry in Australia that regularly conducts public hearings. On the one hand, ICAC uses public hearings as a means of exposing previously compiled evidence of corruption and encouraging high standards of behaviour in public officials. On the other hand, however, ICAC also uses public hearings as an investigative tool in their own right.

The Public Exposure of Corruption

ICAC is principally responsible under s.13 of the *ICAC Act* for exposing corrupt conduct, even if that conduct cannot be proven to be criminal, and encouraging high standards of behaviour in public officials. In effect, ICAC is required to focus on exposing corruption, and reforming public accountability mechanisms, in order to reduce the potential for corrupt activity in the future.

This approach of ICAC emphasising public exposure of corruption is similar to the approach adopted by the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry), which granted indemnities to corrupt witnesses, partly for the purposes of pursuing 'bigger fish', but also in order to get to the factual truth. Fitzgerald justified this by arguing that:

... it was vital that whatever steps are available be taken to maximise the prospect that the truth is told. If individuals escape, even important criminals, even if all escape, a basis is laid for a new and better future, that is preferable to a continuation of the past.¹

Mr Gormly presented the Committee with a similar argument in his evidence to the Committee on 21 March 2002:

... from what I have seen, the systemic problems that emerge from investigations, that are shown up by investigations, are usually of infinitely greater value than catching the baddie. Catching the baddie can often occur anyway, but to expose a deficiency in an

¹ S. Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, (Sydney: Butterworths, 2001), pp 22-23

organisation - I saw that most vividly in the Seaview Inquiry involving the CAA, but also in other bodies as well - is so valuable, that even if you do at times prejudice the possibility of prosecution of a single individual for their wrongdoing, it is a price that has to be paid.²

An important facet of ICAC's focus on public exposure is that it can initiate investigations under s.20 of the *ICAC Act* at its own initiative, possibly based on a complaint by a member of the public or a report by a public authority. As such, ICAC can exercise coercive powers at its own discretion, and need not be bound by externally set terms of reference. ICAC must, however, respond to a reference for an inquiry from Parliament.

Given ICAC's focus on public exposure of corruption, ICAC inevitably uses public hearings as its primary mechanism, along with public reports, to expose the truth and encourage high standards of behaviour in public officials. However, ICAC is also distinguished by its use of public hearings as an investigative tool in their own right: a means of encouraging additional witnesses to come forward and of avoiding suspicion and rumour.

ICAC's use of public hearings as investigative tools raises an important issue in the context of this report. The use of public hearings as investigative tools involves the potential for damage to the reputation of individuals that the Commission investigates through the placing of erroneous allegations on the public record, and sensationalist media reporting of those allegations. Therefore, it is particularly important that ICAC operate in a manner that is procedurally fair, so that the risk of unjustified damage to reputations is minimised.

The Prosecution of Corrupt Individuals

By contrast to the NSW ICAC, the National Crime Authority (NCA)³, the NSW Crime Commission (NSW CC) and the new Queensland Crime and Misconduct Commission (QLD CMC) are principally or solely responsible under their enabling legislation for gathering admissible evidence against corrupt individuals for use in subsequent prosecution of those individuals. They are generally judged according to the success of prosecutions arising from their investigations.

The role of these commissions is thus to supplement traditional law enforcement agencies where such agencies are unlikely to be effective in detecting and prosecuting crimes such as corruption. This may be because of difficulties in obtaining access to relevant information, or because of the need for a wide range of expertise to investigate a particular criminal scheme.

The role of these commissions in supplementing traditional law enforcement mechanisms is apparent in their enabling legislation. Unlike the NSW ICAC, these commissions are generally prevented from investigating a matter unless the relevant governing committee has specifically referred it to them, on the basis that normal law enforcement methods are unlikely to be effective:

² Evidence, 21 March 2002, p 4

³ To be replaced by the new Australian Crime Commission (ACC) on 1 January 2003

1. The NCA may initiate general investigations using normal policing and investigative powers. However, it may only conduct special investigations using coercive powers following referral of such an investigation from the Intergovernmental Committee on the NCA under s.11(2) of the *NCA Act*. The NCA is also able to request such a referral under s.10 of the *NCA Act*.
2. The NSW CC requires referral of an inquiry into 'relevant criminal activity' by the commission's management committee under s.6(1)(a) of the *NSW CC Act*.
3. The new QLD CMC may only act on major crime referred to it by the commission's reference committee under s.26 of the *CMC Act*, with the major objective of 'gathering evidence for the prosecution of persons for offences and the recovery of proceeds of major crime'.⁴

The collection of admissible evidence for possible prosecution is also the principal responsibility of the Hong Kong ICAC. The Hong Kong ICAC does not prosecute offenders itself, but pursuant to s.31 of the *Prevention of Bribery Ordinance*, it forwards the relevant information to the Department of Justice for prosecution. Some 12 percent of complaints about corrupt conduct made to the Hong Kong ICAC result in prosecutions.⁵

By contrast to these agencies, the compilation of admissible evidence for prosecutions by the DPP is an additional but not principal function for the NSW ICAC, pursuant to s.14 of the *ICAC Act*.

Importantly, ICAC's additional function of collecting evidence for the prosecution of corrupt individuals is potentially inconsistent with ICAC's use of public hearings to publicly expose corruption. This is because to publicly expose corruption and encourage high standards of behaviour in public officials, ICAC may find it necessary to obtain evidence under s.38 of the *ICAC Act*. That evidence is not subsequently admissible in a criminal court. This issue is discussed further later in this report.⁶

⁴ S.Donaghue, *op cit*, pp 22-23

⁵ Hong Kong ICAC, *Hong Kong ICAC: The Facts*, (Hong Kong Information Services Department, 1998). See also J.Hatzistergos & A.Fraser, 'Comparative Study of the Hong Kong ICAC: Delegation's Report to the Committee on the ICAC', (October 1999)

⁶ S.Donaghue, *op cit*, pp 22-23

Chapter Two

Judicial Models and ICAC

Introduction

This chapter examines the inquisitorial and adversarial judicial models, as practised in Continental Europe and common law countries respectively, and argues that ICAC straddles the two in its conduct of investigations and hearings. ICAC follows the inquisitorial judicial model through its conduct of private investigations and use of public hearings as a means of exposing corruption, but follows the adversarial judicial model in the use of public hearings as an investigative tool in their own right. A fuller discussion is provided in *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*.⁷

The Inquisitorial Judicial Model

The judicial system in France, Germany, Italy and other parts of Continental Europe is characterised by a continuous progression through investigation, public exposure of the investigation at a trial, determination of guilt (and if necessary punishment) at trial, and appellate review.

Investigation is the crucial phase in the inquisitorial system. An investigation quite simply seeks to establish the factual truth in relation to the matter being considered, together with the background of the accused. Because of the importance of this phase, it has traditionally involved the judiciary and the prosecution in compiling evidence and questioning witnesses. However, in some instances this may be left to the police.

Secrecy is an important feature of the investigation phase. The public has no right to know what goes on in an investigation, and even the accused may not be entitled to know that a matter involving them is under investigation (as in Italy).

The results of an investigation are recorded in a dossier. The dossier is the critical element of the inquisitorial system, upon which subsequent phases on the process are based.

Following from an investigation, an inquisitorial trial is essentially a process of public confirmation of the results of an investigation. In general terms, the investigation already conducted prior to the inquisitorial trial is designed to have established guilt. Accordingly, in France in particular, the criminal trial is a demonstration of guilt, rather than an inquiry into guilt. As such, the process has been described as an audit of the dossier, to confirm with witnesses, judges and lawyers the veracity of evidence compiled in the dossier.

⁷ Independent Commission Against Corruption, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, (Sydney: ICAC, November 1994)

The inquisitorial trial is presided over by a presiding judge who has the dossier to hand, and who can interrogate the accused, call any witnesses he or she thinks necessary, and generally conduct the trial.

Superior court review of inferior court decisions is regarded as normal in inquisitorial systems such as those of Continental Europe. It is a comprehensive process involving scrutiny of the facts, and the application of the law and processes of reasoning by the inferior court. As a result, there is considerable quality control of inquisitorial trials.

Throughout this process, the notion of a burden of proof, familiar to lawyers in common law countries, has little relevance, since the presiding judge leads the evidence in inquisitorial systems. In addition, the notion of innocence unless proven guilty, familiar in Australia and other common law countries, has little relevance to inquisitorial proceedings once they go to court. It is highly unlikely that the accused will not be found guilty at a trial once the prosecutor has been satisfied that there is sufficient evidence to put the accused on trial, and that that decision has been confirmed by the committing authority.⁸

Some of the main participants in the inquisitorial judicial system and their roles are described below:

1. **The Judicial Police:** The judicial police are responsible to prosecutors (and in France to examining magistrates) and ultimately the relevant ministries of justice. They carry out the great bulk of criminal investigations, generally with minimum supervision from prosecutors and examining magistrates. They have extensive powers of interrogation and preliminary detention, although the exercise of intrusive and coercive powers requires prosecutorial or judicial authority. The role of the judicial police is distinct from that of the administrative police.
2. **Prosecutors:** Prosecutors supervise investigations, and are the agents of the state in all phases of the criminal process. They may authorise the exercise of intrusive and coercive powers by judicial police during investigations. They have a large say in committals for trial, they represent the state in court at trial, they may propose specific punishment, and they may bring appeals against outcomes considered unfavourable to the state. They are trained for their role from graduation in law, and have professional and social status similar to that of judges.
3. **Defence Counsel:** Defence counsel play a significant role during an investigation. They generally have access to the dossier during the investigation, are entitled to be present during the interrogation of the accused, and may suggest lines of investigation beneficial to the accused. However, defence counsel have only a limited role at the trial, including addressing the court on liability and sentence (although this seems to have little impact on professional judges), and seeking leave to ask supplementary questions of the accused or witnesses.

⁸ ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, pp 1-8

4. Judges: The main role of judges in the modern inquisitorial judicial system is to preside at the public confirmation of the results of the investigation, as recorded in the dossier. Judges are expected to have read and digested the dossier before the trial, to publicly examine the accused and the witnesses, to attend to what the prosecutor and defence counsel have to say, to formalise a decision based on the investigation as recorded in the dossier, and to write a comprehensive reason-based judgement.⁹

The Adversarial Judicial Model

By contrast to the inquisitorial system in Continental Europe, the adversarial system in common law countries such as Australia, England and the United States is readily divisible into three distinct phases: investigation, trial and, if necessary, sentencing. Each of these phases is kept separate, with questions of guilt and punishment considered independently, the former being resolved before the latter need be considered.

If the investigation phase is crucial in inquisitorial judicial systems, the trial phase is crucial in common law countries. The trial phase determines the main issue in the judicial process – guilt or innocence. All the main players involved in a trial – judge, jury, prosecutor, defence counsel, police and accused – play an important role in the trial phase, whereas in inquisitorial systems these parties play a greater role in the investigation phase.

Importantly, the adversarial process lacks the unifying element of the dossier. Rather, the results of investigations are to be found in various places including police files, forensic tests, the memories of witnesses, and other items tendered in evidence. In inquisitorial judicial systems, all this material would be collated into a dossier for use by the presiding judge at the trial.

