COMMITTEE ON THE ICAC

REPORT ON ALLEGED CONTEMPT IN RELATION TO THE DRAFT REPORT OF BRON McKILLOP ON INQUISITORIAL SYSTEMS

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Parliament House
Macquarie Street
Sydney 2000

ISBN 07347 6873 7

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Committee Functions

Independent Commission Against Corruption Act 1988

"64 (1) The functions of the Joint Committee are as follows:

(a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee –

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to is continue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint."

Chairman's Foreword

The subject of this report is the second of two draft reports on inquisitorial systems which were prepared by Mr Bron McKillop for the Independent Commission Against Corruption in 1994.

In correspondence to the Committee in May 2000 and in a newspaper article in June 2001, journalist Mr Evan Whitton claimed that the ICAC had withheld two chapters of a report from the previous ICAC Committee. The report concerned was prepared for the ICAC by Mr Bron McKillop in relation to the Commission's report entitled, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*.

The tenor of the allegations by Mr Whitton raised the issue of whether or not a contempt of the previous Committee had occurred. The current Committee on the ICAC considered there to be sufficient public interest in the issue to examine it further.

Based on a thorough inspection of records belonging to the Parliamentary Committee and the ICAC, it appears unlikely that the document was received. However it is not possible to determine from the evidence available whether there was any deliberate intention on the part of the then Commissioner or staff of the ICAC to mislead the previous Committee in not producing the final draft report.

The ICAC's inquiry system and the applicability of non-adversarial processes to this system will be examined in Stage III of the Parliamentary Committee's review of the ICAC. The Committee now has a copy of the July 1994 McKillop draft report and intends to consider the information contained in it for this further stage of the review. ICAC Commissioner, Ms Irene Moss, has indicated that she would welcome discussion of the issues.

The Hon John Hatzistergos MLC
Chairman

1. BACKGROUND

Public hearing 15 September 1995 and previous committee report

Question on notice 11.4 for the public hearing on 15 September 1995 asked Commissioner O'Keefe:

> Could the Committee be supplied with all the work completed by Mr Brian(sic) McKillop in relation to that report? (a reference to the publication *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, November 1994).

The Collation of Evidence Report on the hearing records the following answer to question 11.4:

> A copy of Mr Bron McKillop's initial report to the Commission is attached. As the preface of the Commission's report acknowledges, it was ". . . compiled primarily by Mr Bron McKillop, a senior lecturer in law at the University of Sydney, with the assistance of ICAC General Counsel, Simon Stretton and other ICAC staff".

The Committee's report indicated that a copy of the McKillop report could be obtained by contacting the Committee Secretariat[1].

Media Report

In May 2000 journalist Evan Whitton corresponded with the Committee concerning the inquisitorial report. He alleged that the ICAC withheld two chapters of the McKillop report from the previous ICAC Committee.

The Committee considered Mr Whitton's correspondence at a deliberative meeting held on 15 June 2000. The Committee resolved at the meeting that the Chairman should write to Mr Whitton to advise that the Committee has no evidence that the Commission failed to provide the information requested by the previous Committee, and that, as the previous Committee expressed no dissatisfaction with the information received, the current Committee does not propose to take action on the matter. The Committee further resolved to advise Mr Whitton that he could make a submission on the subject.

Mr Whitton was advised in a letter from the Chairman, dated 20 June 2000, that the Committee was "unable to determine whether the Commission failed to provide the information requested by the previous Committee" and, as the previous Committee did not express dissatisfaction with the information received, the current Committee did not propose to take any action on the matter. The Chairman indicated to Mr Whitton that the Committee would be pleased to consider any further submission on the issue of inquisitorial justice and the ICAC that he may wish to make.

