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# COMMITTEE MEMBERSHIP

## LEGISLATIVE COUNCIL

The Hon J Hatzistergos MLC  
**Chairperson**

The Hon D Oldfield MLC

The Hon J Ryan MLC

## LEGISLATIVE ASSEMBLY

Mr J Price MP  
**Vice-Chairperson**

Mr M Brown MP

Mr A Fraser MP

Mr K Hickey MP

Dr E A Kernohan MP

Mr G Martin MP

Ms A Megarrity MP

Mr M Richardson MP

### **Secretariat**

M H Minnican - Director  
Ms H Parker - Committee Officer

Ms T van den Bosch - Research Officer  
Natasha O'Connor - Assistant Committee Officer

# COMMITTEE FUNCTIONS

## *Independent Commission Against Corruption Act 1988*

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

- (a) to monitor and to review the exercise by the Commission of its functions;
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- (c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

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

- (a) to investigate a matter relating to particular conduct; or
- (b) to reconsider a decision to investigate, not to investigate or to 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."

# CHAIRMAN'S FOREWORD

The Committee on the ICAC is strongly supportive of the role and function of the Independent Commission Against Corruption. Investigating, exposing and preventing public sector corruption remains important today. In reviewing the ICAC, the Committee has sought to identify areas in which the Commission's performance, procedures or structure can be enhanced. The objective at all times has been the maintenance of an effective means of ensuring the highest standard of public sector ethics.

In this report, the Committee's concern has been to determine whether there is an appropriate level of accountability for the extraordinary powers held by the ICAC. At its inception, the Commission was intended by the Parliament to exercise its functions independently, and enormous discretionary powers were afforded to the Commissioner. However, the exercise of these powers and functions must be satisfactorily accounted for and oversighted.

The current accountability structure of the ICAC includes this Committee's oversight of the Commission's policy, procedures and legislative framework. In addition, the Operations Review Committee advises the Commissioner on investigative decisions, and judicial review is available for administrative actions that are in excess of power or which breach the rules of procedural fairness. Various statutes applying to the entire executive branch also place certain requirements and responsibilities on the Commission.

The Committee has concluded from its examination of the ICAC's current accountability regime that a significant gap exists in relation to the consideration of complaints against the Commission and its officers. Given the nature and extent of the powers and discretions of the Commission, and particularly their covert character, the Committee considers it essential that there be an independent means of proactively monitoring the use, and investigating alleged abuses, of those powers.

After considering the accountability models of several other investigative agencies, the Committee has made a number of recommendations, the most important of which is the establishment of an Inspector of the ICAC. For the Inspector to provide effective supervision of the Commission, he or she must be equipped with appropriate powers. The Committee has therefore recommended that the Inspector be empowered to hold inquiries, investigate any aspect of the Commission's operations, make reports and recommendations, and access any information held by the Commission.

I am confident that the recommendations contained in this report will, if adopted, create an effective and efficient structure to ensure the level of accountability suitable for the Commission.

The Committee has undertaken a substantial amount of information gathering for the purpose of this Review, and I would like to thank all the witnesses who gave evidence at the Committee's hearings and supplied written submissions. In particular, the Commission has been co-operative and forthcoming, and I thank both Commissioner O'Keefe and Commissioner Moss for their participation. I am also grateful to the members of the Committee for their input and bi-partisan support, and to the Secretariat for its assistance.

The Hon John Hatzistergos MLC  
**Chairman**

May 2000

# EXECUTIVE SUMMARY

As part of its function of monitoring and reviewing the Independent Commission Against Corruption, the Committee on the ICAC has undertaken a review of the Commission. The Committee's purpose in so doing has been to strengthen the Commission's capabilities for fighting corruption and to enhance the public's confidence in the ICAC. It is the Committee's belief that an effective, efficient Commission is unquestionably to the advantage of New South Wales.

The accountability of the ICAC is the focus of this first report arising from the Review of the ICAC. In Chapter One, the Committee has examined the current accountability structure applying to the ICAC. The current regime encompasses supervision by the courts, legislative checks and balances, the Operations Review Committee's provision of advice on investigative decisions, and this Committee's oversight of the Commission's policies and procedures. The Committee has assessed the current oversight structure to be inadequate, and requiring particular amendment to address the absence of a mechanism to handle complaints against the Commission and its officers.

Chapter Two of the Report is a comparative study of the accountability regimes of comparable organisations in New South Wales and elsewhere. It includes an evaluation of the Inspector of the Police Integrity Commission, the Inspector-General of Intelligence and Security, the Parliamentary Commissioner of the Queensland Criminal Justice Commission, the consultative committees of the Hong Kong ICAC, the Western Australian Anti-Corruption Commission, and the National Crime Authority. The Committee concludes from this study that an Inspector model is the preferred option for the New South Wales ICAC.

In Chapter Three, the Committee's proposal for an Inspector of the ICAC is detailed. The model advanced by the Committee is for an Inspector responsible for investigating complaints of misconduct, impropriety or illegality by the Commission and its staff, for proactively monitoring the ICAC's compliance with the law, and auditing the reasonableness of the Commission's investigative decisions. The Committee has further recommended that the Inspector be empowered to access all information held by ICAC, including current operational material, and that he or she should have all the powers of a Royal Commissioner. The Inspector is to submit an annual report each year, and will be included within this Committee's jurisdiction. The Operations Review Committee is to continue within this model in a slightly amended form, with the Parliamentary Committee to review the situation after the Inspector has been operational for 12 months.

The issue of accountability of performance is addressed in Chapter Four, in which the Committee has examined the ICAC's current performance measuring process, and found it to be unsatisfactory. The Committee has noted the need to develop

appropriate key performance indicators, with independent validation of performance information, and attempts at comparative benchmarking.

## SUMMARY OF RECOMMENDATIONS

### **Recommendation 1**

The Committee recommends no change to the Committee's statutory functions in relation to its oversight of the ICAC, as specified in section 64 of the *ICAC Act 1988*.

### **Recommendation 2**

The Committee recommends the amendment of section 62(1)(c) of the ICAC Act to remove the requirement for the Commissioner of Police to be a member of the ORC.

### **Recommendation 3**

The Committee recommends that instead, the Minister, with the concurrence of the Commissioner, appoint to the ORC an individual with an investigative background.

### **Recommendation 4**

The Committee recommends that the merit selection principles of the *Public Sector Management Act* should apply to the ICAC.

### **Recommendation 5**

The Committee recommends that the ICAC Act be amended to provide for the establishment of an Inspector of the ICAC.

### **Recommendation 6**

The Committee recommends that the Inspector's functions be:

- to deal with, by reports and recommendations, complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission;
- to audit the Commission's operations for the purpose of monitoring the legality and propriety of its activities and procedures; and
- to audit the reasonableness of the ICAC's investigative decisions.

### **Recommendation 7**

The Committee recommends the Inspector's functions and powers be able to be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint, or following a reference by this Parliamentary Committee or any other agency.

### **Recommendation 8**

The Committee further recommends that the Inspector should not be subject to the Commission in any respect.

### **Recommendation 9**

The Committee recommends that the Inspector of the ICAC be included as an authorised recipient of telecommunications product under the Commonwealth *Telecommunications (Interception) Act 1979*.

### **Recommendation 10**

The Committee recommends that the position of the ORC be reviewed by the Committee after the Inspector has been operational for 12 months.

### **Recommendation 11**

The Committee recommends that the Inspector be empowered to:

- investigate any aspect of the Commission's operations and any conduct of the Commission's officers;
- access and have copies made of all records of the ICAC;
- require Commission officers to supply information, documents or other items;
- call Commission officers to produce information, documents or other things;
- recommend disciplinary action or criminal prosecutions against Commission officers where appropriate; and
- any other thing necessary to fulfill the Inspector's functions.

The Committee recommends that the Inspector be empowered to make and hold inquiries, with all of the powers, authorities, protections and immunities of a Commissioner under the *Royal Commissions Act 1923*.

The Committee recommends that the Inspector be empowered to issue investigation reports and Special Reports. The Committee recommends that the distribution of these reports be determined by the Inspector's assessment of the public interest. In the event that the Inspector determines not to investigate a complaint, he or she should advise this fact and the circumstances of it to the complainant and include it in the Annual Report.

The Committee recommends that the Inspector be empowered to issue "default in consequent action" reports where there is inadequate response to his/her recommendations. Such reports should be tabled in the Parliament, with the Minister being required to make a statement in the House in response to the report within 12 sitting days after its tabling.

The Committee further recommends that the Inspector be required to submit an Annual Report to Parliament on the performance of the Inspector's functions.

### **Recommendation 12**

The Committee recommends that a person be eligible for appointment as Inspector if he or she: is or was qualified to be appointed as a Judge of any court in New South Wales or any other State or Territory; or, is or was qualified to be a Judge of the Federal Court or a Justice of the High Court of Australia.

### **Recommendation 13**

The Committee recommends that a person be ineligible for appointment as Inspector if he or she is a Member of Parliament in New South Wales or any other State or Territory, or is a Member of the Commonwealth Parliament.

### **Recommendation 14**

The Committee recommends that the Committee's jurisdiction be extended to include the proposed office of Inspector.

The Committee further recommends that its functions in relation to the Inspector be:

- to monitor and review the exercise by the Inspector of his/her functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Inspector or connected with the exercise of his/her functions;
- to examine each annual and other report of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- to report to both Houses of Parliament any change which the Committee thinks desirable to the functions, structures and procedures of the Inspector; and
- to refer any matter relating to the Inspector's functions to the Inspector for investigation.

### **Recommendation 15**

The Committee recommends a statutory prohibition on the Committee reconsidering the Inspector's decision to investigate, not to investigate or to discontinue investigation of a particular complaint. Reconsideration of the findings, recommendations and determinations of the Inspector should also be prohibited.

### **Recommendation 16**

The Committee recommends that the Independent Commission Against Corruption be the subject of a special audit, otherwise known as a performance audit, by the NSW Audit Office under section 38 of the *Public Finance and Audit Act*.

**Recommendation 17**

The Committee further recommends that the Audit Office be provided with additional funding to undertake the special audit.

**Recommendation 18**

The Committee recommends that the Commission's performance indicators and performance information be independently assessed and verified on a regular basis and that the results of the assessment be made available to the Committee.

**Recommendation 19**

The Committee further recommends that the independent assessment be carried out by a consultant engaged by the Committee and that additional funding be made available for this purpose.

# INTRODUCTION

## I. Establishment of the Independent Commission Against Corruption

Plans for the establishment of the Independent Commission Against Corruption (“the ICAC”) originated as a result of rumours of corruption of high level officials and doubt about the integrity of public administration in New South Wales in the 1980s.

Introducing the Bill in the Legislative Assembly on 26 May 1988, then Premier Nick Greiner explained the rationale behind the creation of the Commission:

*There was a general perception that people in high office in this State were susceptible to impropriety and corruption. In some cases that has been shown to be true.*

*In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct (NSW Parliamentary Debates, Legislative Assembly, 26 May 1988, p 673).*

The passage of the *Independent Commission Against Corruption Act 1988* established a Commission with a focus on investigating corrupt conduct, preventing corruption, and educating the community about the effects of corruption. In order to fulfill these tasks, the ICAC was equipped with extraordinary coercive powers, including powers to:

- obtain statements of information (section 21)
- inspect documents (section 22)
- enter premises of public authorities or public officials (section 23)
- override claims of privilege by public officials in obtaining documents and information (section 24)
- obtain documents and other things from private individuals (section 22)
- issue a search warrant or apply for one (section 40)

- apply for warrants for listening devices (section 19(2))
- hold hearings in private or in public (sections 30 and 31)
- summon a person to give evidence or produce documents (section 35)
- require a person to give evidence despite any grounds of privilege, including self-incrimination (section 37), and
- issue a warrant for the arrest of a witness who fails to appear (section 36)

The powers accorded to the Commission reflected the perception that the nature of corrupt conduct was such that traditional investigative techniques were ineffective. Exposure of corruption was favoured as a means of improving public sector integrity. Mr Greiner observed:

*... corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the Commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal Commission (NSW Parliamentary Debates, Legislative Assembly, 26 May 1988, p 675).*

The Commission was empowered to make public reports on its investigations and on other matters relating to the Commission. The Commission's power to make findings of corrupt conduct against individuals was clarified by legislative amendment in 1990, following an interpretation of the ICAC's reporting powers in the High Court judgment on the *Balog and Stait v ICAC* case ((1990) 64 ALJR 400). The 1990 amendments made clear the power of the ICAC to make and report findings about individuals and to make recommendations for the consideration of prosecution or disciplinary action against individuals.