Finally, unlike the inquisitorial judicial process, the burden of proof under the common law system means that if the prosecution does not prove the charge it has brought against the accused to the required standard, then the accused should be acquitted. In addition, unlike inquisitorial systems, it is appropriate to talk of the burden of proof, and innocence until proven guilty, in the adversarial criminal case. This means that if the prosecution does not prove the charge against the accused to the required standard, then the accused is entitled to be acquitted.¹⁰

The role of the main participants in the adversarial judicial system are described below:

1. The Police: Unlike their Continental counterparts, the police in Australia are generally not subject to control or supervision by prosecutors or the judiciary in their investigation of crime. Rather, they are in a position to pursue their own lines of inquiry. Some coercive measures require judicial warrants such as search of premises and telephone intercepts, but others are taken routinely such as arrest. However, it should be noted that there is

⁹ ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, pp 1-3

¹⁰ ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, pp 23-28

- in Australia now increased prosecutorial surveillance of police investigations to ensure that cases are properly prepared for committal hearings and trial, similar to the Continental process.
2. **Prosecutors:** Prosecutors in Australia have a more modest role than their counterparts on the Continent. The role of prosecutors in Australia is essentially to represent the prosecution's case at trial. Although this role is more demanding than that placed on prosecutors in inquisitorial systems, they are not involved in the earlier stages of an investigation. By contrast to prosecutors on the Continent, who are regarded as agents of the state, prosecutors in Australia are regarded as members of an independent bar, both professionally and socially. That said, the role of prosecutors in Australia is being extended somewhat with the growth of prosecutions by the various Directors of Public Prosecutions. In this role, prosecutors are beginning to exercise some supervisory functions over police investigations, and presenting cases at committal hearings.
 3. **Defence Counsel:** Defence counsel in Australia play a significant role at trials but a negligible role in investigations, in contrast to inquisitorial judicial systems. Defence counsel has no right of access to information collected during an investigation, and no right to knowledge of the prosecution's case until committal proceedings. At trial, defence counsel are generally responsible for determining how the defence case will be presented, for cross-examining prosecution witnesses, and addressing the jury or magistrate.
 4. **Judges:** The primary function of Australian judges is to arbitrate disputes between parties by applying the relevant laws. They usually have a background in private practice rather than a career in judicial service, and they are not trained, as are Continental judges, in the writing of reasoned judgements. Their role during a criminal trial with a jury is to determine the admissibility of evidence and explain the applicable law to the jury, a more modest role than that played by a presiding judge in a Continental criminal trial. At summary hearings, Australian judges decide the facts and guilt solely on the basis of the oral evidence given in court, rather than primarily on the basis of written records contained in a dossier.¹¹

The ICAC Hybrid Judicial Model

ICAC does not follow precisely either the inquisitorial or adversarial judicial models. Fundamentally, both inquisitorial and adversarial systems are concerned with determining whether a person has committed an offence and how that person should be punished. This is not the role of ICAC. Although ICAC may recommend that matters be the subject of consideration for prosecution by the DPP, it is specifically precluded from making findings of guilt.

That said, ICAC follows the inquisitorial judicial model to the extent that its primary role is to determine the factual truth of a particular matter or situation. In doing so, ICAC does not passively rely on the evidence that those before it choose to adduce,

¹¹ ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, pp 23-25

as in an adversarial system, but is active in the gathering of documentation, the pursuit of leads and the summoning and examination of witnesses. No person may refuse to attend an ICAC hearing or to give evidence to ICAC. It is also relevant to note s.17(2) of the *ICAC Act*, which states:

The Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and hearings shall be conducted with as little emphasis on an adversarial approach as is possible.

There is, however, a contrast between the inquisitorial investigative process, which is uniform in its application, and the various forms of investigations that ICAC may undertake. ICAC investigations may consist of the following:

- assessment of a complaint, report and/or referral to another agency;
- preliminary investigation;
- formal investigation;
- hearings; and
- report and referral for consideration of prosecution by the DPP.

Accordingly, there is far greater discretion for ICAC in the conduct of its investigations, and in determining what is to be done with the results of its investigations, than there is in the inquisitorial system which requires mandatory prosecution.

While the focus of ICAC on investigations is largely consistent with the inquisitorial judicial model, ICAC's use of public hearings as an investigative tool in their own right clearly is not. Instead it appears to borrow on the adversarial judicial model as practised in common law countries, where the examination and cross-examination of witnesses is generally left to counsel assisting and legal representatives.

Furthermore, ICAC has also adopted adversarial-based common law rules of procedural fairness in the conduct of public hearings. These rules arise either from specific provisions in the *ICAC Act*, or from common law. They include the right to be given notice of a matter under investigation, the right to disclosure of adverse material, and the right to legal representation.

It should also be noted that participants in the ICAC investigative process differ, in some cases significantly, from their role in the inquisitorial and adversarial systems:

1. The Police: The investigative staff of the ICAC are closer in operation to investigative police in the inquisitorial system than in the adversarial system in that they are at all times subject to the direction and supervision of the Commissioner, either directly or by delegation. ICAC investigators also have access to a range of coercive powers to obtain information by forcing reluctant witnesses to cooperate. These coercive powers are different from the powers of the NSW Police. In addition, ICAC investigators also have access to non-coercive powers, principally search powers, which also differ from those of the NSW Police.

2. Prosecutors: There is nobody who specifically appears at ICAC hearings with the purpose of adducing evidence to prove the guilt of anybody there. However, counsel assisting generally examine and cross-examine witnesses, and make opening and closing addresses to assist the Commissioner in making findings and forming opinions. Counsel assisting have a duty to perform their functions in a fair and even-handed way, and in this respect have a role similar to that expected of both inquisitorial and adversarial prosecutors.
3. Defence Counsel: ICAC may, and invariably does, authorise the legal representation of persons appearing at hearings. That legal representative may re-examine or cross-examine witnesses, and may make submissions, similar to the adversarial judicial system. There is no statutory provision for legal representation prior to the hearing stage of an investigation, similar to the adversarial judicial system.
4. Judges: ICAC Commissioners have inquisitorial-like powers to summon persons to appear before the Commission to give evidence or produce documents (s.35(1)), to conduct a hearing (s.30(2)), and to examine the witness (s.34(2)). However, in practice, the examination of witnesses is generally left to counsel assisting and legal representatives in accordance with the adversarial model.¹²

The McKillop Report

In February 1991, the Parliamentary Committee on ICAC recommended that ICAC 'conduct a study of the inquisitorial system of criminal justice practises in Europe and elsewhere, and whether its application to commission inquiries is appropriate, with a view to further consideration by the Committee'.

In response, ICAC commissioned an outside specialist, Mr Bron McKillop, to prepare a draft report on inquisitorial judicial systems. Mr McKillop provided his draft report, entitled *Inquisitorial Systems of Criminal Justice: The Grand Jury and the Independent Commission Against Corruption*, in November 1991, and subsequently his final report in July 1994. ICAC in turn published a discussion paper, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison* in November 1994, based on Mr McKillop's research.

Mr McKillop's final report of July 1994 was subsequently the subject of considerable controversy. In September 1995, the Committee on ICAC sought a copy of this report from ICAC, but was only provided with a copy of the initial report of November 1991. Significantly, the final report of July 1994 included two extra chapters not in the preliminary report.

Subsequently, in May 2000, the Committee received correspondence from a journalist, Mr Evan Whitton, alerting the Committee to this discrepancy, and alleging that the final report had been deliberately withheld from the Committee. The Committee subsequently conducted an inquiry, and published a report on the matter in September 2001 entitled *Report on Alleged Contempt in Relation to the Draft*

¹² ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, pp 30-32

Report of Bron McKillop on Inquisitorial Systems. In that report, the Committee did not find ICAC in contempt of Parliament, but expressed its concern at ICAC's handling of the Committee's request for information. Furthermore, the Committee indicated that it would inquire further into inquisitorial judicial systems:

In practical terms, the Committee is of the view that greater effectiveness and more efficient use of limited resources would be achieved by focussing on the issue of inquisitorial systems. Moreover, the Committee considers that it is in the public interest for it to consider fully the advantages and disadvantages of applying an inquisitorial method of inquiry to the operation of the ICAC. The Committee plans to do so during the third stage of its review of the ICAC, due to commence later in the current Parliamentary session. The Committee will utilise the information contained in the July 1994 McKillop draft report during this stage of the review.

The Committee also received a written submission from Mr Whitton during its Stage II review of ICAC in which he advocated that ICAC adopt in full the inquisitorial judicial model. In particular, he cited the following conclusion from chapter five of the final McKillop report of July 1994:

If getting to the truth is accepted as important for legal purposes then the [French] procedures are probably more effective than are the procedures of the adversarial system where the investigation and trial involve two contesting sides and where the suspect/accused can refuse all interrogation.¹³

In support of his submission, Mr Whitton argued that the lawyer-controlled adversarial system does not seek the factual truth. Rather, barristers representing the various witnesses as defence counsel under s.33 of the *ICAC Act* are in a position to conceal evidence, to lie and to cross-examine with a view to polluting the truth. In turn, Mr Whitton suggested that the system is not fair on suspects, victims, witnesses and the community.

By contrast, Mr Whitton argued that inquisitorial judicial systems are directed towards finding the truth: evidence is not concealed; witnesses, suspects and victims are treated fairly; and proceedings are controlled by a trained judge who has the evidence in the dossier to hand. Mr Whitton continued:

The problem for taxpayers is that Australian inquisitors... have never properly used the system: evidence is concealed from suspects before the public hearing; assisting lawyers do most of the questioning; suspects' barristers can usually pollute the truth (and incidentally increase their emolument) by lengthy cross-examination.¹⁴

Accordingly, Mr Whitton reiterated the recommendation of Mr McKillop that recent law graduates be trained for careers in ICAC and other permanent commissions of inquiry.

The Committee acknowledges these issues raised by Mr Whitton, and notes that they are considered in greater detail later in this report. This is in accordance with the Committee's earlier undertaking to examine inquisitorial judicial systems that it

¹³ B.McKillop, *Inquisitorial Systems of Criminal Justice: The Grand Jury and the Independent Commission Against Corruption*, Final Report, July 1994, p 49

¹⁴ E.Whitton, Submission to the ICAC Stage II Review, July 2000, p 2

made in September 2001 in its *Report on Alleged Contempt in Relation to the Draft Report of Bron McKillop on Inquisitorial Systems*.

Chapter Three

Earlier Reforms of the Conduct of ICAC Hearings

Introduction

This chapter initially looks at the original provisions of the *ICAC Act* on public and private hearings and the Inquiry into Commission Procedures and the Rights of Witnesses conducted by the Parliamentary Committee on ICAC in 1990-1991. Subsequently, it considers the amendments to the *ICAC Act* in late 1991 arising from the Inquiry into Commission Procedures and the Rights of Witnesses, together with the findings of the NSW Court of Appeal in *ICAC v Chaffey* (1993) 30 NSWLR 21 in 1993.

The Original *ICAC Act 1988*

Section 31 of the *ICAC Act 1988* originally provided that:

1. A hearing shall be held in public, unless the Commission directs that the hearing be held in private.
2. If the Commission directs that a hearing be held in private, the Commission may give directions as to the persons who may be present at the hearing.
3. At a hearing that is held in public, the Commission may direct that the hearing or part of the hearing be held in private and give directions as to the persons who may be present.
4. The Commission shall not give a direction under this section that a hearing or part of a hearing be held in private unless it is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

Accordingly, the original *ICAC Act* required that ICAC should conduct most hearings in public. The basis for this was that the public interest is usually best served by sitting in public.

The Inquiry into Commission Procedures and the Rights of Witnesses

On 15 August 1990, the Hon Duncan Gay, former vice-chairman of the Joint Parliamentary Committee on ICAC, announced in the NSW Legislative Council terms of reference for an inquiry by the Committee into ICAC. They were:

1. To review the exercise by the Commission of its functions relating to witnesses and other interested parties who appear at Commission hearings or who otherwise assist the Commission in its investigation; and

2. To report to both Houses of Parliament on any changes which should be made to Commission procedures or the *Independent Commission Against Corruption Act 1988* (with particular reference to, but not restricted to, matters relating to Commission hearings and the rights of witnesses).

Concurrent to announcing these terms of reference, the Hon Duncan Gay tabled a discussion paper in the Legislative Council entitled *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*. This paper was based on two documents prepared for the Committee on ICAC by the Hon Athol Moffitt.¹⁵

Following conduct of the inquiry, the Committee published a report in November 1990 entitled *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*. In the report, the Committee noted a number of perceived advantages of public hearings, based on the evidence of the Hon Athol Moffitt, Mr Costigan QC, Mr Fitzgerald QC and the former ICAC Commissioner, Mr Temby:

1. Exposure is a key weapon in the fight against secret crime. Organised corruption flourishes on secrecy, codes of silence and on the difficulty of exposing it by criminal proceedings. Revealing it by open investigations is a step towards depriving it of those benefits. By comparison, the criminal trial is limited in the manner in which it may portray a criminal scheme, being restricted to the elements of the charge required by law to be laid. In addition, a criminal trial may take place several years after the event, by which time public interest has waned.
2. The conduct of inquiries in the open allows opportunity for other individuals to come forward with information where they would not otherwise have known a particular matter was under investigation. At the same time, openness helps avoid suspicions and rumours, thereby keeping down the number of innocent people implicated.
3. Because ICAC operates in the interests of the public, it should be prepared to account for itself to the public. ICAC's performance of its tasks in the open is conducive to that end.
4. The publicity generated by open hearings can be beneficial in changing community attitudes about public sector corruption and fraud.