Mr Whitton wrote to the Committee again on 31 July 2000 submitting that the Committee take evidence from the ICAC on the matter of certain draft chapters of the report *Inquisitorial*

[1] *Collation of evidence of the Commissioner of the ICAC Mr Barry O'Keefe AM QC on general aspects of the Commission's operations*, p 72

Systems of Justice and the ICAC: A Comparison and pursue the general issue of non-adversarial processes. The Committee resolved that the matter of the draft chapters be raised at the next General Meeting with the Commission, and that the Chairman acknowledge Mr Whitton's letter and advise that a future stage of the Review of the ICAC would closely examine the ICAC's use of hearings, including, where appropriate, non-adversarial processes. The Chairman conveyed the Committee's resolution to Mr Whitton in a letter dated 31 August 2000 and the Committee subsequently received a submission from Mr Whitton.

On 11 June 2001, an article by Mr Whitton concerning the McKillop draft report was published in the *Sydney Morning Herald* repeating the allegation that the ICAC buried two chapters of the McKillop report and failed to provide them to the previous Committee in September 1995.

The ICAC Commissioner responded to the media article in a letter to the editor of the *Sydney Morning Herald* on 14 June 2001 in which she indicated that it was her understanding that the full report had been provided to the Committee.

ICAC Committee Hearing 18 June 2001

At an ICAC Committee public hearing on 18 June 2001, the Commissioner of the ICAC made a statement indicating that Mr McKillop had prepared two draft reports for the ICAC dated November 1991 and July 1994. Ms Moss told the Committee that in previous correspondence with Mr Whitton she had relied upon the advice of Mr John Feneley, then Solicitor to the Commission, that the full draft report had been given to the Committee in 1995.

In preparing for the public hearing, Ms Moss had reviewed relevant papers and come to the view that it appeared the previous Committee had been given a copy of McKillop's initial paper produced in November 1991 as distinct from the July 1994 draft. She concluded:

> It is not clear from ICAC files that the 1994 paper was provided to the Committee. It may be that the report provided in September 1995 was in fact the 1991 draft. Perhaps the Committee's records can assist in clarifying this matter.

The Commissioner tabled a copy of the July 1994 draft report by McKillop at the public hearing and provided relevant ICAC files to the Committee.

The Committee agreed in a deliberative meeting held on 18 June 2001 to examine the matter further and resolved that the Chairman should write to individuals involved at the time for their advice about the claims made by Mr Whitton and the apparent failure of the ICAC to provide the July 1994 report to the previous Parliamentary Committee.

2. RECORDS SEARCH

Committee Records

A thorough search of the archived official Committee records for the relevant period failed to locate a report by Mr McKillop amongst the documents and files relating to the public hearing held in September 1995.

A search of relevant unofficial files kept by the then Clerk to the Committee, Ms Ronda Miller (currently Clerk-Assistant, Procedure), located a copy of a report to the ICAC by Mr McKillop entitled, *Inquisitorial Systems of Criminal Justice, The Grand Jury and the ICAC,* and dated November 1991.

No reference to, or copy of, the July 1994 Draft Final Report by Mr McKillop entitled *Inquisitorial systems of Criminal Justice, the Grand Jury and the Independent Commission Against Corruption* was located.

Several committee staff changes since September 1995 mean there is no reliable corporate memory on the issue. The only other relevant paper found in the Committee's archives was an item of correspondence from the then Solicitor to the Commission, Mr John Feneley, providing material in response to questions on notice at the public hearing. The correspondence was located in papers for a deliberative meeting held on Tuesday, 5 December 1995, and contained a copy of "material incorporated in ICAC reports on study tours". The relevant questions on notice concerned:

i. information gathered on study tours by Commissioner Temby and other ICAC staff; and,
ii. the availability of reports produced by the ICAC as a result of the study tours.

The 60 page report enclosed with Mr Feneley's letter was based on the study tour interviews, observations of trials, and available literature. Mr Feneley advised that "at the end of the day the Commission decided to rely on the material prepared by Mr McKillop". This material did not include a copy of the McKillop report.