Additional powers have been conferred on the Commission since its inception. The power to intercept telecommunications was first used by the ICAC in 1992-3, and since then a total of 46 telephone intercept warrants have been obtained. The *Law Enforcement (Controlled Operations) Act 1997* authorises specified agencies, including the ICAC, to undertake controlled (or 'sting') operations for the purpose of obtaining evidence relating to criminal conduct. Commission officers are now also empowered to access tax records, and to assume identities for the purpose of an investigation.

The *ICAC Act* established several accountability mechanisms, outlined below, to provide a measure of oversight of these extraordinary powers.

## **II. Accountability Issues**

The development of democracy in the last two decades has seen an increased emphasis on accountability and accountability mechanisms. Accountability encompasses:

*the obligation to demonstrate continued official trustworthiness through justification of performance in a position of responsibility.*  
(Uhr, 1993, p 3)

Accountability involves being answerable for the way in which power is exercised. The effectiveness of an accountability body is influenced by a number of factors, including its independence (whether it is dependent for staff and resources on the authority being oversighted and whether it is subject to the influence of that authority) and the powers it holds to enable it to fulfil its functions and to report on its activities and findings. Effective accountability also relies upon the power to make recommendations, to gain access to necessary information through examining files and witnesses and the ability to investigate complaints.

In view of the Commission's extensive coercive powers, particularly of a covert nature, the *Independent Commission Against Corruption Act 1988* built in advisory and accountability mechanisms. The Operations Review Committee (ORC) was established to provide the Commission with forensic expertise and advice on investigation decisions. Oversight of a policy and procedural nature is provided by the Parliamentary Committee on the ICAC. These operate in conjunction with the general accountability mechanisms applying to the rest of the executive branch. Chapter One examines the ICAC's current accountability regime.

### **III. The Review of the Independent Commission Against Corruption**

The Review of the ICAC commenced under the previous Committee on the ICAC, chaired by Mr Peter Nagle, MP. Following the release of an issues paper in May 1997, the former Committee called for submissions from interested individuals and organisations. Thirteen submissions were received, details of which are appended in Appendix 1. A program of public and in camera hearings was commenced in October 1997, beginning with Commissioner O'Keefe. Appendix 2 contains a list of the public hearings held by the former Committee.

The former Committee ceased to exist upon the dissolution of Parliament prior to the 1999 election, and had not finalised a Review report prior to dissolution.

The Committee was reconstituted with new Members following the 1999 election, with the Hon John Hatzistergos MLC elected as Chairman, and Mr John Price MP elected as Vice-Chairman. A full membership list appears at page 3. At the deliberative meeting on 30 June 1999, the Committee considered the continuing importance of issues raised in the Review and the resources previously allocated

for the Inquiry, and resolved to continue with the Review of the ICAC begun under the previous Committee and to call for new submissions. The additional submissions received by the current Committee are detailed in Appendix 1. Pursuant to section 69(3) of the *ICAC Act*, the evidence obtained through hearings and submissions by the previous Committee were carried forward and considered by the current Committee.

As a large number of complex matters have arisen in the course of the Review of the ICAC, the Committee intends issuing a series of reports on separate themes. The current Report deals with the issue of accountability.

# CHAPTER ONE

## EXISTING ACCOUNTABILITY AND ADVISORY MECHANISMS

### 1.1 Committee on the ICAC

#### 1.1.1 Functions of the Committee

When introducing the ICAC Bill, Mr Greiner advised the Legislative Assembly that a parliamentary committee would be established to serve as a means of accountability:

*The Commission's activities will be monitored by a Parliamentary Committee. This Committee will not be involved with specific operational matters, but will be concerned with looking at the overall effectiveness of the commission's strategies.*

The role and functions of the Committee are set out in Part 7 of the *ICAC Act 1988*. The Committee's oversight of the Independent Commission Against Corruption is of a general nature:

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 omission 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.*

Under amendments to section 64A of the Act, the Committee was given the power to veto proposed appointments of the Commissioner. The amendment was made in 1992, and sought to ensure the suitability, integrity and independence of the appointees to the position of Commissioner. At the same time, the appointment of other statutory officers was made subject to veto by relevant parliamentary committees.

Certain operations of the Commission are excluded from the Committee's jurisdiction under s.64(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.*

These exclusions reflect the intention that the Committee perform a general monitoring and review role, rather than serving as an appeal mechanism for complainants who are dissatisfied with the Commission's decisions, or as an alternative investigatory agency.

In order to fulfil its functions, the Committee has the power to "send for persons, papers and records" (s.69(1)). Summonses to give evidence are enforceable under the *Parliamentary Evidence Act 1901*, and all lawful questions must be answered. There is no penalty for failure to produce papers and records, but any failure to produce can be reported to the Parliament, which itself can call for papers. The Committee may also hold public hearings to take evidence on any matter within

its jurisdiction, or private hearings where the material being considered is confidential (s.70, *ICAC Act 1988*).

To date, the Committee's activities have involved holding public hearings with the Commissioner, dealing with a limited number of complaints against the ICAC that raise general issues within the jurisdiction of the Committee on the ICAC, and undertaking inquiries about the functions of the Commission. The Committee usually holds public meetings with the Commissioner at six-monthly intervals to ask questions on general matters relating to the Commission. Questioning at the hearings covers such matters as:

- Staffing and resources
- Numbers and kinds of complaints received
- Numbers of investigations undertaken
- Numbers of public and private hearings held
- Use of the Commission's coercive powers
- Prosecutions arising from Commission investigations
- Corruption prevention programs
- Education work
- Outcomes arising from Commission reports
- Evaluation of operations
- Electronic detection and surveillance
- Protected Disclosures

The evidence obtained is collated and tabled in the House, together with a report on the contents by the Committee. The General Meetings have in the past raised issues requiring further inquiry. Inquiries have included themes such as the rights of witnesses, the televising of hearings, damage to reputations, and Commission procedures.

### **1.1.2 Evaluation of the Committee's role**

The Parliamentary Committee's role is to ensure the ICAC generally is operating as intended by the Parliament. Accordingly, the Committee's powers are commensurate with the role set out in the Act, enabling it to report and make recommendations on matters relating to the functioning of the Commission.

The Committee does not have the ability to review the Commission's decisions and findings, to investigate conduct, or to examine the legality and propriety of the Commission's actions with respect to particular complaints. **It is the Committee's opinion that these statutory restrictions imposed upon the Committee under**

**section 64(2) are appropriate.** Committee Members have neither the qualifications nor the expertise to conduct investigations, nor does the Committee have the resources to serve as an appeal mechanism for individuals dissatisfied with the decisions and findings of the Commission.

Whilst the Committee does perceive the need for an oversight body with the power of examining complaints about the conduct of ICAC officers, it would not be appropriate for the Committee itself to fulfil that function. Such a role should be undertaken by a body independent of both the Commission and the Parliament. Further consideration of, and recommendations concerning, the most effective form of oversight for the Commission appear in Chapter Three. The only recommended changes to the Committee's functions relate to its interaction with the proposed Inspector. These changes are detailed further below at section 3.5.1.

### **Recommendation 1**

The Committee recommends no change to the Committee's statutory functions in relation to its oversight of the ICAC, as specified in section 64 of the *ICAC Act 1988*.

## **1.2 Operations Review Committee (ORC)**

The Operations Review Committee serves as a consultative mechanism, providing advice to the Commissioner on whether the Commission should investigate a complaint or discontinue an investigation of a complaint.

### **1.2.1 Functions of the ORC**

Established under Part 6 of the *ICAC Act*, the ORC's functions, as set out in s.59 (1), are:

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

The Commissioner must meet with the ORC at least every three months. Pursuant to s.20(4), the Commissioner is required to consult with the ORC before deciding not to conduct an investigation, or to discontinue the investigation of any complaint made under section 10 of the Act (that is complaints made by the

general public concerning corrupt conduct). There is no statutory requirement for the Commissioner to consult the ORC about complaints made by principal officers of public authorities under section 11, nor any matter received by the Commission that is categorised as information rather than as a complaint. The ORC's advice to the Commissioner is non-binding. Mr Greiner described the ORC's role:

*There will be an operations review committee, which will advise the commission on action to be taken in relation to complaints. In contrast to the parliamentary committee it will be closely involved in operational matters, and will have the necessary forensic expertise to provide the commissioner with advice on operations (NSW Parliamentary Debates, Legislative Assembly, 26 May 1988, p 675, emphasis added)*

The ORC and the Commission have, by agreement, formulated broader terms of reference for the ORC. This appears to be an attempt to redress the lack of other more appropriate accountability mechanisms elsewhere in the legislation. These are detailed in the 1998-9 Annual Report (page 13) as follows:

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

The Operations Review Committee has eight members, as set out in s. 60, comprising the Commissioner, an Assistant Commissioner, the Police Commissioner, a person appointed by the Governor on the recommendation of the Attorney-General, and four community representatives, appointed by the Governor on the recommendation of the Minister. The current membership of the ORC is attached at Appendix 3.

### **1.2.2 Operation of the ORC**

In 1998-9, the ORC considered a total of 1223 matters at its ten meetings (ICAC Annual Report, p 34). The Commission reports that the ORC accepted the Commission's recommendation on 78 per cent (950 matters) of the matters it considered. A further 11 per cent (137 matters) were altered or commented upon by the ORC, and another 8 per cent (99 matters) were rejected and required further reports to be prepared. Status reports were accepted on 37 matters. On each matter, the Commissioner accepted the advice of the Operations Review Committee.

As part of the Review the Committee obtained evidence from current ORC members about the way in which the Operations Review Committee functions. The Committee values the evidence of the two ORC community members who accepted the invitation to attend before the Committee, as very little information about the ORC's operation is available on the public record. The Rev Harry Herbert, one of the community members of the ORC, described the process for meetings in the following way:

*The operations of the committee are that committee members receive the papers a week in advance. The papers are prepared by the staff and come from the assessment committee which is a staff committee of the ICAC. The papers comprise a number of sections, some of them being reports on on-going matters, some of them being reports on complaints that have been lodged and with recommendations made by the staff-comprised assessments committee ...*

Ms McColl, another community representative on the ORC, also explained the functioning of an ORC meeting:

*We meet monthly. Each month, we get a large folder of materials, which is subdivided into various categories. One is just current matters under review, and then there are various categories of stages of investigation - for example, initial complaint, preliminary investigation, further investigation, where the officers of the commission have decided that further investigation should not be undertaken - and we review all of those categories and decide whether or not we agree with the recommendation of the officers of the commission.*

*There are further categories in relation to reports - for example, where we have earlier reviewed a matter and decided more work needed to be done to decide whether or not the matter should be proceeded with or discontinued, and we look at those.*

*There is also a large category of matters where we are given reports and are invited to consider whether the investigation should proceed further but, in the event that they do not proceed, there are various recommendations - for example, referring a matter back to another government department to actually exercise the function under section 53 of the Independent Commission Against Corruption Act to investigate the matter themselves (McColl, Evidence, 23 February 2000).*

Reverend Herbert advised the Committee that the Commissioner of the ICAC receives the papers at the same time as other ORC members, and usually has not previously formed a view on a matter:

*The commissioner does not sit on the assessments committee, so he receives the papers in the same fashion as other members of the ORC and my experience is that the commissioner himself will often ... say "This report is not good enough". Before anyone speaks he will say, "I am not happy with this one" (Evidence, 23 February 2000).*

Both Ms McColl and Rev Herbert indicated to the Committee that disagreements with the Commissioner do take place in relation to recommendations on complaints:

*Mr Fraser: You said you often ask for matters to be reviewed. How often would that happen and what sort of resistance would you get from the commissioner and the assistant commissioner as they sit on the committee?*

*Ms McColl: Well, I have never observed resistance. As I said earlier, there might occasionally be disagreement, and that is debated and resolved. I cannot think of a matter now where a request by the committee that a matter be further reviewed has been resisted and opposed and not pursued (Evidence, 23 February 2000).*

Ms McColl went on to explain that disagreements are resolved by agreement rather than by formal vote.

Reverend Herbert noted:

*I do want to stress that the ORC is not reluctant to send matters back. In fact, one matter I can recall which involved a government agency was a couple of times sent to the ORC by the assessments process to*

*be dismissed, to be not investigated. We would not accept that and in the end it resulted in hearings being held and the allegation that \$150,000 had been pinched from this government agency was borne out" (Evidence, 23 February 2000).*

### **1.2.3 Evaluation of the Operations Review Committee**

The Operations Review Committee serves as an advisory body which the Commissioner has a statutory responsibility to consult before deciding whether to investigate, or discontinue an investigation of, a complaint.