At the same time, the Committee also raised concern, as noted earlier, that public hearings could unnecessarily damage the reputations of individuals involved. For example, unsupported assertions may be made in the course of an open hearing, which may later turn out to be groundless, but which are given sensational media coverage. In addition, the revelation of the identity of informers in public hearings

¹⁵ Mr Moffitt is a former Supreme Court Judge, having retired from the NSW Court of Appeal in 1984. In 1973 and 1974, he conducted the first Royal Commission into organised crime in Australia, the Royal Commission into Allegations of Crime in Clubs.

may endanger their lives and destroy the informer system. Indeed the Committee noted just such an example of that occurring in the case of Mr Brian Preston.¹⁶

Given these competing issues, the Committee on ICAC recommended in its report of November 1990 the implementation of safeguards relating to the conduct of hearings in an attempt to prevent a repeat of the Preston matter:

1. the Commission's document "Procedures at Public Hearings" should be amended to note that the Commission will hear and consider applications for private hearings; and
2. s.31 of the *ICAC Act* should be amended to provide the Commission with greater discretion as to whether to conduct a hearing in public or in private.¹⁷

The *ICAC (Amendment) Act 1991*

The *Independent Commission Against Corruption (Amendment) Act 1991* implemented changes to the *ICAC Act* to give effect to the recommendations of the Inquiry into Commission Procedures and the Rights of Witnesses. The legislation passed the Legislative Assembly on 23 November 1991 and the Legislative Council on 4 December 1991.

Importantly, s.31 of the *ICAC Act* was amended to provide the Commission with greater discretion in determining whether to hold a hearing in public or in private. In addition, the Hon Ted Pickering, the former Minister for Police and Emergency Services, noted in his second reading speech that ICAC had acted on the recommendation of the Committee to amend its "Procedures at Public Hearings" to allow the Commission to hear and consider applications for private hearings. The Hon Ted Pickering concluded:

The bill before the House gives effect to the recommendations of the Committee [on ICAC]. It ensures that the Commission has greater flexibility in determining whether to hold a hearing in public or in private. This does not mean that public hearings will cease to be the norm. Mr Temby QC in his submission to the Joint Committee indicated that the Commission would sit in private only a little more than it does at present. The touchstone for making the decision to sit in private or in public is the public interest and the public interest is usually best served by sitting in public.¹⁸

Accordingly, s.31 of the *ICAC Act (1991)* currently reads:

¹⁶ The "Preston Matter" arose during the NSW ICAC's North Coast Inquiry. In evidence to the inquiry, Mr Frank, a land-owner on the NSW north coast, alleged that Mr Preston attempted to solicit a bribe from him during a visit to his property. This was in return for the termination of proceedings against Mr Frank which Mr Preston's clients were bringing in the Land and Environment Court. The allegations were aired on television news that night, without Mr Preston even being aware of them.

¹⁷ Committee on the ICAC, *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*, First Report of the Inquiry into Commission Procedures and the Rights of Witnesses, (November 1990)

¹⁸ Legislative Council Hansard, 4 December 1991, pp 5437 - 5444

1. A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.
2. Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by a legal practitioner representing such a person, as well as to a closing submission by a legal practitioner assisting the Commission as counsel.
3. In reaching these decisions, the Commission is obliged to have regard to any matters which it considers to be related to the public interest.
4. The Commission may give directions as to the persons who may be present at a hearing when it is being held in private. A person must not be present at a hearing in contravention of any such direction.

The Decision of the NSW Court of Appeal in *ICAC v Chaffey* (1993)

The ability of ICAC to hold public hearings and their impact on the reputations of individuals was considered by the NSW Court of Appeal in *ICAC v Chaffey* (1993) 30 NSWLR 21. This decision dealt with the proposition that the rules of procedural fairness to witnesses require that commissions of inquiry sit in private where failure to do so may cause damage to reputations.

In its decision, the NSW Court of Appeal rejected this proposition, finding that commissions of inquiry have a discretionary power to determine whether they sit in public or private. While reputation is an interest that attracts the operation of the rules of procedural fairness, those rules do not guarantee that harm will not be done to reputations in the course of an investigation. They merely require that a person whose reputation is at risk be given an opportunity to be heard. As stated by Mahoney JA at 60:

Where a proceeding is heard in public, a party to it may suffer harm from the publicity of it. That harm may range from mere embarrassment to grave damage to reputation. However, the fact that harm will result if the discretion be exercised in favour of a public hearing does not mean that the party has not been dealt with with procedural fairness. In some cases, the public interest or other ends to be served by the discretion may outweigh the rights of the individual not to be harmed by the proceedings.

Accordingly, Chaffey's case left it open to commissions of inquiry such as ICAC to continue to hold public hearings, even if they may cause damage to the reputations of individuals.¹⁹

¹⁹ S.Donaghue, *op cit*, pp 194-195

Chapter Four

The Current Conduct of ICAC Hearings

Introduction

This chapter considers the effectiveness of both public and private hearings as an investigative tool, and the adequacy of current arrangements to protect the reputation of individuals appearing before ICAC during public hearings. It also considers the trend for ICAC to conduct more private hearings, or to conduct public hearings only following more extensive private investigations.

In the Committee's opinion, the current conduct of public hearings by ICAC should be reformed. The value of public hearings as an investigative tool is clearly limited, and of declining value. At the same time, however, the Committee wishes to emphasise its view that the value of public hearings as a mechanism for public exposure and education remains considerable.

The Decision to Hold a Public or Private Hearing

ICAC indicated in its written submission that in determining whether to hold a hearing in private or public, all hearing Commissioners are provided with a list of possible considerations. Such considerations may include:

- the integrity of the investigation (it may be prejudicial to the investigation to publicly divulge the fact that the Commission is conducting an investigation, to identify the witnesses or make known the extent of evidence obtained);
- the protection of reputation from anticipated but untested or unverified evidence;
- whether information is being sought at a preliminary stage for the purposes of determining if further investigative effort is required. In this regard, if it is ultimately decided not to proceed further there is no requirement for the Commission to prepare a report in relation to the matter (see s.74(3) of the *ICAC Act*);
- the need to protect the identity of a witness or an informant;
- the requirements of s.18(2) of the *ICAC Act* that where there are proceedings for an indictable offence conducted by or on behalf of the Crown, in order to ensure that the accused's right to a fair trial is not prejudiced, the Commission must, to the extent it thinks necessary, ensure that, as far as practicable, any hearings are conducted in private during the currency of the proceedings;
- any application made by, or on behalf of those appearing before the Commission that it is in the public interest for the hearing to be conducted in private; and

- whether the hearing involves closing submissions. Section 31(2) of the *ICAC Act* provides that the Commission may decide to hear closing submissions in private.²⁰

Subsequently, ICAC listed in its written submission a number of possible advantages of holding hearings in public:

- public hearings allow a wide exposure of corrupt conduct;
- public hearings are an important mechanism for educating the public about corruption;
- public hearings provide a mechanism for public officials to be publicly accountable for their actions;
- public hearings can be an important deterrent to corrupt conduct. If people know their conduct may be subject to public exposure they may be less likely to engage in corrupt activity; and
- public hearings sometimes encourage others to come forward with information, including information relevant to the investigation.²¹

However, Commissioner Moss indicated to the Committee in evidence on 20 March 2002 that some of these perceived advantages of public hearings may be overstated. For example, she noted that although some public hearings have on occasions brought additional information to light, when ICAC has investigated that information, it has often been of little assistance. In addition, the Commissioner noted that despite the fact that ICAC public hearings are well publicised, they are not well attended.²²

In its written submission, ICAC also listed a number of possible advantages to holding hearings in private:

- private hearings allow the detection of inconsistencies in evidence given by different parties, as witnesses give their evidence without being aware of what else might have been said by other parties. This is particularly the case where the investigation plan involves hearing from key individuals towards the end of a hearing to test their evidence against that provided by other witnesses earlier in the proceedings;
- there have been occasions where witnesses have given much more full and frank evidence in private than when they have been called to give evidence in public hearings.²³

²⁰ Submission 12, The ICAC, pp 6-7

²¹ Submission 12, The ICAC, pp 6-7

²² Evidence, 20 March 2002, pp 9,11

²³ Submission 12, The ICAC, pp 6-7

Commissioner Moss again expanded on these points in evidence to the Committee. In particular, she noted that the detection of inconsistencies in evidence presented in private hearings has been a very important investigative tool for ICAC.²⁴

In addition, Commissioner Moss also noted that greater use of private hearings would entail a significant reduction in costs for ICAC. Public hearings may cost up to \$5,000 a day, depending on the cost of transcripts, external lawyers, external commissioners and so forth, whereas private hearings cost only around \$1,000 a day.²⁵

However, while noting the limitations of public hearings and the advantages of private hearings as investigative tools, Commissioner Moss highlighted in her evidence that public exposure of corrupt conduct through public hearings remains a central function of ICAC:

Exposure is important to stop the systemic effects of corruption and to make sure that it will not happen again in that agency.²⁶

The Committee takes careful note of this point. As discussed, there is an important distinction to be made between public hearings used for investigative purposes on the one hand, and public hearings used for expositive purposes on the other. While the use of public hearings as a means of investigation is clearly limited, the Committee believes that the value of public hearings as a mechanism for public exposure and education remains considerable.

The Trend Away from the Use of Public Hearings

Reflecting the limited value of public hearings as an investigative tool, ICAC argued in its written submission that public hearings are no longer the primary or 'most effective' investigative tool available to it, as the Commission previously stated in its 1990 *Annual Report*. Rather, ICAC argued that public hearings are now only one of the tools available in its investigative repertoire:

As discussed, public hearings are just one tool available to the Commission in the investigation of corrupt conduct. Public hearings are perhaps best used to expose corrupt conduct that may be significant, systemic or widespread. Given that public hearings involve significant Commission resources, consideration has to be had to maximizing the impact of public hearings, particularly in addressing systemic corruption risks.²⁷

In addition, ICAC further noted that in instances where it does conduct a public hearing, the Commission needs to be supported by sufficient evidence, gathered by means of an enhanced investigative capacity beforehand. 'Without better, smarter investigations as a prelude, public hearings will become a blunt tool for investigating corruption'.²⁸

²⁴ Evidence, 20 March 2002, p 9, 14-15

²⁵ Evidence, 20 March 2002, pp 12-13

²⁶ Evidence, 20 March 2002, pp 10-11

²⁷ Submission 12, The ICAC, pp 8

²⁸ Submission 12, The ICAC, p 9

Commissioner Moss reiterated this evidence in hearings on 20 March 2002. In particular, she noted that the usefulness of public hearings as an investigative tool has been diminishing:

It has not been as helpful as an investigative tool, if you were looking for extra evidence. It may very well be useful for testing credibility, but we have found over the years that people are more used to that whole hearing process and they are not as fearful or intimidated by it, so that it is less of a main tool for investigation. Now I think it is just more important that we work harder with our investigators to try and get that evidence.²⁹

Given this evidence, the Committee also notes that there has been a relative decline in the use of public hearings vis-à-vis private hearings by ICAC since its inception. This is shown in Table 1 below, based on the *ICAC Annual Reports*.