ICAC Records

At the public hearing on Monday 18 June 2001, the Commissioner of the ICAC tabled the July 1994 Draft Final Report by Mr McKillop and made available to the Committee files from the Commission's records concerning the Inquisitorial Systems Report. The Commission files were examined by the Committee Secretariat. They showed that the report had been subject to a number of revisions and changes suggested by various ICAC officers and an internal committee. The following chronology derives from the ICAC's records:

- Mr McKillop supplied the ICAC with his draft final report on 8 July 1994 and a typed copy of the amended original was returned to Mr McKillop by the ICAC on 28 July. Mr Simon Stretton, General Counsel for the Commission at this time, supplied Acting Commissioner Mant with a copy of the completed report on 27 July.
- Approximately two weeks later, on 11 August, the Solicitor to the Commission sent a revised copy of the Inquisitorial Report to the Acting Commissioner, the General Counsel, the Director of Corruption Prevention and the Executive Director. The Internal Review Panel/Committee was also provided with a copy of the revised report on which to comment by 15 August.

- The Review Panel made changes to the report and a copy of the revised report, incorporating the Panel's changes, was sent to Mr McKillop on 15 August.
- Mr Stretton recalls that he told Mr McKillop the omissions from the draft final report had been made because the Review Panel felt the chapters needed consolidation to reduce repetitiveness.

The ICAC was unable to confirm the membership of the Review Panel and there were no minutes of its meetings contained on the files provided by the ICAC to the Committee.

Conclusion

On the basis of the search conducted and the material available to the Secretariat, it was found that the previous ICAC Committee was provided with the initial draft report by Mr McKillop, dated November 1991, but there is no evidence to show that the Committee received the July 1994 final draft report.

It is not possible from the material available to the ICAC Committee to determine whether Mr McKillop's draft final report of July 1994 was intentionally withheld from the previous Committee.

The major difference between the 1991 and 1994 drafts is the inclusion in the latter of two chapters, numbers 5 and 6. The ICAC's files contain no conclusive evidence that chapters 5 and 6 of Mr McKillop's final draft were removed from the final report on inquisitorial systems for anything other than editorial reasons.

Nevertheless, this Committee is very concerned that the previous Committee on the ICAC apparently was not supplied with all of the material from Mr McKillop available to the ICAC at the public hearing on 15 September 1995. The question on notice asked by the previous Committee was very clear in seeking "**all the work**" completed by Mr McKillop in relation to the ICAC's 1994 publication on inquisitorial systems.

3. PROCEDURAL ISSUES

A major consideration for the Committee was whether or not a contempt of the previous Committee occurred and, if so, by whom. To constitute a contempt of the Parliament an act or omission must obstruct or impede the House, or one of its Committees, a Member or an Officer in the discharge of a duty.[2]

Commonwealth Procedure

At Commonwealth level, s.49 of the Constitution defines a contempt of the Parliament as:

> . . . any act or omission which obstructs or impedes . . . the performance of its functions, or which obstructs or impedes any member or officer . . . in the discharge of his duty, or which

[2] Legislative Assembly, *Fact Sheet No. 30 Parliamentary Privilege.*

> has a tendency, directly or indirectly, to produce such results . . . event though there is no precedent of the offence.[3]

The *Parliamentary Privileges Act 1987* (Cth) qualifies this provision as follows:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an **improper interference** with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.[4] (emphasis added)

May[5] and *House of Representatives Practice*, describe a contempt of the House, or committees of either House, as including: conspiring to deceive; presenting forged, falsified or fabricated documents with the intent to deceive; and deliberately misleading.[6]

The principal penal powers available to the Houses of the Commonwealth Parliament are those of the House of Commons at the establishment of the Commonwealth of Australia in 1901: the power to commit to prison, impose a fine, or publicly reprimand or admonish at the Bar of the House or Senate.[7] Under s.7 of the *Parliamentary Privileges Act 1987* (Cth) a House may impose a penalty of imprisonment for a period not exceeding six months. Section 7 of the Act also enables the House to impose a fine not exceeding $5,000 for an individual and $25,000 for a corporation.[8] It should be noted that the House of Representatives has practised a policy of restraint in the exercise of its penal jurisdiction although it has not formally adopted such a policy.[9] The only occasion on which the House of Representatives has exercised its power of commitment was in 1955 (Browne and Fitzpatrick).