That the ORC is an advisory body rather than an accountability mechanism is indicated by a number of its characteristics. The ORC's key functions involve the provision of advice. Its recommendations, however, are not binding on the Commissioner. Further, the membership of the ORC, in particular the number of representatives from the legal profession, indicates the emphasis on the provision of forensic advice.

An accurate assessment of the effectiveness of the Operations Review Committee is inhibited by the absence of any public reporting mechanism. There is no annual reporting requirement for the ORC, and what little information publicly available about its operations is reported through the ICAC's Annual Reports, or as a result of this Committee's examination of the Commissioner at its biannual General Meetings. Consequently, the available information is limited. The Committee knows, for example, the statistics on the number of recommendations rejected or amended by the ORC (as these are reported in the ICAC's Annual Report). However, it has no indication of the nature of the changes requested, or the reasons or circumstances for the rejections, or their significance.

Obviously, statutory confidentiality provisions apply to the type of information that can be made public by the ORC so that investigations are not endangered by the release of sensitive operational information. This same restriction does not prevent the Hong Kong Operations Review Committee from issuing an annual report. Further details on the Hong Kong model appear in Chapter Two.

A previous Committee, chaired by Mr Malcolm Kerr, examined the Operations Review Committee in 1992, and heard the following evidence about the ORC's effectiveness:

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

*ICAC tends to follow its recommendations. I find that cold comfort as a means of accountability (Committee on the ICAC, 1992, p 37).*

That Committee raised two key concerns about the functioning of the ORC: its limited jurisdiction on matters before the Commission that are not classified as complaints; and its high workload.

The 1992 *Report on the Operations Review Committee* examined the ORC's procedures for dealing with two specific matters - information referred to the Commission by Mr Bayeh, and information provided by Mr Sturgess. Both these matters were classified by the Commission as information rather than complaints. The Commission is required to consult the ORC on decisions about investigations of complaints, but not on matters categorised as information or reports. The Commission's decisions on dealing with these matters were therefore not brought before the ORC for advice. After examining this matter, the (previous) Committee found:

*The ICAC is able to exercise considerable discretion in categorising the information which it receives. It goes without saying that this discretion must be exercised with scrupulous care. The Committee is not suggesting that this discretion has been exercised in such a way as to avoid the requirements to seek the advice of the ORC by defining as "information" matters which should properly be defined as "complaints". However, in relation to the two examples given above ... the ICAC seems to have left itself open to criticism in this regard (p 22).*

In order to overcome concerns of this nature, for the past five years the Commission has invited the Audit Office to conduct an appraisal of the adequacy and effectiveness of the ICAC's procedures "to ensure that all complaints were promptly and properly recorded and were classified and reported to the ORC in compliance with statutory and operational requirements" (1998 - 1999 Annual Report, p 34). The Commission reports that last year's audit found that the ICAC fully complied with its statutory reporting requirements. The Committee notes that there is no legal obligation for such an audit to be performed and commends the Commission for instituting this annual external audit.

The other concern raised in the 1992 Committee's *Report on the ORC* - the high workload of the ORC - appears to have worsened rather than improved. In 1992, the *Report on the ORC* noted an average of approximately 80 matters being considered at each ORC meeting. Since then, the number of reports considered at each meeting has risen, and the 1998 - 1999 Annual Report indicates that 1223 matters were considered by the ORC in its ten meetings. On average last year the ORC therefore considered approximately 122 matters for each meeting, with the

reports distributed to Members a week prior to each meeting. This large number of matters considered at each meeting raises questions about how thoroughly ORC members are able to consider each report.

Current members of the ORC who gave evidence before the Committee conceded that there are a large number of files to be considered for each meeting.

Reverend Herbert advised that the workload for the ORC is:

*... not too onerous, but there is a fair bit of work in going through it and doing it properly (Evidence, 23 February 2000).*

Ms McColl gave evidence that her membership of the ORC usually required some six to seven hours of preparation, and the monthly meetings are generally two or two and a half hours long. The Committee notes that there would be difficulties in finding qualified, experienced and effective people possessing sufficient time available to undertake the amount of work required of ORC members. Ms McColl advised the Committee that time constraints had recently obliged her to resign from the ORC.

When asked whether the workload and the length of meetings affect the efficiency of the ORC, Ms McColl responded:

*There is no curfew. We, if we wanted to, could sit until some terrible hour on a Friday night. Sometimes the meetings have ended earlier ... so I do not think there is a time which is imposing any limit on the debate which takes place or our ability to fully review the matters in the papers (Evidence, 23 February 2000).*

The Reverend Herbert concurred:

*I do not think any meeting has ever been truncated - we have had one meeting maybe in my time that was a bit rushed because the commissioner had another engagement but I do not recall any meeting at which the meeting was compressed and prevented us from saying anything. No member of the Committee is muzzled or told, "We are busy; you had better be quiet because we have to finish at a certain time." (Evidence, 23 February 2000).*

Ms McColl SC explained to the Committee that the ORC performs a valuable function. She sees its value to be:

*... to review that large volume of material that comes before the ICAC, to decide whether or not to investigate matters fully or to discontinue investigations, and I think it performs a very important function in terms of deciding or getting involved in the decision of what further action should be taken in relation to matters which are discontinued and, of course, in deciding whether matters should be further investigated. ... I think it is an accountability mechanism (Evidence, 23 February 2000).*

She noted further:

*I really do not see the committee as a rubber stamp. I have been impressed ever since I started with the commitment of all members of the committee and the zeal with which they do actually read these materials and comment on them comprehensively.*

The earlier Parliamentary Committee, having examined the procedures used by the Hong Kong ORC, recommended that the NSW ORC consider adopting a similar sub-committee approach. The Hong Kong sub-committee's role is to consider minor complaints, thus relieving the ORC of a significant part of its workload. The full ORC then is able to focus on the more complex matters. To date, the ICAC has not adopted the Committee's recommendation for the establishment of an ORC sub-committee.

This Parliamentary Committee has a more fundamental concern about the Operations Review Committee, relating to its lack of structural independence. This potential dependence stems from:

- the presence of the Commissioner on the ORC
- the chairing of the meeting by the Commissioner
- the operation of the ORC from Commission premises
- the responsibility of ICAC staff for the preparation of reports for ORC consideration
- the requirement that the Commissioner's concurrence be obtained for appointments to the ORC
- the lack of reporting mechanism in cases where there is continued disagreement between the ORC and the Commissioner.

The Committee stresses that no evidence has been brought to its attention of specific instances where the Operations Review Committee has failed to exercise independence in its provision of advice to the Commission. The impressive range of hardworking and talented individuals appointed to the ORC over the past ten years has ensured a commitment to the provision of advice to the Commission by

the ORC. Commissioners, too, have treated very seriously the ORC's advisory role, and the Committee is not aware of cases of a Commissioner seeking to exert influence on other ORC members.

The Operations Review Committee may have its value in advising the Commission in its assessment of complaints. This is difficult for the Committee to determine because of the absence of any accountability of the ORC to the public or the Parliament. The Committee notes that Commissioner Moss has indicated her support for the ORC:

*The ORC is a type of merits review of recommendations made by Commission staff on whether it should investigate matters. This is particularly so in relation to complaints from the public.*

*We have a group of external distinguished people - I agree that the words "community representatives" might not be the best description - who read through the details of how Commission staff reach these recommendations, and review them. They can, and do, disagree with the recommendations and advise me on what action I should take, a role that may not be appropriate for an inspector. From my experience in attending ORC meetings, the ORC members take their role very seriously and conscientiously apply themselves to the work. The ORC's existence can give the public confidence that there is no cover-up of any complaints (Moss, Evidence, 17 March 2000).*

Commissioner Moss further commented:

*The people who are chosen to go onto the ORC are people who are well educated, people like Ruth McColl, Senior Counsel, and Reverend Harry Herbert. We are talking about people who are comfortable with analysing complex arguments so I suppose in a sense I would describe them as distinguished representatives. It is probably not quite correct to use "community". I am not too sure what sort of person you would actually describe as a community representative.*

*... From the three meetings that I have been to, I have seen expressions of social values. There might be matters, for example, that the Commission has put forward for discontinuance and a person feels that it might be better in the public interest if more work was done on that particular matter. I have heard that said (Evidence, 17 March 2000).*

The Committee notes that the Police Integrity Commission operates without an ORC, but that all complaints are assessed internally. Commissioner Urquhart of the PIC described the procedure there as:

*We have a screening committee which screens matters and determines which matters will be investigated and then we have an operations advisory group which advises on the investigation as it is proceeding (Urquhart, Evidence, 17 November 1999).*

All participants in the PIC's screening committee are staff members.

Commissioner Moss advised the Committee that an internal assessment panel also operates at the ICAC:

*As the section 10 matters come in, there is an internal panel consisting of officers of the Commission. They meet about four times a week for about half an hour or longer, if necessary, to look at the matters that have come in. There is vetting by an internal vetting process to look at the matters and work out whether they should be proceeded with or not, whether they should go for more inquiry work of an informal nature, or whether the matter is of sufficient importance that it should go further, for a more formal approach, to the investigations branch. If the panel feels that the matters are not substantiated for whatever reason, it will then discuss that and the matters would then be written up for the ORC. So there is also an internal structure which prepares matters to go to the ORC (Moss, Evidence, 17 March 2000).*

Ms Ruth McColl SC, a member of the ORC, does not favour relying on an internal screening committee at the ICAC:

*... Most of the reports that come to us have been reviewed internally, and we often disagree with that, so the danger of an internal assessment procedure is going to be that reports which we would have changed the recommendations to ... will be rubber stamped, which I really do not think is what we are doing (Evidence, 23 February 2000).*

The Committee heard evidence that the functioning of the ORC could be improved with changes to the provisions relating to ORC membership. Commissioner Moss informed the Committee that difficulties had arisen due to the inability of the Commissioner of Police to attend many ORC meetings:

*At the three meetings that I have attended, [Commissioner Ryan] has not attended. ... That actually does present quorum problems. In the last 11 months he or [the Acting Commissioner] has actually attended three times (Moss, Evidence, 17 March 2000).*

Similarly, Ms McColl advised:

*Unfortunately, the Commissioner does not manage to get to many of the meetings, certainly not the ones that I have been to. I think it would be useful if he could delegate from time to time his position to somebody else within the Police Service (Evidence, 23 February 2000).*

Both Ms McColl and Reverend Herbert believe that it is valuable for the ORC to continue to include a representative from the Police Service. Reverend Herbert told the Committee:

*I think that would be useful because police officers have investigative background and experience and understanding in this area (Evidence, 23 February 2000).*

Ms McColl noted:

*I think it would be valuable to have input from the Police Service but, unfortunately, we have not been able to get that (Evidence, 23 February 2000).*

Commissioner Moss, however, questioned the need to retain a position for a representative of the Police Service on the ORC:

*I really do not know that his position adds a great deal of value. We have done without his presence for the last seven meetings. I suppose the original intention was for there to be someone with investigative skills who could add to the analysis of the matters before the meeting, but my feeling is that it probably does not add hugely (Moss, Evidence, 17 March 2000).*

The Committee is of the opinion that, while there is value in the presence on the ORC of an individual with investigative skills, this does not need to be restricted to the Police Commissioner or his delegate. A person with investigative experience could be drawn from agencies such as the NSW Crime Commission, the Police Integrity Commission, the Office of the Ombudsman, or the Police Service. A high

level representative from these offices could be appointed by the Minister, with the concurrence of the Commissioner.

### **Recommendation 2**

The Committee recommends the amendment of section 62(1)(c) of the ICAC Act to remove the requirement for the Commissioner of Police to be a member of the ORC.

### **Recommendation 3**

The Committee recommends that instead, the Minister, with the concurrence of the Commissioner, appoint to the ORC an individual with an investigative background.

## **1.3 Judicial Review**

It is worth briefly describing the additional supervision, checks and balances provided by the judiciary and the legislature.

Under general law, the courts have an inherent power to review the decisions of executive branch tribunals and administrators if:

- the administrators have acted outside of their authority (*ultra vires*),
- the administrators have breached rules of procedural fairness,
- there is jurisdictional error, or
- there is error of law on the face of the record (Ardagh, 1993, p 5).