Table 1: The Conduct of Public and Private Hearings by ICAC

Year	Public Hearings Days	Private Hearings Days	Days with Both Public and Private Hearings
1989-1990	236	30	-
1990-1991	151	39	-
1991-1992	193	118	-
1992-1993	65	71	-
1993-1994*	44	20	27
1994-1995*	19	6	3
1995-1996*	102	32	24
1996-1997*	58	75	24
1997-1998*	44	41	32
1998-1999	40	87	-
1999-2000	50	62	-
2000-2001	20	49	-
2001-2002 (To date)	35	47	-
Total	1057	657	110
Total – 1989-1992 (Pre s.31 Amendments)	580	187	
Total – 1992-2002	487	470	110

* Years in which data is available on the conduct of combined public/private hearings
Source: ICAC, Response to Questions on Notice, 17 April 2002, pp 4-5

Table 1 indicates that in 1989-90, ICAC conducted public hearings on 236 days, compared to private hearings on only 30 days. By contrast, in 2000-2001, ICAC conducted public hearings on only 20 days, compared to private hearings on 47 days.

²⁹ Evidence, 20 March 2002, p 2

The Protection of Individual Reputation in Public Hearings

As discussed, ICAC's use of public hearings as an investigative tool in their own right can potentially cause great unfairness, including irreparable damage to the reputation of the individuals that the Commission investigates. It is therefore particularly important that ICAC operate in a manner that is procedurally fair, so that it minimises the risk of damage to reputations.

In its written submission, ICAC argued that the current regime for protecting the reputations of individuals from unnecessary damage, operating since the 1991 amendments to the *ICAC Act*, is sufficient. In particular, the Commission cited the ability of Commissioners to suppress the identity of witnesses by issuing suppression notices under s.112 of the *ICAC Act*. In addition, the Commission noted that:

- section 30 of the *ICAC Act* requires that witnesses be provided with a copy of the scope and purpose of the hearing, which for practical purposes, in terms of advising the witness of the conduct under investigation, is equivalent to the notice provided by the NCA or the Crime Commission.
- Witnesses are also provided with a comprehensive booklet detailing information relevant to their giving evidence to the Commission. This sets out, among other things, information on obtaining legal and financial assistance.

ICAC also noted in its written submission that where it is necessary to expedite the conduct of an investigation, the Commission would also make arrangements with the Legal Representation Office to provide representation at reasonably short notice for witnesses that may otherwise attend the Commission unrepresented.³⁰

By contrast, in its written submission, Whistleblowers Australia expressed concern that ICAC hearings may "crucify the witness". In support, Whistleblowers Australia cited ICAC's investigation into matters concerning John Kite and the National Parks and Wildlife Service, arguing that ICAC breached the confidentiality of Mr Kite, leaving him open to reprisals from those against whom he alleged corruption.

Whistleblowers Australia also cited a survey of its members who had taken complaints to the ICAC, and who expressed a low level of satisfaction with the Commission's performance.³¹

In response, the Committee recognises that ICAC is in a unique position amongst commissions of inquiry in its use of public hearings as an investigative tool. This in turn makes the protection of individuals' reputations a particular issue for ICAC.

The Committee also notes the advice of the new Queensland CMC that the system most often adopted by the CMC to protect an individual's reputation at a public

³⁰ Submission 12, The ICAC, p 10

³¹ Submission 4, Whistleblowers Australia, pp 1-3

hearing has been to make a non-publication order in relation to the name of any person against whom allegations are made.³²

The Committee raised with Commissioner Moss in hearings on 20 March 2002 the availability and use of non-publication orders by ICAC under s.112 of the *ICAC Act*. In her response to Questions on Notice, Commissioner Moss indicated that in practical terms, ICAC's ability to order the suppression or non-publication of identities where it is in the public interest to do so is very similar to that of the Queensland CMC.³³

While the Committee believes that the current regime for protecting the reputations of individuals in public hearings is largely sufficient, a more fundamental issue is whether public hearings should be used for investigations, as opposed to exposition of properly investigated material, in the first place. This is discussed further in the following chapter.

³² Submission 10, Queensland CMC, p 3

³³ ICAC, Response to Questions on Notice, 17 April 2002, pp 2-4

Chapter Five

Alternatives for Reform of the Conduct of ICAC Hearings

Introduction

During the conduct of this inquiry, the Committee investigated two alternatives for reform of the conduct of ICAC hearings. The first was for ICAC to focus solely on private hearings leading to prosecutions, based on the Hong Kong ICAC model and other commissions of inquiry in Australia. The second was for ICAC to move closer to the inquisitorial judicial model of operation, as advocated by the NSW Bar Association.

The Hong Kong ICAC Model

In hearings on 20 March 2002, the Committee raised with Commissioner Moss the possibility of ICAC moving to adopt the Hong Kong ICAC model, whereby ICAC would focus solely on private investigations leading to prosecution by the DPP. Adoption of this model would represent a 'generational change' for ICAC away from its current focus on public exposure of corruption.

In her response, Commissioner Moss noted that many of ICAC's brother and sister agencies follow this model successfully and without controversy, and that it is open to ICAC to adopt a similar model. Commissioner Moss continued:

For whatever reason, historically, be it a combination of the original section 31 of the Act and a public expectation of public hearings, ICAC hearings have in the past mostly relied on public hearings, and I think that historically that has continued for some time, and been expected certainly by the public and the press.³⁴

The Committee notes that a shift in the operation of ICAC towards the exclusive use of private hearings for investigative purposes, as practised by the Hong Kong ICAC, would have certain advantages. They include:

1. a guarantee that the reputation of individuals would be protected from unnecessary damage through the exclusion from hearings of the public and the press;
2. greater scope for ICAC to detect inconsistencies in the evidence of different witnesses during private hearings; and
3. a significant reduction in costs to ICAC.

³⁴ Evidence, 20 March 2002, p 11

At the same time, however, the Committee notes that this option is inconsistent with ICAC's principal function under s.13 of the *ICAC Act*: investigating and exposing corrupt conduct and encouraging high standards of behaviour in public officials.

The NSW Bar Association's Model

A second option for reform of the ICAC hearings process was presented to the Committee by the NSW Bar Association.

Public Exposure of Corrupt Conduct

In its written submission, the NSW Bar Association argued that ICAC should move to conduct all initial investigations, including hearings, in private, but that following a full investigation in private, ICAC could consider conducting a public hearing. Such a public hearing would be expositive rather than investigative – in effect a public airing of fully investigated material before the public and media.³⁵

Mr Gormly, appearing before the Committee on behalf of the NSW Bar Association, expanded on this model in evidence to the Committee on 21 March 2002. He indicated in his opening statement to the Committee that ICAC has traditionally held initial hearings in public, but that it would be more effective if it conducted initial hearings in private:

ICAC at the moment is operating on the assumption that it is better to try and do things in public where possible. In fact the proposition ought to be that nothing should occur in public unless there is, underlying what is going to occur in public, sufficient evidence to justify the accusations that are going to be made. I would submit that that is the essence of our submission to this Committee, that any kind of accusation that is made ought only to occur if there is evidence to support it. Therefore, ICAC's investigations ought really to be done in private and, if it accumulates sufficient evidence to justify a prima facie finding of corruption, then it can go public.³⁶

This model of operation would place the onus on ICAC to take a matter to a public hearing only if the Commission was in a position to present probative and fully investigated evidence of corruption. In effect, it would move ICAC's investigative process closer to the inquisitorial judicial model, as practised in many parts of Continental Europe.

In its written submission, the NSW Bar Association argued that adoption of this model for reform of ICAC hearings would provide greater protection of the reputation of individuals than is currently afforded. Importantly, all initial investigations would be in private, meaning that avenues of inquiry that proved fruitless but which could possibly damage reputations would be investigated and discarded at this stage, without entering the public domain.

However, to ensure that any subsequent public hearing would not raise the possibility of unwarranted damage to the reputation of individuals involved, the NSW Bar Association argued that ICAC should be prepared to particularise an allegation

³⁵ Submission 7, NSW Bar Association, pp 6-7

³⁶ Evidence, 21 March 2002, p 1

prior to a public hearing, to allow a proper response to be mounted. Presently, as discussed in the previous chapter, under the terms of s.30(4) of the *ICAC Act*, a person appearing before the Commission at a hearing is entitled to be informed only of 'the general scope and purpose of the hearing'.³⁷

In addition, the NSW Bar Association also argued that public hearings should be conducted continuously. At present, public hearings are sometimes adjourned, to allow further non-public investigation, but at the same time preventing the media from hearing an immediate response to an allegation. The NSW Bar Association submitted that where public hearings are conducted continuously, the allegation and the response to the allegation are produced at the same time, so that the media and the public have the opportunity to weigh up the competing arguments.

The Committee raised this matter in hearings with Commissioner Moss. She indicated that ICAC conducts hearings continuously wherever possible, but that in some instances it may not be possible due to additional evidence coming to light during hearings and the unavailability of participants involved.³⁸

The Committee also raised the matter in hearing with Mr Gormly. He accepted that under current arrangements, it is impossible for ICAC to run a hearing continuously in public. However, he argued that if all investigative work were done prior to a public hearing, and the relevant evidence were accumulated in advance, then there would be no impediment to running a continuous hearing. As stated by Mr Gormly:

It is certainly true that, whatever happens, things will occur in a private hearing that may bring about the need for an adjournment, but if they are given the opportunity to investigate privately first, without any embarrassment about it, so that they can run a full investigation in private and then make a judgment about whether there is sufficient evidence, they will not run across that problem so often of unexpected things cropping up in a public hearing. After all, in ordinary court proceedings where everybody has accumulated their evidence first, continuous hearings are the norm. It is a question of whether you have the information available first.³⁹

Compulsory Interviews

The NSW Bar Association also argued in its written submission that the investigations process prior to any expositive-type public hearings should be reformed. In particular, the Association recommended the drawing of a legislative distinction between a hearing "in camera" on the one hand and a new compulsory interview under oath with s.38 protection on the other:

To do so would maintain the general policy against hearings "in camera" but would clarify the existing de facto power to conduct an investigatory compulsory private interview of a potential witness who could be granted the same s.38 protection currently only available in a "hearing".⁴⁰

³⁷ Submission 7, NSW Bar Association, pp 5-6

³⁸ Evidence, 20 March 2002, p 3

³⁹ Evidence, 21 March 2002, p 2

⁴⁰ Submission 7, NSW Bar Association, p 6

The Committee subsequently sought further the views of Mr Gormly of the NSW Bar Association on how this might be achieved.

In response, in his supplementary submission to the inquiry on behalf of the NSW Bar Association, Mr Gormly recommended the creation of a new Division 2A within Part 4 (Functions of the Commission) of the *ICAC Act*. This would provide a mechanism that would sit between the current Division 2 (Investigations) and the current Division 3 (Hearings). The new Division 2A could be headed "Compulsory Interviews". A short description of the new division could be as follows:

This division establishes a mechanism for the attendance of any person in answer to a summons issued by the Commissioner or such other person as the Commissioner or an Assistant Commissioner shall appoint to answer such questions as may be asked arising out of the functions of the Commission.

Mr Gormly further noted that the new Division 2A (Compulsory Interviews) should have set out the following features:

1. The Commissioner, or some person appointed by the Commissioner or Assistant Commissioner, shall preside at a compulsory interview.
2. The person presiding shall have power to administer an oath (similar to the current s.35(3)).
3. The person presiding shall have the power to make an order under s.38 and to provide the witness with an explanation as to its operation and the exceptions (false evidence) to its operation.
4. Any question and answer asked of or given by a witness summonsed to a compulsory interview shall be recorded.
5. Any person attending a compulsory interview may be accompanied by a legal representative (similar to the current s.33).
6. Any person attending a compulsory interview shall have an obligation to answer any question asked of them (similar to the current s.37).
7. The person presiding may require a person summonsed to attend a compulsory interview to produce a document (similar to current s.35(2)).
8. A person summonsed to attend a compulsory interview shall be obliged to attend until excused from attendance or released (similar to current s.35(4)).
9. Any person who, without being excused or released, fails to appear shall be subject to the same assumption as contained in s.35(5) (that is, deemed to have failed to appear).
10. A compulsory interview shall be conducted without formality.
11. A compulsory interview may be held at such time and place as the Commissioner, or some person appointed by the Commissioner or Assistant Commissioner, may prescribe.
12. A compulsory interview may occur without the issue of a summons if the person interviewed consents to submit to an interview, but upon consenting, is deemed to have been summonsed.