NSW Procedure

Unlike the Commonwealth Parliament, the Parliament of New South Wales has not passed legislation to clarify that its powers, privileges and immunities are those of the House of Commons as at 1856. This means that the power of the Parliament of New South Wales to arrest or fine or otherwise punish Members or non-Members remains unclear.

However, provision is made in the *Parliamentary Evidence Act 1901* for a penalty for false evidence or a refusal to answer by a witness before a House of the New South Wales Parliament or any of its committees. Section 11 of the Act states that:

> . . . if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the

[3] *House of Representatives Practice*, second edition,p.701.
[4] ibid, p.702.
[5] *Erskine May's Treatise on the law, privileges, proceedings and usage of parliament*, ed. C. J. Boulton, London, Butterworths, 1989.
[6] *House of Representatives Practice*, op. cit., pp.703-4.
[7] The House of Commons has not imposed a fine since 1666. The Commons' Committee of Privileges recommended in 1977 that the power to fine should be revived by statute and the power to imprison should be abolished as the latter was no longer appropriate. The New Zealand House of Representatives exercised it power to fine offending members of the public in 1896. (J.R. Odgers, *Australian Senate Practice*, sixth edition, Canberra 1991 p.1029-1030.)
[8] *House of Representatives Practice*, op. cit., pp.715-718.
[9] ibid, p.702.

> House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.

Section 13 of the Act provides:

> If any such witness wilfully makes any false statement, knowing the same to be false, the witness shall, whether such statement amounts to perjury or not, be liable to imprisonment for a term not exceeding five years.

In early cases concerning certain statutes relevant to the privileges of the New South Wales Parliament it was decided that the Colonial Assembly possessed "protective and self-defensive powers only, and not punitive".[10] To date sections 11 and 13 of the *Parliamentary Evidence Act* have not been invoked or legally tested.

The NSW Legislative Assembly historically prefers to deal with questions of privilege on the floor of the House and contempt issues would be dealt with in the same way. In dealing with a contempt matter the Legislative Assembly may resolve to appoint a select committee (as a quasi-privileges committee) to investigate and report back to the House.

4. FURTHER INQUIRIES

The facts are unclear in relation to the failure of the ICAC to provide all available material to the previous Committee on the McKillop draft reports on the inquisitorial systems. While it would appear that the 1994 draft report was not provided to the previous Committee, there is nothing in available Committee and ICAC records to indicate that this was a deliberate attempt to mislead the previous Committee, knowingly provide it with a false answer during evidence, or deliberately obstruct the Committee in the performance of its duties.

In the absence of clear documentary evidence which would clarify the contempt question, the Committee endeavoured to obtain further information by writing to relevant ICAC staff. The Chairman wrote to Ms Gail Furness and Mr John Feneley on 9 July 2001 seeking any recollections they might have of the events surrounding the omission of two draft chapters from the final report on inquisitorial systems and the ICAC's apparent failure to provide the 1994 draft to the Committee.

Mr John Feneley faxed his reply to the Chairman (19 July 2001) and stated that he was not involved in the production of the report but he recalled being told that much of the editing was for the sake of clarity and to avoid duplication. Mr Feneley recollects a telephone conversation on 17 March 1994 in which Mr McKillop was given permission to release his draft report to Mr Whitton, but only after the ICAC's report was published, so that the Commission could have the benefit of the initial publication of the work it had paid Mr McKillop to undertake.