Remedy is available by way of prerogative writs: certiorari, mandamus, and prohibition. A writ of certiorari removes "the official record of an administrative authority or tribunal, or of an inferior court, into a review court". The superior court then orders the decision to be quashed. Prohibition is an order that prevents a decision being made, or action being taken pursuant to an order. Mandamus compels an official to carry out a duty. Declarations and injunctions are also available. An injunction is usually sought to prevent an action from occurring. A declaration serves to "define the rights and obligations of public authorities" by declaring the legal position between the parties (Ardagh, 1993, pp 29 - 33).

The enforceability of court orders makes judicial review an effective means of accountability insofar as relief can be sought for administrative action which is in excess of power or which has involved a breach of the rules of fairness. Its limitations arise from the expense connected with the legal costs of mounting a

case, and the need to establish standing. Moreover, judicial review does not allow for merits review of decisions.

The Committee notes that judicial review applies to the activities of the Commission. The first ICAC Commissioner, Ian Temby submitted to the Parliamentary Committee's 1993 Review of the ICAC Act:

*The fact that the Commission is amenable to judicial review was recognised early in its operation (Parliamentary Committee on the ICAC, 1993, p 67).*

The Commission also stated in its *Second Report on Investigation into the Metherell Resignation and Appointment* that:

*The ICAC is subject to the courts. Ainsworth emphasised that the Court will intervene to correct any breach of the rules of natural justice and the principles of procedural fairness they involve. Further the Court has the same common law power to regulate the ICAC as it does any other quasi-judicial tribunal on the well recognised principles of judicial review (Independent Commission Against Corruption, 1992, p 10).*

At the Committee's hearings for its first review of the *ICAC Act*, Mr Justice Clarke of the NSW Court of Appeal tabled written advice concerning the Court's supervision of the ICAC. He noted that review is available where the principles of administrative law are breached, these being: legality, procedural propriety and rationality (Parliamentary Committee on the ICAC, 1993, p 69). A number of cases have confirmed the Court's supervisory power over the ICAC, such as *Balog*, *Ocean Blue* and, more recently, *Gibson*.<sup>1</sup>

Justice Clarke also advised the Committee in 1992 as to the remedies available in cases of judicial review of the ICAC. He noted that certiorari is not available "because the report made by ICAC has, of itself, no legal effect and carries no legal consequences". Mandamus would probably only be available in respect of references made by the Parliament. Prohibition or injunction would be available should a person prove a ground for relief prior to the publication of an ICAC report. Declaratory relief is available, and has been granted in the past (such as the *Greiner* and *Balog* cases)(Parliamentary Committee on the ICAC, 1993, p 71).

The nature and extent of judicial review of the ICAC was discussed at length by Malcolm Kerr's Committee in the 1993 Report on the Review of the ICAC. This

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<sup>1</sup> *Balog and Stait v ICAC (1990) 169 CLR 625; Glynn, Steel, Ocean Blue Fingal Pty Ltd and Ocean Blue Club Resorts Pty LTD v ICAC*, Unreported judgment, Supreme Court, 22 March 1990; *Gibson v O'Keefe*, Unreported judgment, NSW Supreme Court, 20 May 1998.

Committee considers it unnecessary to re-examine the matters analysed by Mr Kerr's Committee, and agrees with its conclusions on this subject, namely:

*That the current extent and nature of judicial review of the ICAC is appropriate, and*

*That there is no need for the common law remedies which are available in the case of the legal or procedural error by the ICAC to be entrenched in legislation (Committee on the ICAC, 1992, p 72).*

## **1.4 Legislative Accountability**

Legislation passed in New South Wales to improve the accountability of the executive branch includes:

- *Ombudsman Act 1974*
- *Public Finance and Administration Act 1983*
- *Public Sector Management Act 1988*
- *Freedom of Information Act 1988*
- *Protected Disclosures Act 1994*
- *Privacy and Personal Information Protection Act 1998*

The Committee regularly reviews the ICAC's performance in relation to these statutory requirements and responsibilities as part of the General Meeting program. While this Report does not seek to provide a comprehensive analysis of these statutes and their application to the ICAC, for completeness, they should briefly be described.

### **1.4.1 The Office of the Ombudsman**

The Ombudsman has limited authority over the ICAC, as Clause 20 of schedule 1 of the *Ombudsman Act* exempts:

*conduct of the Independent Commission Against Corruption, the Commissioner or an Assistant Commissioner or an officer of the Commission, where exercising functions under the Independent Commission Against Corruption Act 1988.*

In some specific circumstances, however, the Ombudsman has powers with regard to the ICAC. The Ombudsman may investigate protected disclosures relating to maladministration and corruption within the Commission. The Office of the Ombudsman must, under the *Law Enforcement (Controlled Operations) Act 1998*,

conduct audits of the compliance of the ICAC and other agencies with the controlled operations legislation. The Ombudsman also has powers under Part 3 of the *Telecommunications (Interception) Act 1987* (NSW) to ensure that the Commission, and other authorities, have complied with the State's record-keeping requirements. In addition, the Ombudsman is responsible for considering appeals under the *Freedom of Information Act*, including FOI applications made to the ICAC.

#### **1.4.2 The Auditor-General**

The Auditor-General is responsible for auditing the public accounts of government departments and statutory bodies under the *Public Finance and Administration Act 1983*.

To fulfil his or her functions, the Auditor-General has full access to accounts and records of 'persons, bodies, funds or accounts', and has powers to require a person to attend before him or her and produce documents or other records - s.36. Section 41C provides for the Auditor-General to audit the annual financial statements and accounts of statutory bodies, and under Division 2A, the Auditor-General may also conduct special audits of effectiveness.

The ICAC falls within the jurisdiction of the Auditor-General (schedule 3, *Public Finance and Audit Act*), and is required to submit an annual report to Parliament. The financial accountability applying to executive branch departments and agencies in general, therefore, also applies to the Commission.

#### **1.4.3 Public Sector Management**

The Commission is exempt from the *Public Sector Management Act 1988*. In the first Review of the ICAC, the Parliamentary Committee considered the continued appropriateness of the Commission's exemption from the Act (see Chapter 11), and in particular from merit selection principles. The Committee notes that in the 1998-99 Annual Report of the ICAC, two persons were identified as having been employed by the Commission without merit principles applying and without any explanation as to the reasons. The Commissioner subsequently explained the reasons for those exceptions: one involved the appointment of an officer to his position after it was re-graded; the other was a temporary re-appointment of an officer who had recently retired (Moss, Evidence, 17 March 2000).

With regard to merit selection principles, Commissioner Moss noted:

*I am not aware of any reasons why ICAC should not choose people on merit. In fact, it would be very hard to argue that for any agency not to hire people on merit ... I understand since I have taken up office, merit selection is used (Evidence, 17 March 2000).*

In a subsequent submission, the Commissioner raised one possible exception:

*There may be occasions when for operational reasons it could be necessary to employ a specific person with highly specified skills (Submission, 23 March 2000).*

However, the Commissioner reaffirmed the need for the Commission to maintain flexibility in dismissing officers:

*ICAC is a small organisation and it has quite an extraordinary role with its wide powers and looking at extremely serious matters across the public sector. If you are unfortunate in having an officer in whom you have lost confidence, you need the ability to be able to deal with that officer independently, quickly and clearly (Evidence, 17 March 2000).*

The Commissioner also noted that difficulties would arise if dismissals were subject to appeals to GREAT [Government and Related Employees Appeals Tribunal], as operational matters may be revealed in the process of an appeal.

The Commission's exemption from the PSM Act was considered at some length by the Committee in 1993 which concluded as follows:

*While at the time of its establishment, there were reasons why it was considered that the ICAC need not be staffed under the Public Sector Management Act, there are strong public policy reasons for all public sector employment to comply, at the very least, with the merit selection principles contained in the Act.*

*The Committee therefore recommends that the ICAC Act should be amended to require the ICAC to comply with the merit selection principles in the Public Sector Management Act.*

*The Committee notes the concerns raised by the ICAC about the possible application of the Public Sector Management Act generally to the ICAC. The Committee therefore does not recommend that the Public Sector Management Act generally should be applied to the ICAC at this time (Committee on the ICAC, 1993, p 204).*

This Committee concurs with the recommendation of the previous Committee.

#### **Recommendation 4**

The Committee recommends that the merit selection principles of the *Public Sector Management Act* should apply to the ICAC.

#### **1.4.4 Freedom of Information**

The bulk of the ICAC's documents are not able to be accessed under the *Freedom of Information Act 1989*. The ICAC's corruption prevention, complaint handling, investigative and report functions are exempt from FOI provisions under Schedule 2 of the Act, leaving only administrative functions of the Commission falling within the ambit of FOI.

The Committee is of the opinion that it is appropriate that the exemption of the Commission's corruption prevention, complaint handling, investigative and report functions continue, as these activities require and produce sensitive information that should not be made public.

#### **1.4.5 Protected Disclosures**

The *Protected Disclosures Act 1994* protects public officials, including Commission staff, who make a disclosure about corruption, maladministration or serious and substantial waste of public funds pursuant to the Act. In the case of complaints of corrupt conduct, the Act provides for allegations by public officials to be investigated either internally by the agency or department concerned, or externally by the Independent Commission Against Corruption. In cases where those complaints are about conduct of ICAC staff, the *Protected Disclosures Act* provides for the allegation to be investigated by the Ombudsman (s.13).

#### **1.4.6 Privacy and Personal Information Management**

Under the *Privacy and Personal Information Protection Act 1998*, all public sector agencies, except those specifically exempted, must comply with the information protection principles detailed in Part 2, Division 1 of the Act. The ICAC is partially exempted, pursuant to s.27 of the Act. This provides that the Commission must comply with the information protection principles in relation to its administrative and educative functions, but the remainder of its functions are exempt.

Briefly, the information protection principles include:

- the circumstances under which personal information may be collected
- how it is collected

- responsibilities when collecting and holding information
- retention and security of information
- access to, and alteration of, personal information, and
- disclosure of personal information

### **Privacy Management Plans**

Every public sector agency must prepare and implement a privacy management plan by 30 June 2000. Provision exists for agencies to be exempt by regulation, but none have been exempted to date. Even agencies that are exempted from complying with the information protection principles (including the ICAC) must prepare and implement a privacy management plan. A copy must be submitted to the Privacy Commissioner.

The purpose of the Privacy Management Plan (PMP) is to ensure each agency has identified and considered the requirements of the Act, and developed strategies to ensure the appropriate protection of personal information.

The PMPs should detail how the agency intends applying the requirements of the Act, ie:

- information protection principles;
- Privacy Codes of Practice (which modify the agency's obligations under the information protection principles)
- internal review (ie, how the agency will handle complaints about the way they have dealt with personal information)
- public registers of personal information
- training and education of staff in relation to privacy policies and practices
- any other privacy obligation, including statutory confidentiality provisions of other acts applying to the agency.

The Committee notes that the ICAC would gather a great deal of personal and sensitive information in the course of its activities. The Committee heard from Assistant Commissioner John Feneley that the information collected by the Commission is maintained in strict security:

*I also would like to make sure that the Committee understands that the exercise of the Commission's power in relation to accessing information, such as banking records and other things, is done on a highly selective basis. A very small number of investigations warrant the Commission's attention, in terms of the formal exercise of its powers. ... All that information, as I say, is subject to fairly strict*

*secrecy provisions and internal protocols in terms of how it is handled. I am not aware, in our 11 years of operation, of any significant issue arising that would allege misuse of personal information; in other words, a non-legitimate use of personal information other than in the context of the inquiry (Feneley, Evidence, 17 March 2000).*

The ICAC, in common with other investigative agencies, is concerned that the Privacy and Personal Information Management Act should not adversely impact on investigative functions.

**The Committee believes that, although the ICAC is exempt under the Act from applying the information protection principles, the Commission should address the values encapsulated by the principles – namely, establishing safeguards in the collection, secure storage, alteration, and retention of personal information.** As long as its investigation and complaint handling functions are not impeded, the Commission should seek to comply with the principles of information protection, regardless of its statutory exemption.

The Committee does not recommend amendments to the *Privacy and Personal Information Management Act* to create a statutory obligation for the Commission to abide by the Information Protection Principles at this stage. However, the Committee will monitor the situation and discuss the issue of privacy further with the Commissioner at future General Meetings.

## **1.5 The ICAC's accountability: conclusions**

The Commission's accountability mechanisms provide oversight of various facets of its functions. Its policies and procedures are monitored by this Parliamentary Committee, and the Operations Review Committee provides advice to the Commissioner on decisions about investigations. Jurisdictional errors and questions of procedural fairness can be addressed through judicial review, while a number of pieces of legislation impact upon the Commission's activities.