13. No other party or person shall be present at a compulsory interview unless either directed, summoned or authorised by the Commissioner, or some person appointed by the Commissioner or Assistant Commissioner.
14. Documents provided and answers given by a witness at a compulsory interview may be tendered at a public hearing.⁴¹

In noting these features of a new Division 2A, Mr Gormly also noted that the evidence taken in compulsory interviews could be recorded using an ERISP machine of the type now widely used in police stations. Such machines are already used by ICAC in certain circumstances, and are a cheaper mechanism for recording interviews than court reporting services.⁴²

A Widening of Section 38 of the ICAC Act

As mentioned above, to accompany the conduct of compulsory private interviews under a new Division 2A (Compulsory Interviews), the NSW Bar Association also recommended a widening of the protection offered to witnesses under s.38 of the *ICAC Act*. Section 38 states:

The Commissioner or person presiding at the hearing may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing.

Currently, s.38 only allows evidence to be taken in compulsory private interviews arising from an ICAC hearing. However, the NSW Bar Association argued that s.38 should be widened to allow for protection of an individual during the conduct of a private compulsory interview outside of the hearings process. As stated in the NSW Bar Association's written submission:

The private hearing as it currently operates is a mechanism to provide s.38 protection to a useful witness. The use of s.38 in these circumstances is valuable but in the framework of a hearings, the mechanism can be cumbersome, expensive and time-consuming. The private hearings mechanism should be revised to enable a more flexible compulsory but protected interview to occur.⁴³

In evidence, Mr Gormly from the NSW Bar Association restated this position, arguing that s.38 private compulsory interviews are a very effective investigative tool:

If you have somebody standing in the witness box with the protection of section 38 and nobody sitting in the hearing room to hear what they say, it is surprising, every time it occurs, just how conversational a threatened witness can become. It is a very effective mechanism, a compulsory hearing where they are protected by section 38.⁴⁴

⁴¹ Submission 7A, NSW Bar Association, pp 3-4

⁴² Submission 7A, NSW Bar Association, p 4

⁴³ Submission 7, NSW Bar Association, p 6

⁴⁴ Evidence, 21 March 2002, p 3

In advocating a broadening of the definition of s.38, Mr Gormly acknowledged that evidence collected using s.38 protection is not admissible in court to support a prosecution. He justified this on the basis that it is necessary to get to the factual truth of a particular matter:

What is wanted is the information. Corruption is a fetid, closed, secret infection, and the only way to get at it really is to have someone break through with information. They will not usually do it if they think it is going to hurt them.⁴⁵

Once again, the Committee further sought the views of Mr Gormly on how s.38 could be widened. In response, Mr Gormly suggested in the supplementary submission of the NSW Bar Association the following possible changes to s.38:

1. Section 38 should be amended to delete reference to evidence under "objection". As it currently stands, witnesses believe that by taking the protection offered by s.38, they are conceding that they have done something wrong.
2. Section 38 should be applied before evidence is given. Currently, many witnesses believe that they have no reason to take s.38 protection, but once questioning commences, find that their actions may be capable of criticism which they had not anticipated. The witness, therefore, may initially be guarded without the protection, subsequently feel the need to call for protection, but then maintain consistency with answers already given that may not have been frank.⁴⁶

⁴⁵ Evidence, 21 March 2002, p 6

⁴⁶ Submission 7A, NSW Bar Association, p 6

Chapter Six

The Committee's Preferred Hearings Model

Introduction

This Chapter examines the Committee's preferred model for the reform of ICAC hearings. Fundamentally, the Committee believes that ICAC should continue to use public hearings as a means of exposing properly investigated evidence of corruption, in accordance with its principal function under s.13 of the *ICAC Act*, but should cease to use public hearings as an investigative tool in their own right. Accordingly, the Committee largely supports the model of public and private hearings outlined by the NSW Bar Association, in preference to the Hong Kong ICAC model.

However, the Committee is also concerned that ICAC should carry on, wherever possible, compiling admissible evidence to support the prosecution of corrupt individuals, in accordance with its additional function under s.14 of the *ICAC Act*.

Selective Public Exposure of Corrupt Conduct

The Committee continues to believe that public exposure through public hearings should remain a function of ICAC in accordance with s.13 of the *ICAC Act*. The alternative to a public hearing is a private process only (possibly) exposed to the public in the form of a report. In the Committee's view, this is not satisfactory where the report cites evidence of corruption and makes criticisms of the individuals involved. In those circumstances, the individuals involved are entitled to a common expectation of open justice.

Accordingly, the Committee does not support the option for reform of the ICAC hearings process along the lines of the Hong Kong ICAC. Fundamentally, public exposure and prevention of systemic corruption would be lost if ICAC moved to adopt fully the model presented by the Hong Kong ICAC. Furthermore, under this model, ICAC would essentially adopt a passive or reactive position to evidence of corruption.

The Committee's preferred option for reform of ICAC's hearings process is the model presented by the NSW Bar Association. That is, the conduct of all initial investigations, including hearings, wherever possible in private, but coupled with an expositive-type public hearing of fully investigated material before the public and media if there is sufficient evidence to justify the making of an adverse finding.

Fundamentally, the Committee supports this option because it maintains public exposure as a means of preventing systemic corruption, in accordance with the principal function of ICAC under s.13 of the *ICAC Act*. However, the model has a number of other advantages:

1. The model places a higher standard of accountability on ICAC than is currently the case. The basis for this is that if ICAC can only run a expositive-type public hearing when it thinks it has a *prima facie* case of corruption, then it has to discipline itself to ensure that it has investigated a matter properly.⁴⁷
2. The model preserves many of the benefits associated with the alternative Hong Kong ICAC model. In particular, the proposed model would preserve the scope for ICAC to detect inconsistencies in the evidence of different witnesses during initial private investigations. There also would be the additional benefits of cost savings from the conduct of all initial hearings in private.
3. The model is more likely to prevent unnecessary damage to the reputation of individuals than the current conduct of ICAC hearings. This is because there will be a clearer division between non-public investigation on the one hand, and public exposition of properly investigated material on the other. Where ICAC holds a public hearing, only probative evidence of corrupt conduct by an individual should be presented.
4. ICAC is already moving towards much fuller investigations in private prior to the conduct of public hearings, making the Committee's favoured model for reform an evolutionary development. By contrast, the adoption of the Hong Kong ICAC model would represent a more significant 'generational change' in the conduct of hearings by ICAC.

The Committee has also considered the recommendation of the NSW Bar Association that ICAC should be prepared to particularise in advance an allegation against a person appearing before the Commission at a public hearing, to allow a proper response to be mounted. Currently, as noted earlier, scope and purpose statements issued by ICAC prior to public hearings are so broad as to be virtually meaningless. At the same time, opening statements delivered at the beginning of public hearings tend to be more specific in identifying the allegations and individuals to be examined.

The Committee believes that ICAC should provide personally and in advance the particulars of any matter or allegation to be raised in a hearing to the parties appearing (and their defence counsel). The Committee believes that this is an important matter of procedural fairness. It would simply require ICAC to provide the information presently provided in opening statements in advance. Currently, under the terms of s.30(4) of the *ICAC Act*, a person appearing before the Commission is only entitled to be informed of the general scope and purpose of the hearing.

Coupled with this, it is reasonable for ICAC to provide greater detail in its scope and purpose statements of the issues to be raised in a public hearing. The scope and purpose statements may include the nature of events in question, the timing of any alleged corruption, and any general allegations. The Committee believes that this may be beneficial in bringing to light additional substantive information from members of the public.

⁴⁷ Evidence, 21 March 2002, p 4

The Committee also endorses the NSW Bar Association's recommendation that public hearings should be conducted continuously wherever possible. At the same time, however, the Committee recognises that this may not always be possible, and accordingly does not believe that the terms of Division 3 of the *ICAC Act* dealing with the conduct of hearings should be altered to prevent the adjournment of public hearings where this is necessary.

While advocating the reform of ICAC's hearings process through the conduct of all initial investigations in private and the conduct of continuous public hearings where this is possible, the Committee wishes to emphasise a matter of great importance in relation to the conduct of public hearings: the Committee is not advocating that ICAC should conduct public hearings in accordance with the full inquisitorial judicial model.

The Committee does not support this option on the basis that it would present too great a conflict of interest for participants in the hearings process. As discussed, under the full inquisitorial system, prosecutors and the police conduct investigations at arm's length. By contrast, ICAC investigations are conducted "in house", under the direct or indirect control of the Commissioner or Assistant Commissioners. It is thus inappropriate that the Commissioner or Assistant Commissioner could be in a position to present evidence of corruption to an expositive-type public hearing, and subsequently to use that evidence to make findings of corrupt conduct.

Continued Prosecution of Corrupt Individuals

While supporting reform of ICAC hearings to continue to focus on public exposure of corruption, the Committee is nevertheless particularly concerned that ICAC should not lose sight of its additional function under s.14 of the *ICAC Act*. That is, the compilation of admissible evidence to support the prosecution of corrupt individuals.

The Committee raised the prosecution of corrupt individuals at its Annual General Meeting with the ICAC Commissioner on 30 November 2001. The Committee expressed concern that in the past, public investigations by ICAC have on occasions either failed themselves to procure sufficient admissible evidence to secure a conviction in the courts, or have compromised any subsequent attempts to gather such evidence. The 1999 *Investigation into Sydney Ferries: Dishonest Creation and Use of Live Tickets by Former Staff of Sydney Ferries at Manly Wharf from 1994 to 1997* (the so-called Sydney Ferries investigation) is a prime example.

In response, the Committee received assurances from Commissioner Moss that ICAC is making every effort to support prosecutions alongside public exposure of corruption through improvements to ICAC's investigative capacity and the recent strategic operations review.

Commissioner Moss repeated this assurance in hearings during the conduct of this inquiry. In particular, the Commissioner noted that ICAC has a good working relationship with the NSW Police, and is in a position to pursue investigations jointly, so as to ensure that sufficient admissible evidence is gathered to support prosecutions:

There does not appear to be a jurisdictional problem and I would have to say at the moment we have a very reasonable working relationship with the service. We have on many occasions worked together with them on cases and in others where the service has said, look, if we believe your involvement could affect our effectiveness in handling a matter, we actually do stay out of it. In others what has happened is that we have handed over information that we have gleaned from our investigations to the police service to be used by them in very useful situations. I have found that we have done a great deal of that in the past couple of years.⁴⁸

The Committee also raised this issue of prosecutions with Mr Gormly from the NSW Bar Association in hearings on 21 March 2002, referring again to the so-called Sydney Ferries investigation.