File notes from material provided by the ICAC corroborate these details. The ICAC's records place the conversation about releasing the draft report as having taken place in March 1994 prior to the actual provision of the draft by Mr McKillop to the ICAC on 8 July 1994.

[10] Legislative Assembly Fact Sheet No. 30 - Parliamentary Privilege.

Ms Furness replied (20 July 2001) that she recalled reading an early draft but that she resigned her employment with the ICAC in or about July 1994, some months before the publication of the final report.

The ICAC files provided to the Committee show that Mr Stretton had provided the Commission with a copy of a letter he had written in reply to Mr Whitton, dated 14 June 2000. Mr Stretton does not recall any suppression of material and does not recall saying that the omission of any material was political.

A comparison of the 1994 draft and the published report supports the claim made by Mr Feneley, that the editing was substantially to clarify and avoid repetition.

It is therefore not possible from the material available to establish that there was any deliberate intention on the part of the then Commissioner or staff of the ICAC to mislead the previous Committee by not providing Mr McKillop's draft final report of July 1994 when responding to the relevant question on notice from the public hearing on 15 September 1995.

5. CONCLUSION

In conclusion, the Committee wishes to express its concern about the handling of the previous Committee's request for access to the research work performed by Mr McKillop for the ICAC in relation to the inquisitorial systems report. It is the opinion of the Committee that the request contained in the questions on notice for the public hearing on 15 September 1995 was very clear and not open to interpretation. The Committee believes that the previous Committee should have received a copy of Mr McKillop's final draft report of July 1994. Standing Orders and the *Parliamentary Evidence Act* provide parliamentary committees in New South Wales with the power to send for persons, papers, records and exhibits, and the Committee considers that the ICAC should abide by such orders to the fullest possible extent. The Committee views the apparent failure of the ICAC to provide this material to the previous Committee on the ICAC as a very serious matter which warranted further examination.

However, the Committee does not consider that it is in a position to pursue its inquiries further. The matter in question relates to events which occurred several years ago and given the passage of time it is difficult for the Committee to effectively conduct an investigation. Formal inquiries to the key individuals involved in the ICAC's handling of the matter did not produce any evidence to indicate that a contempt had occurred. The length of time which has passed also means that records relating to the period have been archived.

In these circumstances, the resources which the Committee has consumed in investigating this matter are significant. 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 notes that the current Commissioner, Ms Irene Moss, indicated at the public hearing on 18 June 2001 that she had no problems with making the July 1994 report public. Her opinion was that the "missing" two chapters "do not appear to be controversial in any sense to the ICAC"[11] and later added that she would be "quite receptive to these issues being debated. If there are better ways that we can handle inquiries, a much more streamlined and cost-effective way of dealing with inquiries, I would be most open to considering them"[12].

[11] *Report of Proceedings before the Committee on the ICAC: Stage Two of the Independent Commission Against Corruption Review,* 18 June 2001, p 2
[12] ibid. p 3

APPENDICES

Appendix 1: Correspondence to the Committee from Mr Evan Whitton, dated 9 May and 17 May 2000, and reply from the Hon John Hatzistergos MLC, dated 20 June 2000

Appendix 2: Newspaper article by Mr Evan Whitton: "The report that ICAC buried", *Sydney Morning Herald*, 11 June 2001

Appendix 3: Excerpt from the transcript of *Report of Proceedings before the Committee on the Independent Commission Against Corruption – Stage Two of the Review of the Independent Commission Against Corruption*, 18 June 2001, pp 1-4

Appendix 4: Correspondence from the Hon John Hatzistergos MLC to Mr John Feneley and Ms Gail Furness, dated 9 July 2001

Appendix 5: Reply from Mr John Feneley, dated 19 July 2001 and reply from Ms Gail Furness, dated 20 July 2001

Appendix 6: Letter to Mr Evan Whitton from Mr Simon Stretton, dated 14 June 2000