The major shortcoming in the ICAC's accountability regime is the absence of an agency or individual to receive and investigate complaints of impropriety or misuse of power by the ICAC and its officers. The Committee notes that there is no provision for supervision of on-going investigations by the ICAC, a problem which was also identified by the Parliamentary Committee on the NCA in its 1998 Evaluation of the NCA (p 169).

A certain measure of oversight is provided by the *Protected Disclosures Act*, which empowers the Ombudsman and the Auditor-General to investigate complaints

made by public officials concerning allegations of corruption, maladministration and serious and substantial waste of public resources. However, complaints from the general public about impropriety or abuse of power by Commission staff do not fall within the ambit of the *Protected Disclosures Act*. In addition, the Committee notes that the Ombudsman lacks a number of the investigative powers held by the ICAC (such as the power to intercept telecommunications or use listening devices), and therefore an investigation of corrupt conduct at the Commission would not be able to use covert powers.

In recommending the establishment of a Commission to investigate police corruption in New South Wales, Justice James Wood noted the following points about the need for accountability:

*There is always a risk that an agency which is heavily committed to covert investigations, reliant on informants, and possesses powers which are both coercive and of a kind which might involve substantial infringements of rights of privacy, may overstep the mark. For this reason it is important that there be a 'watchdog' which is able to respond quickly and effectively to complaints of misconduct and abuse of power, without risking secrecy of operations, or confidentiality of informants and witnesses (Royal Commission into the NSW Police Service, Interim Report 1996, p 95).*

**The Committee is concerned that there currently exists no such oversight in the case of the Independent Commission Against Corruption. It is the Committee's opinion that the extraordinary coercive powers possessed by the Independent Commission Against Corruption necessitate a corresponding exceptional level of accountability. The Committee believes that the Commission's current accountability regime does not provide an appropriate measure of oversight.**

Since its establishment in 1988, the Commission has been entrusted with additional covert powers, such as controlled operations, telecommunications interception and assumed identities. History has shown that it is problematic to authorise an agency to use covert powers without satisfactory accountability.

Whilst complaints about impropriety and abuse of power at the Commission have not been frequent, in part this may be a reflection of the absence of a formal mechanism for dealing with complaints. The Committee has become aware that, where complaints have been made in the past, they have been incorrectly directed to members of the ORC, members of Parliament and members of this Committee. An examination of the complaints received by the Committee reveal the following breakdown of subjects of complaint:

**1995 - 2000**

**Complaints to the Committee by subject:**

Matters raised	No received
Request for redetermination on decision not to investigate complaint *	18
Alleged misconduct by ICAC Officers/ Commission*	18
Request to reconsider recommendation/ finding*	10
ICAC handling of protected disclosures	9
Request for committee to examine an allegation of corruption*	8
ICAC failure to advise complainant/ lack of reasons	5
Delays in finalising an ICAC investigation report	4
ICAC investigation procedures	3
ICAC complaint handling procedures	2
Protected disclosures reporting guidelines	2
ORC, lack of appeal mechanism	2
ICAC treatment of informants	1
Research/Education report delays	1
ICAC's advisory role	1
Public announcements of referrals to ICAC	1

\* Outside Committee's jurisdiction under s.64(2) of the ICAC Act 1988

NB: Some matters fall into more than one category

In the majority of cases, the complainants were advised that the Committee was unable to take any action as the complaint fell outside of the Committee's jurisdiction.

The Committee is of the firm opinion that, should complaints against the Commission arise in the future, a body should exist with the functions and powers to undertake an investigation, to report, and to make recommendations where necessary. In evidence before the Committee, Commissioner Moss explained:

*... I believe it is important for an organisation such as the Independent Commission Against Corruption [ICAC], an organisation that has been given such wide and special powers, to be subject to effective and efficient accountability ...*

*... Quite clearly, at present with just the ORC, there is a gap in the area of accountability, namely the scrutiny of the more detailed operational side of the ICAC - the appropriateness of its systems, how it handles information and assembles it, can the system be*

*abused, etc; and the independent handling of complaints against the Commission or staff. An inspector model would fill that gap.*

In further evidence, the Commissioner stated:

*I think having an inspector for an organisation like the ICAC with its fairly special powers is appropriate.*

The Commissioner noted the advantages that would flow from the establishment of an Inspector:

*If you have a system in place where abuses can be picked up or such powers are monitored, I think it could only add to the credibility of an organisation and add to the confidence that the public would have in an organisation like that (Moss, Evidence, 17 March 2000).*

With the establishment of anti-corruption and law enforcement agencies in New South Wales and in other jurisdictions, a number of different accountability models have been instituted. In developing its recommendation for increased accountability for the ICAC, the Committee has examined the models found in other jurisdictions. An analysis of the accountability mechanisms of other jurisdictions appears below, and the Committee's proposed model is discussed in Chapter Three.

# CHAPTER TWO

## ALTERNATIVE ACCOUNTABILITY MODELS

### 2.1 The Inspector model

#### 2.1.1 The NSW Police Integrity Commission and Inspector

The Royal Commission into the NSW Police Service found that corruption in the NSW Police Service was both endemic and systemic. The findings made clear the need for an independent agency to deal with serious police misconduct, and resulted in the establishment of the Police Integrity Commission (PIC) in 1996.

Like the ICAC, the Police Integrity Commission was endowed with extensive coercive powers. It may obtain information, documents and other things, may enter public premises, issue or obtain search warrants, summon witnesses to give evidence, hold public and private hearings, issue reports and make recommendations. A witness may not refuse to answer relevant questions at a hearing. Any information provided under objection may be used against the individual in disciplinary proceedings but not in criminal proceedings.

In order to keep the PIC accountable for the use of its coercive powers, two mechanisms were incorporated into the *PIC Act 1996*. Mirroring the provisions of the *ICAC Act 1988* and the *Ombudsman Act 1974*, a Parliamentary Joint Committee was established to monitor and review the exercise by the Commission of its functions (s.95). As is the case with the Committee on the ICAC, the Committee on the PIC is prohibited from reviewing investigation decisions and findings and recommendations of the Commission.

In addition to the Parliamentary Committee, an Office of Inspector of the Police Integrity Commission was created under Part 6 of the *PIC Act 1996*. The current Inspector described his functions, as recommended by the Royal Commission into the NSW Police Service, in the following way:

*The first avenue of accountability acknowledged that there was always a risk that an agency that was heavily committed to covert investigations, reliant upon informants, and possesses powers which are both coercive and of a kind which might involve substantial infringements of the rights of privacy, may overstep the mark. For that reason the commission decided that there be a watchdog which is able to respond quickly and effectively to complaints of misconduct and abuse of power without risking secrecy of operations or confidentiality of informants and witnesses.*

*So it was proposed that the Office of the Inspector of the Police Integrity Commission be created by the same legislation governing the agency. That office, it was suggested, might be held by a serving or former Supreme Court Judge and given powers to audit operations of the Police Integrity Commission; to deal with complaints of abuse of power and other forms of misconduct on the part of its employees and report to Parliament on matters affecting the Police Integrity Commission and its operational effectiveness and needs (Finlay, Evidence, 18 November 1999).*

The Inspector's functions are strictly focused on investigating and reporting on complaints relating to the legality and propriety of the PIC's activities. His powers may be exercised on the Inspector's own initiative, at the request of the Minister, following a complaint, or as a response to a reference from the Parliamentary Committee or another agency. Section 89 details the principal functions of the Inspector:

- 89(1) The principal functions of the Inspector are:*
- (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and,*
  - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
  - (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*
- (2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the ICAC, the NSW Crime Commission, the Joint Committee or any other agency.*
- (3) The Inspector is not subject to the Commission in any respect.*

The Inspector's powers are commensurate with these statutory functions, including full access to the Commission's records, obtaining information and documents from Commission officers, and holding inquiries with the powers of a

royal commissioner. The Inspector's powers are detailed in sections 90 and 91 of the PIC Act 1996:

90 (1) *The Inspector:*

- (a) *may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and*
- (b) *is entitled to full access to the records of the Commission and to take or have copies made of any of them, and*
- (c) *may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and*
- (d) *may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and*
- (e) *may investigate and assess complaints about the Commission or officers of the Commission, and*
- (f) *may refer matters relating to the Commission or officers of the Commission to other agencies for consideration or action, and*
- (g) *may recommend disciplinary action or criminal prosecution against officers of the Commission.*

Section 91

- (1) *For the purposes of the Inspector's functions, the Inspector may make or hold inquiries.*
- (2) *For the purposes of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the Royal Commissions Act 1923 and that Act (Section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner.*

Notwithstanding section 90(1)(b), which expressly provides the Inspector with full access to PIC records, the Committee notes that in practice a difficulty has arisen as a result of the Commonwealth legislation applying to telecommunications interceptions. The Commonwealth *Telecommunications (Interception) Act 1979* contains provisions which prevent authorised telecommunications intercept (TI) product being distributed to other parties. The Inspector of the PIC is not an authorised recipient of TI product under that Act, and therefore is currently not empowered to access PIC files that contain TI material. The Committee notes that amendments are before the Senate that would remove this obstacle by enabling the Inspector to access TI material.

The Inspector's reporting powers are described in sections 101 and 102 of the *Police Integrity Commission Act 1996*. He may report to Parliament at any time on any matter affecting the Commission, or administrative or general policy matters relating to the Inspector. The Inspector is required to publish an annual report.

### **Operation of the Inspector of the PIC**

The current Inspector of the Police Integrity Commission, The Hon Mervyn Finlay QC, gave evidence to the Committee on 18 November 1999, and advised the Committee of the practical operation of the Office of Inspector of the PIC.

The Committee was informed by Mr Finlay that the Inspector's office is located separately from the Police Integrity Commission offices, so as to ensure that "it is seen to be totally independent" from the PIC (Finlay, Evidence, 18 November 1999). The Inspector also has a small office at the Police Integrity Commission, from which he can access the Commission's computer records. Mr Finlay gave evidence that he regularly inspects the records of the PIC:

*Particularly I would inspect those that have been the subject of discussion or on which there has been action, such as section 25 or section 26 notices which are notices for people to produce documents or to attend, just to check on the basis of those issuing to ensure that the legality and propriety of them being issued is in order (Finlay, Evidence, 18 November 1999).*

The current Commissioner of the Police Integrity Commission, Judge Paul Urquhart QC, expanded upon this in his evidence before the Committee. He noted that the role of Inspector could only be properly effective if the Commissioner was unaware of the Inspector's activities, and if the Inspector did not have to rely on the Commission for information. He gave evidence that:

*Ninety-nine percent of what we do is recorded electronically, and so ... I made available within our own premises a discrete room with discrete access to our IT databases that he could use whenever he wanted to obtain whatever he wanted ... without me knowing (Urquhart, Evidence, 17 November 1999).*

Mr Finlay emphasised that the Inspector does not reconsider the PIC's decisions on whether to investigate a complaint:

*One thing that perhaps I should mention to the Members, Mr Chairman, is that it is important, I think, to understand that the Inspector has no role in, in effect, second-guessing whether the Commissioner should have embarked upon an investigation or not embarked on an investigation. That is a discretionary decision by the Commissioner, who has a very strong team focused toward ensuring that the best decisions are made in that regard, but it would only be reviewable by me as Inspector if the decision made was one such that no responsible person holding that office would have arrived at. ... I find no difficulty with that at all, I think it is appropriate for the Commissioner to be the one responsible, except for that extreme case, in allocating the limited resources of the agency and the many demands for investigations in different areas as to which ones are (he considers) in the best public interest to embark upon at the particular time (Finlay, Evidence, 18 November 1999).*

In relation to this point, the Inspector informed the Committee that his oversight includes pro-active audits:

**Chair:** *You indicated that you would not intervene unless there was action taken by the Commissioner which was so unreasonable that no reasonable person would take it. Do you pro-actively audit if the Commissioner decides to investigate so as to ascertain whether that has in fact occurred or not?*

**Mr Finlay:** *Yes, Mr Chairman ... there is a special fortnightly committee that has to consider all of these things and put recommendations to the Commissioner and has to set out all its reasons and bases for them. That is all accessible to me and any new operation I always look at and sometimes discuss with the Commissioner, so I am aware of the operations and I think it is part of my job to be aware (Evidence, 18 November 1999)*

Judge Urquhart's evidence supports this. In response to questioning about whether the Commission's decisions in terms of proceeding or not proceeding with an investigation can be audited by the Inspector, the Commissioner confirmed:

*That is right, not only [arising from complaints], but if we decide proactively to investigate something which is not the subject of a complaint (Evidence, 17 November 1999).*

The Inspector's 1998-1999 Annual Report indicates that 28 complaints about the PIC were received by his office over the past year. Of these, Inspector Finlay noted that:

*The majority of the complaints dealt with were unfounded or lacking in substance. Several cases did however, point to minor deficiencies in the manner in which the Commission dealt with, or sought to resolve particular matters (Annual Report 1998-9, p 10).*

The substantiated complaints included:

- the improper conveyance by the Commission of information about a protected witness to a judicial officer without the consent or knowledge of the witness;
- the Commission's failure to respond to requests for relevant information by an affected individual;
- the absence of any Commission procedures for the notification of corrupt findings to affected individuals in an effective, appropriate and proper manner; and
- inappropriate lengths of time taken by the Commission to respond to requests by affected individuals for relevant information (Inspector of the PIC, Annual Report 1998-9, pp 14 - 17).