In response, Mr Gormly argued that there is a difficulty in ICAC pursuing its role of exposing corruption without, to some extent, damaging evidence for possible prosecution. Essentially, he argued that this problem is an unavoidable consequence of running the ICAC along an inquisitorial-type model while the courts follow the adversarial model. At the same time, however, he argued that the problem is not great:

It is hard to see how ICAC can effectively pursue its role as an exposé of corruption on the one hand and not, to some extent, damage evidence for possible prosecution. I really think that there is a dilemma there, but for my part, I would have thought that the two functions still operate reasonably well. I do not really see that there is a serious problem there. The criminal sphere seems to operate adequately when they are referred, and ICAC certainly does its exposition role effectively so far as I can see, but the friction between the two is, I think, just an unavoidable consequence of having two types of systems going.⁴⁹

A possible answer to this dilemma is to delay an ICAC hearing until the police are in a position to proceed with a criminal prosecution. However, in response, Mr Gormly noted that ICAC investigations typically need to be conducted as soon as possible, and in such circumstances it is not ideal to wait for criminal proceedings.⁵⁰

The Committee acknowledges the evidence of Mr Gormly in this regard, but also notes that the move to conduct all investigations in private will assist in the compilation of as much admissible evidence for prosecution as possible before going public.⁵¹

The Committee also notes that following the conduct of hearings, Mr Gormly made a supplementary written submission on this matter. In his supplementary submission, Mr Gormly reiterated that exposing loopholes that allow for corrupt conduct is far more valuable than exposing individual wrongdoers:

The pursuit of individual wrongdoing as a primary goal may produce an individual prosecution, but will leave untouched defects and deficiencies that can be at the root of the problem. Individual wrongdoing (particularly when corruption is involved), often

⁴⁸ Evidence, 20 March 2002, p 10

⁴⁹ Evidence, 20 March 2002, p 3

⁵⁰ Evidence, 20 March 2002, p 5

⁵¹ Evidence, 21 March 2002, p 5

involves individuals in public administration taking advantage of their knowledge of administrative deficiencies in the organization that they work for or that they deal with. Catching one wrongdoer will never be as effective in preventing the repetition of an offence as the exposure of the loophole or deficiency that allowed the wrongdoing, death, corruption or other problem to occur.⁵²

Mr Gormly further argued that public bodies that are subject to inquisitorial-type investigations frequently undergo substantial internal changes to prevent a re-occurrence of the matters being investigated. For example, the Thredbo inquest ultimately led to the redistribution of planning power within the National Parks and Wildlife Service. Similarly, the Seaview Inquiry ultimately led to a division of the Civil Aviation Authority into the Civil Aviation Safety Authority and Airservices Australia.⁵³

The Committee accepts the fundamental basis of Mr Gormly's evidence that exposure and organisational reform is more important than prosecution of individuals. This is reflected in the Committee's support for the focus of ICAC remaining on public exposure of corruption in accordance with s.13 of the *ICAC Act*. The Committee does, however, continue to believe that where individuals have profited through corrupt conduct, they should, wherever possible, be prosecuted.

Unchanged Investigative Procedures

In its written submission, the NSW Bar Association argued for reform of the ICAC hearings process to be accompanied by the drawing of a legislative distinction between a compulsory private interview conducted with s.38 protection outside of the hearings process, and a hearing that goes "in camera". The NSW Bar Association argued that the ability of ICAC to conduct s.38 compulsory interview without first conducting a formal hearing would greatly enhance the investigative capacity of ICAC.

To implement this proposal, the NSW Bar Association recommended the creation of a new Division 2A of Part 4 (Functions of the Commission) of the *ICAC Act*. This would provide a mechanism that would sit between the current Division 2 (Investigations) and the current Division 3 (Hearings). The new Division 2A could be headed "Compulsory Interviews".

In conjunction with this reform, the NSW Bar Association also recommended a widening of s.38 of the *ICAC Act*, on the basis that private hearings under oath with s.38 protection for the witness are a very effective investigative tool by which the Commission can gather evidence. Accordingly, they should be available to ICAC outside of the current hearings mechanism, which can be cumbersome, expensive and time-consuming.

The Committee does not support this reform. Fundamentally, the Committee is concerned that were a "compulsory interview" with s.38 protection more readily available, investigators might not make every effort to first obtain admissible evidence of corrupt conduct sufficient to support a prosecution through a normal investigative interview. The current mechanism for accessing s.38 will continue to be

⁵² Submission 7A, NSW Bar Association, p 2

⁵³ Submission 7A, NSW Bar Association, p 2

available. However, at the same time, the Committee is particularly concerned that ICAC should not lose sight of its additional function under s.14 of the *ICAC Act*: the compilation of admissible evidence to support the prosecution of corrupt individuals. This position was also expressed by ICAC in its supplementary submission to the inquiry:

As the Committee would appreciate, the Commission has indicated a current priority on gathering admissible evidence to enable consideration to be given to substantive charges arising from Commission investigations. The effect of blanket application of the protection of ss. 37 and 38 on evidence gathered by way of interviews would be to reduce the potential admissible evidence available to the Commission and other authorities.

In fact, the arguments put forward by Mr Gormly in favour of this proposal clearly countenance this possibility, indicating support for the argument that the purpose of an investigation is to uncover information bearing on the exposure of systemic failures in preference to exposure of individual wrongdoing. The Commission would prefer to keep its options open in respect of both functions, and submits that any changes to the regime adopted for interviews and private hearings should take this into account.⁵⁴

Furthermore, the Committee also believes that the current mechanism for offering witnesses the protection of s.38 is sufficient for the investigative purposes of the Commission. The Committee is not convinced that a witness is likely to be significantly more forthcoming and frank when brought to the ICAC premises for a “compulsory interview” as compared to a private hearing. At the same time, the Committee does not believe that the conduct of a “compulsory interview” in less intimidating surroundings in the field, as suggested by the NSW Bar Association, is logistically realistic. This is because “compulsory interviews” would need to be overseen by the ICAC Commissioner or Assistant Commissioner, who may not be in a position to travel for investigations.

Accordingly, the Committee believes that the current investigative procedures of ICAC should remain unchanged.

⁵⁴ Submission 12A, The ICAC, pp 1-2

Chapter Seven

Other Matters

Introduction

The following is a brief discussion of four issues of importance raised during the conduct of this inquiry, or arising from the Issues Paper, but not specifically related to the conduct of hearings by ICAC.

The Initiation of ICAC Inquiries

The Committee raised in the Issues Paper whether the ICAC should continue to be able to initiate its own inquiries under s.20 of the *ICAC Act*, or if not, how inquiries should be initiated. Section 20(1) of the *ICAC Act* states:

The Commission may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.

In response, ICAC argued in its written submission that the ability to initiate its own inquiries is an important aspect of the independence of the Commission. It noted that the Commission receives information from a range of sources, including the general public, public officials, the heads of public agencies and so on, making it appropriate that ICAC be able to manage its own priorities and resources in determining what to investigate.

In this regard, ICAC also noted that the agencies nominated in the Issues Paper as lacking the power to initiate their own inquiries (the National Crime Authority, the NSW Crime Commission and the former Queensland Crime Commission) all have a law enforcement focus, with particular responsibility for organised crime and drug trafficking, as opposed to a focus on public exposure.⁵⁵

Similarly, in its written submission, the NSW Bar Association also strongly supported the retention of ICAC's power to initiate its own inquiries. It suggested that the strength of ICAC is that it can act directly on information from members of the community, and that if ICAC were to act only on referred matters, that would be an election against public exposure in favour of law enforcement:

The question whether the ICAC should continue to initiate its own inquiries is closely tied to the public policy issue of whether the ICAC as an independent exposor of corrupt conduct or an ancillary law enforcement mechanism.⁵⁶

The Committee acknowledges these arguments, and accepts that it is important that ICAC retain the power to initiate investigations as it sees fit, especially if it moves to adopt the model for the conduct of hearings favoured by the Committee.

⁵⁵ Submission 12, The ICAC, p 9

⁵⁶ Submission 7, NSW Bar Association, pp 4-5

By contrast, the Committee notes that were ICAC to focus on prosecutions of private individuals as does the Hong Kong ICAC, the mechanisms by which investigations are referred to ICAC would need to be significantly reformed in line with those adopted by the NCA, the NSW CC and the QLD CMC. Similarly, the coercive powers of ICAC would need to be extensively reconsidered.

Jurisdiction over Unsworn NSW Police Officers

In its written submission, the NSW Police argued for legislative amendment to the *ICAC Act* to provide for PIC rather than ICAC to have jurisdiction to investigate and report on allegations of corruption or serious misconduct amongst NSW Police Service Administrative Officers (as opposed to sworn officers).

Commissioner Moss took this matter on notice during hearings on 20 March 2002. In her subsequent response, the Commissioner stated:

I do not believe that this matter is one on which the Commission can reach a view on its own, particularly given the potential impact on the Police Integrity Commission. While I appreciate the arguments put forward by NSW Police, and I can offer views on the potential impact for the ICAC, I would be reluctant to appear to come to a firm view on this matter without being apprised of the PIC's views on having jurisdiction over unsworn officers.⁵⁷

To assist the Committee, however, Commissioner Moss observed that the number of complaints regarding the NSW Police that fall within ICAC's jurisdiction is relatively small. For example, in 2000-2001, there were only fifteen notifications regarding the NSW Police under s.10 of the *ICAC Act*, and only thirty-four notifications under s.11 of the *ICAC Act*, regarding possible corrupt conduct by unsworn officers.⁵⁸

This matter was raised subsequently via the annual General Meeting on 16 May 2002 between the Parliamentary Committee on the PIC and the PIC Commissioner, Commissioner Griffin, and his staff.

In his evidence, Commissioner Griffin indicated that it would be logical to have unsworn members of the NSW Police subject to the jurisdiction of the PIC, although he reiterated that there are not a large number of misconduct cases involving unsworn NSW Police Administrative Officers.

That said, Commissioner Griffin also noted that the division of responsibilities between the PIC and ICAC had not in the past caused any difficulties during investigations, and that PIC has a good working relationship with ICAC. Furthermore, Mr Robson, Acting PIC Solicitor, noted that PIC can investigate unsworn officers directly if it is part of an overall investigation into allegations of misconduct by sworn officers.⁵⁹

⁵⁷ ICAC, Response to Questions on Notice, 17 April 2002, p 1

⁵⁸ Submission 11, NSW Police Service, p 3

⁵⁹ Evidence, Thursday 16 May 2002, p 21

The Availability of Legal Professional Privilege at ICAC Hearings

In its written submission, the NSW Police also raised the availability of legal professional privilege at PIC hearings under s.27 of the *PIC Act*. This section is virtually identical to s.24 of the *ICAC Act*. Section 24 of the *ICAC Act* states:

1. The section applies where, under section 21 or 22, the Commission requires any person:
 - a) to produce any statement of information, or
 - b) to produce any document or other thing.
2. The Commission shall set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.
3. The person must however comply with the requirement despite:
 - a) any rule which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
 - b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
 - c) any duty of secrecy or other restriction on disclosure applying to a public official or public authority.

In its written submission, the NSW Police referred the Committee to two rulings handed down in PIC hearings in 2001. The NSW Police argued that at those hearings, the respective presiding PIC Commissioners effectively ruled to abrogate the legal professional privilege of the Police Commissioner, on the basis that he is a public official.

The first ruling was handed down in hearings on Operation Malta on 25 June 2001 by then Commissioner Urquhart:

I have concluded that legal professional privilege cannot be relied upon by the Commissioner of Police in relation to compliance with the notice ...

Subsequently, however, in the penultimate paragraph of his decision, Commissioner Urquhart found:

... no legal practitioner need be concerned about being summoned before the Commission and compelled to disclose privileged communication passing between himself and his clients for purposes preparatory to hearings. In effect the provision (s.40(5)) seems intended to avoid legal practitioners being placed in the invidious and ethically abhorrent predicament of being called to incriminate their client.

The second ruling was handed down by Commissioner Sage on 10 September 2001, requiring the Police Commissioner to produce documents brought into existence by the Service's legal team in otherwise privileged situations, again on the basis that the Police Commissioner was a public official.

As a result of these two rulings, the NSW Police concluded in their written submission that PIC could not compel a legal practitioner to give evidence about privileged communication with a public official, but that PIC could:

- require a public official to divulge the contents of any communication with his or her legal practitioner;
- require the legal practitioner to produce all documents brought into existence in the course of communications between the legal practitioners and his or her public official client, including notes taken by the legal practitioner in conference with his or her client.

Following the ruling of the Acting Commissioner Sage on 10 September 2001, the NSW Police sought legal advice on this matter from Robert McDougall QC, who indicated that there were proper grounds to challenge the decision. This challenge was not lodged in order to complete the inquiry expeditiously, however the NSW Police reserved its right in this regard.

The NSW Police subsequently also sought the advice of Barry Toomey QC. His advice was that the two rulings effectively shut off free and open communications between lawyers and their public official clients under the terms of both the *PIC Act* and the *ICAC Act*.

Based on this advice, the NSW Police contended in its written submission that it was not the intention of Parliament to abrogate the availability of legal professional privilege to public officials under the PIC or ICAC Acts, except in instances where the client and legal adviser are involved in corrupt or criminal conduct.

To rectify this perceived anomaly, the NSW Police recommended that s.24(3)(b) of the *ICAC Act*, dealing with production of any statement or information regardless of 'privilege of a public authority or public official', be amended specifically to allow legal professional privilege or its statutory equivalent.⁶⁰

This matter was again raised via the annual General Meeting on 16 May 2002 between the Parliamentary Committee on the PIC and Commissioner Griffin and his staff.

In his response on behalf of PIC, Mr Robson indicated the Commission's view that it was not the intention of Parliament that the Police Commissioner or other public officials should be in a position to withhold information or documents on the basis of legal professional privilege:

The Act in section 27 (3) (b) abrogates the privilege of a public authority or a public official in that capacity, and that is consistent with that policy. It does not abrogate the private privilege of a natural person or a private corporation: those persons may still claim privilege in relation to a notice that is issued by the Commission.

⁶⁰ Submission 11, NSW Police Service, pp 2-3

Mr Robson further argued that were NSW public officials in a position to claim legal professional privilege, then it could be used to undermine the investigative powers of the PIC through the deliberate provision of all sensitive documents to the legal advisers for protection:

It is not just conversations that occurred between members of the Police Service and legal advisers that attract privilege, it is what is communicated and the circumstances of communication. That means that documents that previously would not have attracted legal professional privilege if copied or in their original form are handed to the legal team or the Police Service lawyers, they then attract privilege. ... The High Court has held that in relation to copy documents, which is essentially what I am talking about, documents that, perhaps, served a different purpose at a different time but, copied and provided to legal advisers subsequently, thereby take the privilege because their contents are communicated in those particular circumstances.⁶¹

The Committee does not wish to comment on this issue further at this stage, but notes that the availability of legal professional privilege under the *PIC Act* is considered in the Review of the *PIC Act* by the Ministry of Police, which was due to be tabled in Parliament on 21 June 2002. The Committee will revisit this issue as it relates to ICAC following receipt of the Government's response to the Ministry of Police review.

The Availability of ICAC Hearings Transcripts on the Web

During the course of this inquiry, the Committee raised the unavailability of ICAC transcripts of public hearings on the web. Currently, the public can obtain transcripts of public hearings from ICAC, but only on a cost recovery basis.

The Committee believes that transcripts of public hearings should be freely available on the ICAC web site. The public is entitled to the opportunity to access material arising from ICAC public hearings, without the necessity of relying on media reporting of proceedings. Heightening public awareness of ICAC's procedures and inquiries far outweighs any consequential small loss of income to ICAC from such a move.

In this regard, the Committee notes that the PIC has recently undertaken to publish on its web site the transcripts of public hearings that it conducts. Similarly, the NSW Parliament publishes transcripts of all sessions of parliament together with Committee hearings, on the basis that the public have a right to the information.

⁶¹ Evidence, Thursday 16 May 2002, pp 16-18

Chapter Eight

Conclusions and Recommendations

The Purpose of ICAC

This report is based upon an understanding of the purpose of ICAC, when compared with other commissions of inquiry in Australia and internationally.

Fundamentally, under s.13 of the *ICAC Act* as it currently stands, ICAC is principally responsible for investigating and exposing corrupt conduct and encouraging high standards of behaviour in public officials. The primary means by which it does this is through the conduct of public hearings.

ICAC's use of public hearings raises the potential for damage to the reputation of individuals that the Commission investigates through the placing of erroneous allegations on the public record, and sensationalist media reporting of those allegations. Therefore, it is particularly important that ICAC operate in a manner that is procedurally fair, so that the risk of unjustified damage to reputations is minimised.

By contrast to ICAC, the principal responsibility of commissions of inquiry such as the Hong Kong ICAC, the NCA (ACC) and the NSW CC is to reduce corruption through the conduct of confidential investigations and private hearings aimed directly at obtaining admissible evidence for the prosecution of corrupt individuals. This is an additional but not principal function for ICAC pursuant to s.14 of the *ICAC Act*.

Importantly, ICAC's additional function of collecting evidence for the prosecution of corrupt individuals is potentially inconsistent with ICAC's use of public hearings to publicly expose corruption. This is because to publicly expose corruption and encourage high standards of behaviour in public officials, ICAC may find it necessary to obtain evidence under s.38 of the *ICAC Act*. That evidence is not subsequently admissible in a criminal court.

Judicial Models and ICAC

ICAC follows the inquisitorial judicial model in the conduct of its investigations to the extent that it is primarily focused on investigations to determine the factual truth of a particular matter or situation. This is in contrast with the distinct investigation, trial and sentencing phases of the adversarial process. However, although essentially an investigative body, ICAC does not follow fully the inquisitorial judicial model:

- Inquisitorial investigations are conducted solely in private, whereas the hearings phase of ICAC investigations is often in public. ICAC does not use public hearings solely as a public confirmation of the results of the prior investigation, but also as an investigative tool in their own right.

- Inquisitorial investigations are supervised by an “outside” examining magistrate or prosecutor, whereas ICAC investigations are done “in house” by a team of assembled police-type investigators.
- Inquisitorial investigations are based on a dossier, which is made available to defence counsel, whereas at ICAC hearings, there is no such right of access to material.
- Inquisitorial investigations are dominated by the presiding judge, who has all the evidence to hand, and examines the witnesses and generally conducts the inquiry, whereas ICAC hearings are generally run by counsel assisting, who does most of the questioning of witnesses on behalf of the Commission.

Earlier Reforms of the Conduct of ICAC Hearings

The fact that ICAC conducts investigations in public as well as private hearings arises from s.31 of the *ICAC Act*. As originally enacted in 1988, s.31 provided that ‘a hearing shall be held in public, unless the Commission directs that the hearing be held in private’. The touchstone for deciding to sit in public or in private was the public interest, which it was interpreted was usually best served by sitting in public.

However, in 1991, the *Independent Commission Against Corruption (Amendment) Act 1991* implemented changes to the *ICAC Act* to give effect to the recommendations of the Inquiry into Commission Procedures and the Rights of Witnesses. Importantly, s.31 of the *ICAC Act* was amended to provide the Commission with greater discretion in determining whether to hold a hearing in public or in private.

Accordingly, s.31 of the *ICAC Act* currently provides that:

1. A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.
2. Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by a legal practitioner representing such a person, as well as to a closing submission by a legal practitioner assisting the Commission as counsel.
3. In reaching these decisions, the Commission is obliged to have regard to any matters which it considers to be related to the public interest.
4. The Commission may give directions as to the persons who may be present at a hearing when it is being held in private. A person must not be present at a hearing in contravention of any such direction.

The Current Conduct of ICAC Hearings

In its written submission to this inquiry, ICAC argued that it no longer regards public hearings as the primary or “most effective” investigative tool available to it, as the

Commission previously stated in the 1990 Annual Report. Rather, ICAC indicated that it now regards public hearings as only one of the investigative tools available in the investigative repertoire of the Commission.

Commissioner Moss reiterated this evidence in hearings. She indicated to the Committee her belief that the current use of public hearings by ICAC as an investigative tool tends to bring little additional information of value to light. By contrast, private hearings offer the opportunity to uncover inconsistencies in the evidence of different witnesses, which Commissioner Moss suggested is a very important investigative tool. In addition, private hearings are considerably cheaper to conduct.

On this basis, the Committee considers that the current conduct of public hearings by ICAC should be reformed. In the Committee's opinion, supported by the ICAC Commissioner, the value of public hearings as an investigative tool is clearly limited, and of declining value. At the same time, however, the Committee wishes to emphasise its view that the value of public hearings as a mechanism for public exposure and education remains considerable.

Alternatives for Reform of the Conduct of ICAC Hearings

During the conduct of this inquiry, the Committee considered two alternatives for reform of the ICAC hearings process and the protection of the identity and reputation of individuals making complaints to, and appearing before, the Commission.

The first alternative considered by the Committee was the possibility of ICAC adopting the Hong Kong ICAC operational model. If this model were adopted, ICAC would cease to focus on public hearings in favour of private hearings leading to prosecution of corrupt individuals. In effect, this would entail a 'generational change' in ICAC's investigative procedures. The advantages of this option include:

1. a guarantee that the reputation of individuals would be protected from unnecessary damage through the exclusive use of private hearings;
2. greater scope for ICAC to detect inconsistencies in the evidence of different witnesses during private hearings; and
3. a significant reduction in costs to ICAC.

The second alternative considered by the Committee was the model presented by the NSW Bar Association. The Association advocated the conduct of all initial investigations, including hearings, in private, but coupled with an expositive-type public hearing of fully investigated material before the public and media if there is sufficient evidence to justify the making of an adverse finding. This would effectively move ICAC closer to the inquisitorial judicial model of investigations and hearings.

Coupled with this reform, the NSW Bar Association argued that the investigations process prior to any expositive-type public hearings should also be changed. In particular, the NSW Bar Association recommended in its written submission the drawing of a legislative distinction between a hearing "in camera" on the one hand

and a compulsory interview under oath with s.38 protection on the other. This could be achieved through the insertion of a new Division 2A within Part 4 (Functions of the Commission) of the *ICAC Act*, and a widening of the protection offered by s.38 of the *ICAC Act*.

The Committee's Preferred Hearings Model

As discussed, the Committee believes that the conduct of ICAC hearings should be reformed. The use of public hearings as an investigative tool is clearly limited, and of declining value.

Selective Public Exposure of Corrupt Conduct

The Committee's preferred option for reform of the ICAC hearings process is for ICAC to conduct all initial investigations, including hearings, in private, followed by an expositive-type public hearing if there is sufficient evidence to justify the making of an adverse finding. This is the model of ICAC public and private hearings advocated by the NSW Bar Association, and moves the ICAC hearings process closer to the inquisitorial judicial model.

Fundamentally, the Committee supports this option because it maintains public exposure as a means of preventing systemic corruption, in accordance with the principal function of ICAC under s.13 of the *ICAC Act*. However, the model has a number of other advantages:

1. The model places a higher standard of accountability on ICAC than is currently the case. The basis for this is that if ICAC can only run a expositive-type public hearing when it thinks it has a *prima facie* case of corruption, then it has to discipline itself to ensure that it has investigated a matter properly.
2. The model preserves many of the benefits associated with the alternative Hong Kong ICAC model. In particular, the proposed model would preserve the scope for ICAC to detect inconsistencies in the evidence of different witnesses during initial private investigations. There also would be the additional benefits of cost savings from the conduct of all initial hearings in private.
3. The model is more likely to prevent unnecessary damage to the reputation of individuals than the current conduct of ICAC hearings. This is because there will be a clearer division between non-public investigation on the one hand, and public exposition of properly investigated material on the other. Where ICAC holds a public hearing, only probative evidence of corrupt conduct by an individual should be presented.
4. ICAC is already moving towards much fuller investigations in private prior to the conduct of public hearings, making the Committee's favoured model for reform an evolutionary development. By contrast, the adoption of the Hong Kong ICAC model would require a more significant 'generational change' in the conduct of ICAC hearings.

Recommendation 1

The Committee recommends that ICAC wherever possible should conduct all initial investigations, including hearings, in private, followed by an expositive-type public hearing of fully investigated material if there is sufficient evidence which may justify the making of an adverse finding. Where ICAC determines to proceed in public, it should in its subsequent report to Parliament explain the basis of its decision.

The Committee notes that adoption of this option would require ICAC to amend the ICAC 'Procedures at Hearings' manual (March 1997).

The Committee also endorses the recommendation of the NSW Bar Association that ICAC should be prepared to particularise personally and in advance an allegation against a person appearing before the Commission at a public hearing, to allow a proper response to be mounted. The Committee believes that this is an important matter of procedural fairness. It would simply require ICAC to provide the information currently contained in opening statements in advance. Currently, under the terms of s.30(4) of the *ICAC Act*, a person appearing before the Commission is only entitled to be informed of the general scope and purpose of the hearing.

Recommendation 2

The Committee recommends that s.30(4) of the *ICAC Act* should be amended to read as follows:

An interested person appearing before the Commission at a public hearing is entitled to be informed personally and in advance of the particulars of any allegations to be raised.