### **Impact on the Police Integrity Commission**

Commissioner Urquhart believes that the existence of the Inspector of the PIC is beneficial for the operation of the Commission. He gave evidence that:

*... all of my people, including me, are human and mistakes will be made. It is refreshing to know that, if a mistake is made, the Inspector is more*

*than likely going to find out about it. ... that is a management tool and that is welcomed by us (Evidence, 17 November 1999).*

When asked whether he accepted the criticisms about the Commission expressed by the Inspector from time to time, the Commissioner noted that

*... there is not one adverse comment about the Commission that he has made that I have not accepted and have not acted on ... (Evidence, 17 November 1999)*

Overall, Judge Urquhart believes that the Inspector has a positive impact on the Police Integrity Commission:

*... I have told you about the Inspector and the Police Integrity Commission and the way in which that area of accountability, which on my understanding is missing from the ICAC or is not there with the ICAC, is present with the Police Integrity Commission and in my view it works very well (Evidence, 17 November 1999).*

## **2.1.2 The Commonwealth Inspector-General of Intelligence and Security**

The Inspector-General of Intelligence and Security (IGIS) serves to keep accountable five Commonwealth intelligence and security agencies: Australian Security and Intelligence Organisation (ASIO); Australian Secret Intelligence Service (ASIS), Defence Signals Directorate (DSD); Defence Intelligence Organisation (DIO); and the Office of National Assessments (ONA). The Inspector-General is independent of all government departments and agencies, and is appointed by the Governor-General for a term of three years. The term may be renewed once only.

The current Inspector-General, Mr William Blick, in giving evidence to the Committee on 11 November 1999, described the functions of his office:

*... the basic function of the office is to ensure that the activities of the five Australian intelligence and security agencies are carried out legally and with propriety. There are two sides to that function. One is to do inspection work in relation to the agencies and the other is to investigate complaints that are made to the Inspector-General (Evidence, 11 November 1999).*

This involves conducting inquiries and proactive monitoring of the activities of the intelligence and security agencies to ensure that they act legally and comply with ministerial guidelines and directives and have regard to human rights.

According to the IGIS website ([www.igis.gov.au](http://www.igis.gov.au)), the Inspector-General's powers include obtaining information, requiring a person to answer questions or produce relevant documents, taking sworn evidence and entering the premises of intelligence and security agencies. All of the Inspector-General's inquiries take place in private. Reports are not tabled in Parliament, but are made to the head of the agency the subject of the inquiry, and to the responsible Minister. Some matters may be reported in the Inspector-General's Annual Report. Any classified information in the Annual Report is made available to the Prime Minister and the Leader of the Opposition, but is not tabled in the Parliament.

Mr Blick agreed with Mr Richardson that the office of IGIS provides a check on the potential for excesses by the intelligence and security agencies:

*... there is great consciousness within the agencies of the existence of my office and the activities of the office. The agencies themselves are highly conscious of the need for accountability and they realise that the primary avenue of accountability, apart from the ministerial responsibility,... is via my office ... (Evidence, 11 November 1999).*

Mr Blick further noted:

*This model I think has peculiar advantages in relation to the intelligence and security community because it enables inquiries to be done in complete confidentiality and secrecy, but also I guess enables them to be done with sufficient informality to permit these agencies to feel that there is not an adversarial relationship between themselves and my office (Evidence, 11 November 1999).*

### **2.1.3 Evaluation of the Inspector model**

The Committee considers that there are a number of strengths in the Inspector model. In particular, an Inspector is able to provide:

- a means of investigating complaints of illegal or improper actions by officers;
- an audit of the reasonableness of decisions to investigate;
- proactive monitoring of compliance with the law; and
- an assessment of effectiveness and appropriateness of procedures relating to legality and propriety.

The Committee notes that the accountability structure of the ICAC does not at present incorporate these features but that this oversight could appropriately and usefully be applied to the ICAC. That this could be provided by an agent entirely independent of the Commission, and with access to highly confidential operational material, is another positive aspect of the Inspector model that is supported by the Committee.

## **2.2 The Queensland Parliamentary Commissioner model**

The Queensland *Criminal Justice Act 1989* establishes the Queensland Criminal Justice Commission and its oversight bodies: the Parliamentary Criminal Justice Committee and the Parliamentary Criminal Justice Commissioner.

The Criminal Justice Commission (CJC), created following recommendations of the Fitzgerald Inquiry into official corruption in Queensland, is responsible for investigating official and police misconduct, in addition to law reform and corruption prevention research, resolution of complaints, and witness protection.

The Commission as constituted under the *Criminal Justice Act* comprises five Commissioners: four part-time Commissioners, and one full-time Commissioner who serves as Chairperson. The five Commissioners together are responsible for the decision-making of the Commission, with the Chairperson acting as Chief Executive Officer. Mr Brendan Butler, the current Chairperson of the CJC, explained to the Committee that this structure serves as an accountability measure:

*... the CJC itself operates as a Commission with five members. I do not have the extensive powers that the Commissioner of the ICAC enjoys individually; the Commission makes all its important decisions as a Commission sitting as a board with the necessary quorum (Butler, Evidence, 14 February 2000).*

Mr Butler elaborated on the input of the Commissioners:

*If an investigation reaches the point where there is a recommendation from the Director of the Official Misconduct Division that it be referred to the Director of Public Prosecutions or to some other agency, that referral must be by way of a decision of the Commission. ... If there is some matter of high public interest, the Commission itself might choose to involve itself, be briefed on the matter and give direction to the Director of the Official Misconduct division or others. Under the Act, it is able to give some direction and guidelines (Evidence, 14 February 2000).*

The Committee also obtained the views of Ms Kathryn Biggs, one of the part-time Commissioners of the CJC. Ms Biggs emphasised the importance of the Commissioners in terms of community input:

*I think it brings a balance. ... Having community members in that role reflects the values within the community (Biggs, Evidence, 14 February 2000).*

The Chairman of the Parliamentary Committee overseeing the CJC, Mr Paul Lucas MLA, also sees merit in having Commissioners drawn from the community:

*I think that is a good thing. It is a bit more expensive to pay part-time Commissioners, but the idea of actually having it a bit more broadly drawn does focus it a little more on community expectations (Lucas, Evidence, 14 February 2000).*

### **2.2.1 Queensland Parliamentary Committee**

Accountability of the CJC is centred to a significant degree on the Parliament. The Parliamentary Criminal Justice Committee (PCJC), comprising six Members of Parliament from across party lines, has broad oversight functions under section 118 of the *Criminal Justice Act 1989*. This includes monitoring and reviewing the CJC's fulfilment of its functions, reporting to the Parliament on any relevant matter, examining the CJC's reports, participating in the constitution of the CJC, conducting three-yearly reviews of the CJC, and issuing guidelines and directions to the Commission.

The PCJC's oversight includes regular meetings with the Commission to obtain briefings on current investigations:

*We have joint meetings with the Commission bi-monthly. Frequently, we discuss those issues arising from complaints as we also discuss general issues about operational matters with the CJC. ... For our bi-monthly briefings the CJC prepares a document that is probably about 150 pages thick. It contains a paragraph about each of its investigations. It does not go into detail ... But it does give you the flavour of what the Commission is investigating so you can know the trends and what is important (Lucas, Evidence, 14 February 2000).*

The PCJC has also recently had its functions clarified in relation to the consideration of complaints against CJC Commissioners and staff. Amendments to s.118F of the *Criminal Justice Act* gave the PCJC the discretion to deal with such complaints by:

- asking the CJC to report to the Committee on the matter; and/or
- asking the CJC to investigate and then report to the Committee; and/or
- asking the Police Service or other law enforcement agency to investigate and report to the Committee; and/or
- asking the Parliamentary Commissioner to investigate and report on the matter and/or
- take other action the Committee considers appropriate.

The Chairman, Mr Lucas, noted that this power is both resource-intensive and time consuming:

*We have significant powers in relation to the Criminal Justice Commission that some other comparable committees do not have. In particular, we have the power to investigate individual complaints [about the CJC]. That is a two-edged sword. If you have the power to investigate complaints, you have to take that power seriously. It does take a lot of resources for both the Committee and its secretariat (Lucas, Evidence, 14 February 2000).*

### **2.2.2 Parliamentary Commissioner**

In order to facilitate the PCJC's oversight of the CJC, the Queensland Parliament amended the *Criminal Justice Act* in 1997 to create the Office of Parliamentary Criminal Justice Commissioner (Parliamentary Commissioner). The role and functions of the Parliamentary Commissioner are outlined in s.118R of the *Criminal Justice Act*. Importantly, these functions may only be undertaken at the request of a bi-partisan majority of Members of the PCJC. The Parliamentary Commissioner's role is to assist the Committee by:

- investigating complaints made against the CJC and its officers
- investigating allegations of unauthorised disclosure of confidential material
- conducting audits of the CJC's records and operational files
- verifying the CJC's reasons for withholding information from the PCJC
- verifying the accuracy and completeness of reports given to the PCJC, and
- otherwise assisting the PCJC.

The Committee Chairman explained that this amendment arose because of the Committee's inability to access operational material held by the CJC:

*Previous committees had identified that one of the problems with investigating complaints against the Criminal Justice Commission was that frequently ... the Committee does not have access to operational*

*material. That is appropriately so. It is very sensitive. If it leaked out, you could have all sorts of problems with people's security being compromised...Therefore, our review of that investigation would necessarily be very attenuated (Lucas, Evidence, 14 February 2000).*

In addition, Mr Lucas noted that the investigation of some complaints required legal qualifications:

*One of the problems was that frequently decisions would need to be taken about procedural fairness, matters of evidence and those sorts of things that really were beyond the capacity of the Committee to take an expert view in relation thereto. That was one of the reasons that we thought the Parliamentary Commissioner model would be appropriate. She has the power to investigate matters that are operationally sensitive. She has access to any documentation that the Commission has. [The Parliamentary Commissioner] is an experienced senior criminal barrister. She also has knowledge of criminal procedural or quasi-criminal procedural law at a senior level (Evidence, 14 February 2000).*

The PCJC had further reasons for recommending the Parliamentary Commissioner model:

*She is a Parliamentary Commissioner, so she is subject to the Parliament. Having said that, she is independent in her investigations. We do not seek to influence her. And once we refer a matter to her, how she investigates it within the terms of the referral is a matter for her. I think that one of the reasons that the view was taken - and I was in the Parliament at the time but I was not on the Committee - was that it is important to make sure that the Parliamentary Commissioner is not seen as just having to deal with all and sundry but investigates matters of serious import (Lucas, Evidence, 14 February 2000).*

Ms Julie Dick SC, the current Parliamentary Commissioner, gave evidence to the Committee on 25 November 1999. She described her powers to the Committee:

*Once an investigation has been referred to me, I have all the powers, rights and privileges under the Commission of Inquiry Act 1950 in Queensland. Those powers include being able to compel people to give evidence, require documents, search and seize, if necessary. Over and above that, there are particular powers given to me under the Criminal Justice Act in relation to the Criminal Justice Commission which must cooperate with me and I have, under section 118T, power to do all things necessary or convenient for the performance of my function (Evidence, 25 November 1999).*

Ms Dick emphasised that she could only act on the request of the Parliamentary Committee (PCJC):

*My powers are not triggered unless there is a reference from the Committee (Evidence, 25 November 1999).*

When asked what she considered to be the impact of the Parliamentary Commissioner on the CJC, Ms Dick responded:

*I think that the CJC is now much more conscious ... of how an independent person might view steps that it has taken or might take (Evidence, 25 November 1999).*

The Criminal Justice Commission has publicly expressed its support for the concept of the Parliamentary Commissioner. In speaking to the Committee, the Chairperson of the CJC advised:

*I think that any oversight has to be healthy. Obviously, it always concentrates one's attention if you know that there is someone else looking over your shoulder when you are doing something. ... The advantage of a Parliamentary Commissioner is that there is someone who has access to everything - all the holdings - and one knows that nothing is secret from that process (Butler, Evidence, 14 February 2000).*

Notwithstanding his support for the oversight provided by the Parliamentary Committee, Mr Butler believes there to be some practical problems with the way the mechanism operates. Mr Butler raised the concern that the model as it operates is excessively formal and legalistic:

*I suppose it would be fair to say that my experience over the last year has led me to feel that the way the system is working in Queensland tends to be very formalistic and legalistic. ... I suspect it is because the Parliamentary Criminal Justice Commissioner may only act at the direction of the Parliamentary Criminal Justice Committee, and, consequently, acts on a complaint-by-complaint or reference-by-reference process. That prevents an ongoing relationship of oversight between the Commissioner and the Commission. If, for example, I have a matter which arises in an undercover operation ... I cannot pick up the phone and ring the Parliamentary Commissioner and get some advice from that source, because there is no statutory direct line of communication there (Butler, Evidence, 14 February 2000).*

In addition, Mr Butler noted:

*I think perhaps the legalism of the way in which the Parliamentary Commissioner has proceeded in Queensland - and, in saying that, I am not trying to lay the blame at her feet; I think to some extent it might flow out of the legislation - the Parliamentary Commissioner tends to proceed by way of formal hearings. All CJC officers are generally compelled to appear by notices and notices to produce are utilised to obtain material from the CJC.*

*... The difficulty for me as CEO of the CJC is that we have 250 staff, and when people find themselves compelled to give evidence on notice in circumstances where there is not a very clear indication of what the allegations are, they tend to require legal representation in that context, particularly where they are being cross-examined by counsel (Evidence, 14 February 2000).*

Ms Biggs expressed similar concerns, commenting that:

*In terms of the role of the Parliamentary Commissioner, there have been some problems, yes. The legislation was not clear, so we have ended up in court over the role of the Commissioner (Evidence, 14 February 2000).*

### **2.2.3 Assessment of the Parliamentary Commissioner model**

The Committee considers the oversight model operating in Queensland to have a number of strengths. In particular, the office of Parliamentary Commissioner supports the Parliamentary Committee's accountability functions by providing it with the powers, resources and expertise needed to effectively oversee the legality of the CJC's operations and to ensure the full co-operation of the CJC in its dealings with the Parliamentary Committee. The legislature thus maintains a primary role in the accountability of the CJC, while politicisation of the process is reduced by the requirement that referrals to the Parliamentary Commissioner be made by a bi-partisan majority of PCJC members.

Despite the benefits of the CJC's accountability regime, this Committee does not favour its replication for the New South Wales Independent Commission Against Corruption. The Committee firmly believes that it is appropriate that the Parliament in general, and the Committee specifically, play an important role in monitoring the Commission's functions and the successful operation of the ICAC's legislation. However, there is a distinction between general monitoring and review functions and the investigation of particular complaints of misconduct. The Committee does not believe it should have an investigative function, and considers that complaints of misconduct would be better investigated by an independent office.

Moreover, it is the Committee's opinion that, since Committee Members (in common with all Members of Parliament) fall within the investigative jurisdiction of the ICAC, it would be inappropriate for Members to be involved in investigating complaints against the ICAC. The Committee is concerned that such a circular oversight system could give rise to allegations of either conflicts of interest or 'paybacks' for previous investigations.

While the Committee sees merit in the oversight mechanism adopted in Queensland, it is concerned by comments that the model has in practice effected a legalistic approach that is both costly and disruptive.

## **2.3 The Hong Kong model - Consultation as Accountability**

Consultative committees form the principal means of accountability for the Hong Kong Independent Commission Against Corruption. Of these, the Operations Review Committee and the Complaints Committee are of particular relevance to this Review, and are described below.

### **2.3.1 The Hong Kong Operations Review Committee**

The role of the Hong Kong Operations Review Committee (ORC) is to advise the Hong Kong ICAC on how each complaint or report of corruption is to be dealt with, as well as considering the Commission's decisions to investigate a matter on its own motion. Like the other consultative committees, the Hong Kong ORC is not a statutory body, but is established by administrative arrangement. The Hong Kong ORC has functions that are broader than those fulfilled by the NSW ORC. The Terms of Reference of the Hong Kong ORC are:

1. To receive from the Commissioner information about all complaints of corruption made to the Commission and the manner in which the Commission is dealing with them.
2. To receive from the Commissioner progress reports on all investigations lasting over a year or requiring substantial resources.
3. To receive from the Commissioner reports on the number of, and justifications for, search warrants authorised by the Commissioner, and explanations as to the need for urgency, as soon afterwards as practical.
4. To receive from the Commissioner reports on all cases where suspects have been bailed by ICAC for more than six months.

5. To receive from the Commissioner reports on the investigations the Commission has completed and to advise on how those cases that on legal advice are not being subject to prosecution or caution, should be pursued.
6. To receive from the Commissioner reports on the results of prosecutions of offences within the Commission's jurisdiction and of any subsequent appeals.
7. To advise the Commissioner on what information revealed by investigations into offences within its jurisdiction shall be passed to government departments or public bodies, or other organisations and individuals, or, where in exceptional cases, it has been necessary to pass such information in advance of a Committee meeting, to review such action at the first meeting thereafter.
8. To advise on such other matters as the Commissioner may refer to the Committee or on which the Committee may wish to advise.
9. To draw to the Chief Executive's attention any aspect of the work of the Operations Department or any problems encountered by the Committee.
10. To submit annual reports to the Chief Executive which should be published.

Membership of the Hong Kong ORC is mixed, including community members, the Commissioner of the ICAC, and members of the Legislative Council and the Executive Council. The Hong Kong ORC is chaired by a community member (rather than the Commissioner as is the case in NSW) so as to enhance its independence.

On 27 September 1999, a Committee delegation consisting of the Chairman and Mr Fraser met with two members of the Hong Kong ORC, Ms Anna WU Hung-yuk (Chairperson) and the Hon Kenneth TING Woo-shou. The delegation was informed that the ORC could access virtually all records held by the ICAC, relating to both overt and covert matters. ORC Members frequently request papers and further information to assist in consideration of matters before the ORC (Delegation Report, pp 2-3 - appended to Sept-Nov Collation), and also question ICAC officers on decisions about prosecutions and charging of alleged offenders.

The delegation further noted:

*The Operations Review Committee has a high workload, with hundreds of reports being considered at each meeting. ... To assist with expediting the consideration of the reports, a sub-Committee of the ORC was*

*formed to consider minor investigations and reports of non-pursuable corruption. At its eight meetings in 1998, the sub-committee advised on more than 3000 complaints, and reported to the full Committee for endorsement. This frees up the main Committee to examine more complex matters (p 3).*

### **Comparison with NSW Operations Review Committee**

The Hong Kong ORC differs from the NSW ORC in several key respects. The ORC's jurisdiction is somewhat broader in Hong Kong. The Hong Kong ORC considers all files opened by the ICAC, whether as a result of a complaint from the public, a report from the public sector, or an own motion investigation. Thus all files that are opened at the Commission either come before the ORC to be closed, or go to the Department of Justice for prosecution. Furthermore, the Hong Kong ORC examines the Commissioner's authorisation of search warrants, advises on how to pursue cases not being prosecuted or cautioned, and receives reports on the results of prosecutions.

The Hong Kong ORC's independence is enhanced by its reporting powers, a power lacking in New South Wales. The Hong Kong ORC reports directly to the Chief Executive of Hong Kong, and publishes an Annual Report. As mentioned, the appointment of a community member as Chair of the ORC is also notable in Hong Kong.

### **2.3.2 Other Advisory Committees**

Advisory Committees have also been established at the Hong Kong ICAC to provide advice on various facets of the ICAC's operations. These are:

- The Advisory Committee on Corruption, which has a role to advise on the Commission's general policy;
- The Corruption Prevention Advisory Committee, which is responsible for advising on the output of the Corruption Prevention Department; and
- The Citizens Advisory Committee on Community Relations, which advises the Commission on its public education, media relations and community research functions.

The Advisory Committees publish annual reports on their activities.

### **2.3.3 Complaints Committee and L Group**

Complaints against officers of the Hong Kong ICAC are investigated by the “L Group” section of the ICAC, with the investigation monitored, and reviewed where necessary, by an independent Complaints Committee. Membership of the Complaints Committee is drawn principally from the Legislative Council and the Executive Council, and meetings usually are held three times per year.

The delegation of this Committee held discussions with two members of the Complaints Committee, the Hon Yang Ti-Liang (Chairman) and Hon Howard Young. They advised the delegation that:

*most complaints about the Commission relate to non-serious matters such as discourtesy by Commission officers. Serious complaints about torture or malpractice are not received, particularly since all interviews of suspects are videotaped (Delegation Report, p 4).*

The Complaints Committee’s effectiveness is limited by a number of factors. In particular, it is unable to investigate complaints itself, but must rely on Commission officers to conduct the investigation. Additionally, the Complaints Committee may not access current operational files, nor matters which are subjudice. Significant doubts about the effectiveness of the Complaints Committee were raised by some of the solicitors, barristers and academics whom the delegation met.

### **2.3.4 Assessment of the Hong Kong model**

As discussed earlier, the Hong Kong model takes a “consultative” approach to accountability. The Committee believes that the advisory committee structure would not ensure sufficiently independent oversight of the ICAC in New South Wales. Such a structure would be dependent on the ICAC for the preparation of files and information, and fails to facilitate autonomous examination of Commission records.

In addition, advisory committee members generally are selected because they are successful, hardworking people. Yet these characteristics can also mean that it is difficult for the members to spend a great deal of time considering and questioning the information on files. Such difficulties would be overcome under the recommended proposal for a dedicated, independent officer to oversee the ICAC.

In 1994, a committee was established in Hong Kong to review its ICAC. That Review identified several weaknesses in the Hong Kong Operations Review

Committee relating to its independence and transparency (ICAC Review Committee, 1994, pp 109 - 115). Recommendations, which were later implemented, included appointing a non-official member to serve as Chairperson of the ORC and the other advisory committees, the requirement for the advisory committees to submit annual reports for publication, an expansion of the ORC's functions so that it receives progress reports on long running or expensive investigations, and an ability to report directly to the Governor on matters of concern in the Operations Department.

The Committee notes that the New South Wales ORC, which was modelled on the Hong Kong ORC, has not been amended to overcome the problems that were recognised in Hong Kong.

The Hong Kong Review Committee examined the option of establishing an Inspector-type model to deal with complaints about the investigation activities of the Hong Kong ICAC. The Review Committee, however, determined against establishing a new supervisory body, arguing that as it:

*would have to develop its own identity and methods of operation, we consider that it would be more practical to build on the existing functions of the ORC (p 108).*

The Review Committee further argued that:

*... the operation of a single monitoring body would be unwieldy because of the diverse activities of the Commission (p 108).*

This argument does not hold in New South Wales, where the ICAC's activities have a more discrete focus, with police corruption, private sector corruption and federal matters falling outside its jurisdiction.

The Review Committee concluded that the ICAC Complaints Committee was sufficiently independent to deal with the complaints that were received. This option is not available in New South Wales, as the NSW Commission lacks a Complaints Committee comparable to the Hong Kong Complaints Committee.

## **2.4 Western Australia - the Anti-Corruption Commission**

In 1988 the Western Australian Parliament passed the *Anti-Corruption Commission Act*, constituting an independent commission with responsibilities for investigating corruption and serious improper conduct in the public sector. By resolution of the Western Australian Parliament and the Standing Orders of the Legislative

Assembly, a Joint Standing Committee was established to provide administrative and policy oversight of the Anti-Corruption Commission. The Committee is prohibited under the Standing Orders from becoming involved in operational matters, from reconsidering the ACC's decisions, and from investigating a matter relating to particular conduct.