Coupled with this, it is reasonable for ICAC to provide where possible greater detail in its scope and purpose statements of the issues to be raised in a public hearing. They may include the nature of events in question, the timing of any alleged corruption, and ICAC's general allegations. The Committee believes that this may be beneficial in bringing to light additional substantive information from members of the public.

Recommendation 3

The Committee recommends ICAC include where possible in its scope and purpose statements the issues to be raised in a public hearing, including where appropriate the nature of events in question, the timing of any alleged corruption, and ICAC's general allegations.

The Committee also partially endorses the NSW Bar Association's recommendation that public hearings should be conducted continuously, but believes that this may not always be practical. In this regard, the Committee notes the evidence of Commissioner Moss that ICAC attempts to complete hearings in as short a time as possible, but that even with the best preparation work, it is sometimes impossible to avoid a break in hearings. Accordingly, the Committee does not believe that the terms of Division 3 of the *ICAC Act* dealing with the conduct of hearings should be altered to prevent the adjournment of public hearings where this is necessary.

Recommendation 4

The Committee recommends that where ICAC believes that there is sufficient evidence to justify the making of an adverse finding against an individual or individuals, and accordingly undertakes an expositive-type public hearing, that hearings should, wherever possible, be conducted continuously.

While advocating the reform of ICAC's hearings process through the conduct of all initial investigations in private and the conduct of continuous public hearings where this is possible, the Committee wishes to emphasise a matter of great importance in relation to the conduct of public hearings: the Committee is not advocating that ICAC conduct public hearings in accordance with the full inquisitorial judicial model.

The Committee does not support this option on the basis that it would present too great a conflict of interest for participants in the hearings process. As discussed, under the full inquisitorial system, prosecutors and the police conduct investigations at arm's length. By contrast, ICAC investigations are conducted "in house", under the direct or indirect control of the Commissioner or Assistant Commissioners. It is thus inappropriate that the Commissioner or Assistant Commissioner could be in a position to present evidence of corruption to an expositive-type public hearing, and subsequently to use that evidence to make findings of corrupt conduct.

Continued Prosecution of Corrupt Individuals

While advocating the continued focus of ICAC on public exposure of corruption, the Committee is also particularly concerned that ICAC should not lose sight of its additional function under s.14 of the *ICAC Act*. That is, the ongoing compilation of admissible evidence which may be the subject of consideration for prosecution by the DPP where appropriate. The Committee does not in any way see public exposure of corrupt conduct as precluding the gathering of admissible evidence for the prosecution of corrupt individuals in appropriate circumstances.

The Committee notes that prosecution of corrupt individuals was raised at the Committee's Annual General Meeting with the ICAC Commissioner on 30 November 2001. At that meeting, the Committee expressed concern that in the past, public investigations of ICAC have on occasions either failed themselves to procure sufficient admissible evidence to secure a conviction in the courts, or have compromised any subsequent attempts to gather such evidence.

In response to these concerns, the Committee received assurances from Commissioner Moss that ICAC is making every effort to support prosecutions alongside public exposure of corruption through improvements to ICAC's investigative capacity and strategic operations reviews. Commissioner Moss repeated this assurance in evidence during the conduct of this inquiry.

The Committee considers that moving to conduct all initial investigations in private will assist ICAC in the compilation of admissible evidence for prosecution. The Committee is of the view that the best approach is for ICAC to gather as much admissible evidence as possible before going public.

Recommendation 5

The Committee recommends that ICAC should recommit itself to working towards assembling evidence that may be admissible in the prosecution of a person in connection with corrupt conduct.

Unchanged Investigative Procedures

In its written submissions, the NSW Bar Association argued that reform of ICAC hearings should be accompanied by the insertion of a new Division 2A (Compulsory Interviews) into the *ICAC Act*, together with a widening of the protection to witnesses offered by s.38 of the *ICAC Act*. This would enhance the investigative capacity of ICAC to accompany reform of ICAC hearings along the inquisitorial judicial model.

As it currently stands, s.38 allows evidence to be taken in compulsory private interviews during a hearing, which is not subsequently admissible in court. The NSW Bar Association argued that s.38 protection should be available for the conduct of a compulsory private investigatory interview outside of the hearings process, on the basis that private interviews under oath with s.38 protection are a very effective investigative tool by which the Commission can gather evidence.

The Committee does not support this reform. Fundamentally, the Committee is concerned that were a "compulsory interview" with s.38 protection more readily available, investigators might not make every effort to first obtain admissible evidence of corrupt conduct sufficient to support a prosecution through a normal investigative interview.

Furthermore, the Committee also believes that the current mechanism for offering witnesses the protection of s.38 is sufficient for the investigative purposes of the Commission. The Committee is not convinced that a witness is likely to be significantly more forthcoming and frank when brought to the ICAC premises for a "compulsory interview" as compared to a private hearing.

Accordingly, the Committee believes that the current investigative procedures of ICAC should remain unchanged.

Other Matters

The Committee raised in the Issues Paper whether the ICAC should continue to be able to initiate its own inquiries under s.20 of the *ICAC Act*, and if not, how inquiries should be initiated. In response, both ICAC and the NSW Bar Association argued that the Commission's ability to initiate its own inquiries is an important aspect of ICAC's independence and ability to publicly expose corruption. The Committee accepts this, and believes that ICAC should retain its current discretionary powers to initiate investigations as it sees fit.

On a separate matter, the NSW Police argued in its written submission for legislative amendment to the *ICAC Act* to provide that PIC, rather than ICAC, should have jurisdiction to investigate and report on allegations of corruption or serious misconduct amongst NSW Police Service Administrative Officers (as opposed to sworn officers).

In her response, Commissioner Moss indicated that this was largely a matter for the PIC, although she noted that the number of complaints regarding the NSW Police that fall within ICAC's jurisdiction is relatively small.

In turn, the PIC Commissioner, Commissioner Griffin, indicated that it would be logical to have unsworn members of the NSW Police subject to the jurisdiction of the PIC, although he reiterated that there are not a large number of corrupt conduct cases involving unsworn NSW Police Administrative Officers.

The Committee endorses this proposal. However, it notes that the matter is largely outside the scope of the Parliamentary Committee on ICAC, since it would require an amendment to the definition of a Police Officer under Part 4 of the *PIC Act 1990*.

In its written submission, the NSW Police also raised the availability of legal professional privilege at PIC hearings under s.27 of the *PIC Act* (this section is virtually identical to s.24 of the *ICAC Act*). Specifically, the NSW Police referred the Committee to two rulings handed down in PIC hearings in 2001, during which the respective presiding PIC Commissioners effectively ruled to abrogate the legal professional privilege of the Police Commissioner, on the basis that he is a public official.

The NSW Police contended that it was not the intention of Parliament to abrogate the availability of legal professional privilege to public officials under the PIC or ICAC Acts, except in instances where the client and legal adviser are involved in corrupt or criminal conduct.

To rectify this perceived anomaly, the NSW Police recommended that s.24(3)(b) of the *ICAC Act*, dealing with production of any statement or information regardless of 'privilege of a public authority or public official', be amended specifically to allow legal professional privilege or its statutory equivalent.

The Committee does not wish to comment on this issue further at this stage, but notes that the availability of legal professional privilege under the *PIC Act* is considered in the Review of the PIC Act by the Ministry of Police, which was due to

be tabled in Parliament on 21 June 2002. The Committee will revisit this issue as it relates to ICAC following receipt of the Government's response to the Ministry of Police review.

Finally, the Committee also wishes to raise the availability of ICAC transcripts of public hearings on the internet. Currently, the public can obtain transcripts of public hearings from ICAC, but only on a user-pays basis.

The Committee believes that transcripts of public hearings should be freely available to all on the ICAC web site. The public is entitled to the opportunity to access material arising from ICAC hearings, without the necessity of relying on media reporting of proceedings. Heightening public awareness of ICAC's procedures and inquiries far outweighs any consequential small loss of income to ICAC from such a move.

Recommendation 6

The Committee recommends that ICAC henceforth publish the transcripts of public hearings it conducts on its web site promptly after availability.

Appendices

Appendix One: List of Submissions

Appendix Two: Edited Minutes of Relevant Proceedings

Appendix One: List of Submissions

Submissions

1. Inspector of the Police Integrity Commission
2. Mr Peter Waite
3. (Confidential)
4. Whistleblowers Australia
5. Mrs P Wagstaff
6. Mr Albert Perish
7. The NSW Bar Association
8. Hong Kong ICAC
9. NSW Law Reform Society
10. The NSW Police
11. Queensland Crime and Misconduct Commission
12. The NSW ICAC

Supplementary Submissions

- 7A The NSW Bar Association
12A The NSW ICAC

Appendix Two: Edited Minutes of Relevant Proceedings

No. 31

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

WEDNESDAY 20 MARCH 2002
6.00PM, WARATAH ROOM
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon G Pearce

Legislative Assembly

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

Apologies: The Hon D Oldfield

Also in attendance: Ms Helen Minnican, Mr Stephen Frappell, Ms Hilary Parker, Ms Jennifer McVeigh

ICAC officers in attendance: Mr Stephen Murray (Executive Officer), Mr John Pritchard (Solicitor to the ICAC), Ms Rachelle Fenton, Senior Project Officer, Media and Publications

REVIEW OF THE ICAC – STAGE III

Resolved on the motion of Mr Hickey, seconded Ms Megarrity that the Committee table all submissions to Review of the ICAC – Stage III, except Submission 3 which is confidential.

PUBLIC HEARING

Ms Irene Moss, Commissioner, Independent Commission Against Corruption, on former affirmation; Mr Kieran Pehm, Deputy Commissioner on former oath.

The ICAC Commissioner made an opening statement.

The Chairman questioned the witnesses followed by other Committee members.

The Chairman thanked the witnesses and the witnesses withdrew.

The hearing concluded at 7.05pm.

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

THURSDAY 21 MARCH 2002, 1.00PM
NATIONAL PARTY ROOM
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon D Oldfield

Legislative Assembly

Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr Price

Apologies: The Hon G Pearce, Mr Brown, Mr Fraser, Mr Richardson

Also in attendance: Ms Helen Minnican, Mr Stephen Frappell, Ms Hilary Parker, Ms Jennifer McVeigh

REVIEW OF THE ICAC – STAGE III PUBLIC HEARING

Mr Jeremy Patrick Gormly, Barrister, Secretary and Member of the Council of the New South Wales Bar Association, 16th Floor, Wardell Chambers, 39 Martin Place, Sydney, sworn and examined.

Mr Gormly made an opening statement.

The Chairman questioned the witness followed by other Committee members.

The Chairman thanked the witness and the witness withdrew.

The hearing concluded at 1.40 pm.

PARLIAMENT OF NEW SOUTH WALES

MINUTES OF PROCEEDINGS
OF THE COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

THURSDAY 9 MAY 2002, 1.00PM
ROOM 1254
PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

The Hon J Hatzistergos (Chairman)
The Hon G Pearce

Legislative Assembly

Mr Brown
Mr Hickey
Dr Kernohan
Mr Martin
Ms Megarrity
Mr O'Farrell
Mr Price

Apologies: The Hon D Oldfield, Mr Fraser

Also in attendance: Ms Helen Minnican, Mr Stephen Frappell, Ms Pru Sheaves, Ms Hilary Parker, Ms Jennifer McVeigh

.....

3. Correspondence received

.....

Item 7: Correspondence from the ICAC Commissioner being responses to Questions on Notice taken by Commissioner Moss at the Committee's public hearing on the ICAC Review Stage III on 20 March 2002.

The Committee noted that the responses have been incorporated into the draft report.

.....

Late Item 1: Correspondence from Mr Jeremy Gormly SC, NSW Bar Association. Further submission to the Review of ICAC Stage III.

The Committee noted the correspondence and resolved on the motion of Dr Kernohan, seconded Mr O'Farrell, to forward the submission to ICAC for advice.

.....

4. ***Business arising from the Minutes***

The Chairman briefed the Committee on

- a) the draft report: Review of ICAC Stage III, and
- b)

The deliberative meeting concluded at 1.15pm.