Aside from the Joint Standing Committee, accountability is provided by the presence of part-time Anti-Corruption Commissioners, who are community representatives and are involved in reviewing operational decisions. The Committee on the ACC examined the ACC's operational accountability in 1998, and determined that ACC lacked effective accountability mechanisms. The Report noted:

*The only mechanism presently existing through which the ACC may be accountable for its operations is the Commission itself (JPC on the ACC, 1998, p 10).*

The Committee on the ACC further found:

*At present there is no continuing, independent mechanism through which the ACC's operations can be audited. Apart from resort to judicial redress of grievances, there is no mechanism for ensuring that the powers of the ACC are exercised lawfully. Nor is there authority for reviewing the appropriateness of operational procedures, or for addressing complaints against the ACC or its officers. The lack of independent scrutiny is a significant gap in accountability (ibid, p 3).*

The Committee on the ACC recommended the establishment of a Parliamentary Inspector of the ACC, whose role and functions would be to investigate complaints against the ACC and to assess the effectiveness and appropriateness of the ACC's procedures. The Parliamentary Inspector would have full access to the ACC's operational files, and would be appointed on the recommendation of the Committee. The Parliamentary Standing Committee would also be empowered to direct the Parliamentary Inspector to undertake an audit or inquiry (ibid, p 12-13).

The Committee's recommendations for a Parliamentary Inspector have not been implemented at this point.

## **2.5 The National Crime Authority**

The accountability of the National Crime Authority has on two occasions been the

subject of a report by the Parliamentary Joint Committee on the National Crime Authority. The most recent report on the subject, the *Third Evaluation of the National Crime Authority*, tabled in April 1998 discussed the problems faced by the Parliamentary Joint Committee in its efforts to monitor and review the NCA. The PJC concluded that a lack of access to information about the operations of the Authority was impeding its ability to provide an appropriate level of supervision, and noted:

*The PJC wants to make it clear that the status quo is unacceptable. It must either go forward to a position of genuine scrutiny of the operations of the NCA or it may as well cease to exist (PJC on the NCA, 1998, p 168-9).*

The PJC's report was also critical of the absence of a mechanism for investigating the legality of the NCA's operations. Unlike ASIO, ASIS and the other intelligence and security agencies, there currently is no provision for an Inspector-General of the NCA. This was examined in the PJC's *Third Evaluation*, and the Committee reached a conclusion recommending that:

*the Inspector-General of Intelligence and Security be designated as the Inspector-General of the National Crime Authority and be given responsibility for overseeing the operations of the National Crime Authority in respect of complaints made against the actions of all its officers, including seconded police (ibid, p 186).*

To date, no statutory amendments have been made to implement this recommendation. The Commonwealth Ombudsman's 1998-9 Annual Report foreshadows the complaints function being brought within the jurisdiction of the Commonwealth Ombudsman, rather than the Inspector General (Commonwealth Ombudsman, 1999, p 10).

## **2.6 Comparative study: conclusions**

Having reviewed the various models in operation around the country, the Committee has resolved to recommend the Inspector model which currently applies to the New South Wales Police Integrity Commission and the Inspector-General of Security and Intelligence as the most appropriate and suitable model available for the NSW ICAC. The strengths of this model are:

- the independence of the Inspector
- the security of confidential information
- its ability to access operational material without compromising investigations
- its proactive auditing powers, and
- its complaint handling role.

The Committee has developed a proposal for an Inspector that incorporates some of the functions and powers of other models. The full proposal is detailed below in Chapter Three. In making this recommendation, the Committee notes that it would bring the ICAC into line with other agencies - such as the Police Integrity Commission, the Commonwealth intelligence and security agencies, the CJC in Queensland, the National Crime Authority and the Western Australian Anti-Corruption Commission - where a similar level of external oversight is either operational or has been recommended.

# CHAPTER THREE

## PROPOSED OVERSIGHT MODEL - INSPECTOR OF THE ICAC

As discussed at section 1.5, the Committee is of the opinion that improvements should be made to the ICAC's accountability regime. After considering the various components of the accountability mechanisms applying to other watchdog agencies in New South Wales and interstate, the Committee has determined that an Inspector model is most appropriate to be applied to the ICAC, based on that which currently applies to the Police Integrity Commission.

### 3.1 Proposed Role and Functions of the Inspector

The Committee envisages that the proposed Inspector of the ICAC will perform those essential accountability functions that fall outside the jurisdiction of this Committee. In many respects, the proposed functions of the ICAC Inspector are modelled on those of the Inspector of the PIC. It is important that these functions of the Inspector are able to be activated in a wide range of circumstances, and that they can be exercised completely independently of the ICAC.

#### 3.1.1 Investigation of complaints

**A key function of the Inspector would be receiving and investigating complaints of misconduct, impropriety or illegality by the Commission or its officers.** Under the existing statutory framework, the Committee is unable to investigate such complaints because of the prohibition on investigating particular conduct or reconsidering the Commission's decisions relating to particular investigations and complaints, as detailed in section 64(2) of the *ICAC Act*. Given the extraordinary coercive powers of the Commission it is critical that any complaint about the misuse of such powers should be able to be investigated. The Committee considers that an Inspector would be best placed to investigate complaints of this nature.

It would also be appropriate for the Inspector to investigate protected disclosures made about the ICAC. The Committee therefore recommends amendment of the *Protected Disclosures Act 1994* to include the Inspector of the ICAC as an investigating authority.

The Committee considers it essential that the Inspector's investigatory function include the reporting of findings and making of recommendations where appropriate. The Committee does not believe that the Inspector's recommendations should be binding upon the Commission: this would be injurious to the ICAC's independence. Should the Commission not wish to adopt any of the Inspector's recommendations, it would be more appropriate for the Inspector to report any

difference of opinion about recommendations to the Parliament. This reflects the current practice for disagreements over the Ombudsman's recommendations to the Police Service and to government departments.

### **3.1.2 Monitoring Compliance with the Law**

In addition to a reactive role investigating complaints, the Committee is of the opinion that the Inspector should undertake a pro-active role, monitoring the ICAC's compliance with Commonwealth and State laws, particularly in relation to the Commission's use of its covert powers. This function will also involve assessing the legality and propriety of the general procedures in place at the ICAC.

The Inspector should perform random audits on Commission records, including current operational matters, to provide a valuable level of scrutiny of the legality of the ICAC's activities. Because of the degree of secrecy required for such a monitoring role, the Committee believes it most appropriate that an independent statutory officer such as the Inspector fulfil this function.

The Committee is aware that the Commonwealth legislation governing the transmission of legally acquired telecommunications intercept product currently would prevent the proposed Inspector from accessing any ICAC records that contain TI product. The Committee consequently notes that amendments will need to be made to the Commonwealth *Telecommunications (Interception) Act 1979* if the Inspector's access to ICAC records is to be uninhibited. Advice to this effect will be provided to the New South Wales Attorney-General.

### **3.1.3 Decisions about Investigations**

Inspector Finlay and Commissioner Urquhart described to the Committee the pro-active audit role of the Inspector of the Police Integrity Commission in relation to decisions about investigations at the PIC. This involves monitoring the decision-making process to ensure that no decision is 'so unreasonable that no reasonable person could make it'. At the PIC, all investigation decisions are monitored in this way, including investigations begun on the Commission's own motion. The Committee believes that the Inspector of the ICAC should play the same role for the ICAC. The Committee emphasises that it does not suggest that the Inspector should 'second guess' the Commissioner's investigation decisions: the function of the Inspector would strictly be focused in this respect on the propriety of the decision-making process.

### **3.1.4 Role and Functions: Recommendations**

### **Recommendation 5**

The Committee recommends that the ICAC Act be amended to provide for the establishment of an Inspector of the ICAC.

### **Recommendation 6**

The Committee recommends that the Inspector's functions be:

- to deal with, by reports and recommendations, complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission;
- to audit the Commission's operations for the purpose of monitoring the legality and propriety of its activities and procedures; and
- to audit the reasonableness of the ICAC's investigative decisions.

### **Recommendation 7**

The Committee recommends the Inspector's functions and powers be able to be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint, or following a reference by this Parliamentary Committee or any other agency.

### **Recommendation 8**

The Committee further recommends that the Inspector should not be subject to the Commission in any respect.

### **Recommendation 9**

The Committee recommends that the Inspector of the ICAC be included as an authorised recipient of telecommunications product under the Commonwealth *Telecommunications (Interception) Act 1979*.

## **3.2 Role of the ORC within the new structure**

The Committee considered the necessity of maintaining the Operations Review Committee following the establishment of the proposed Inspector. The Inspector model may obviate the need for scrutiny by an ORC, since the Inspector would be empowered to check the legality and propriety of investigative decisions through proactive audits.

Commissioner Moss advised the Committee that she believes it to be valuable to maintain the ORC in the event that an Inspector model is adopted. She gave evidence that:

*... it is possible, and perhaps even desirable, to have both an inspector*

*model of accountability and an ORC.*

*... I say that having both models may be desirable because the ORC mechanism of accountability, as you know, is quite different to the inspector model. (Evidence, 17 March 2000).*

Ms Moss further noted in evidence that as long as an Inspector model did not impact on Commission resources, there would be no financial grounds for dis-establishing the ORC.

The objective of the ORC is to provide advice, rather than oversight. As the statutory framework for the ORC makes it a somewhat inflexible means of providing advice to the Commissioner, the Committee considered amending the *ICAC Act* to bring the ORC outside of the statute. The amendment would give the Commissioner the discretion to constitute the ORC after determining the need for advice on investigation decisions. This would reflect the situation in Hong Kong, where the ORC is established by administrative order, rather than by statute. Unlike Hong Kong, however, the Parliamentary Committee will maintain a monitoring role over the structure and operations of the ORC. Commissioner Moss indicated to the Committee that she would have no difficulties if such a change were to be made, commenting:

*I would be comfortable with that and I would support that. Ultimately, the form of the ORC, whether in legislative form or not, is up to the Parliament. I would have to say that I do not think at this point that I have any strong views one way or the other. What I would have liked to do - if it were not the legislative form - is still have and still maintain an ORC. (Evidence, 17 March 2000).*

The Committee has some doubts about whether the ORC should continue as a statutory body. However, having weighed the options, the Committee considers it appropriate to maintain the ORC within the new structure until the impact of the Inspector and the on-going need for a statutory advisory body are assessed. The Committee notes that several of the non-statutory functions currently undertaken by agreement by the ORC could be taken over by the proposed Inspector, thus reducing the workload of the ORC. The Committee is keen to avoid duplication of effort, jurisdictional overlap and waste of resources, and intends reviewing the situation when the Inspector has been operational for 12 months.

### **Recommendation 10**

The Committee recommends that the position of the ORC be reviewed by the Committee after the Inspector has been operational for 12 months.

### **3.3 Proposed Powers of the Inspector**

To effectively fulfill his or her functions, the Inspector will require a wide range of powers to obtain information and issue reports and recommendations. The Committee has drawn on the model provided by the Inspector of the Police Integrity Commission, and has concluded that the following powers should be made available to the Inspector.

#### **3.3.1 Coercive powers**

The Committee considers it essential that all activities of the Commission and all conduct of its officers be open to scrutiny by the Inspector. The Inspector should have access to all records of the ICAC, and be able to have copies made of any of them. He or she should be able to require officers of the ICAC to supply information, documents or other things, and to call Commission officers attend before the Inspector to answer questions or produce documents and items. The discretion to recommend disciplinary action or criminal prosecutions against officers of the Commission should also be held by the Inspector. In fact, the Committee believes that the Inspector of the ICAC should be empowered to do anything that is necessary to be done for the exercise of his or her functions.

#### **3.3.2 Inquiries**

The Committee considers it necessary for the Inspector to be empowered to summon witnesses and to hold inquiries. For this purpose, the Inspector should have all of the powers, authorities, protections and immunities of a Royal Commissioner under the *Royal Commissions Act 1923*.

#### **3.3.3 Reporting**

A number of reporting mechanisms should be available, to be used at the Inspector's discretion. The Inspector may choose to issue a report at the conclusion of an investigation of a complaint, and to distribute it as widely as he or she considers is in the public interest. The investigation report therefore might be provided to the complainant and the Commissioner only, or it might be tabled in Parliament, whatever is deemed by the Inspector to be appropriate. Where a public hearing has been conducted, the Inspector should be required to report to Parliament on the outcome.

As indicated above, the Committee believes that where there is continued disagreement between the Inspector and the Commissioner over the desirability of adopting a recommendation of the Inspector, it should be open to the Inspector to issue a 'default in consequent action' report to Parliament. Such a report should

set out the background to the recommendation/s, the Commissioner's response to the recommendation, and the Inspector's comments, and should be tabled in Parliament with a copy being sent to the Minister. The Minister should be required to make a statement to the House in response to the report within 12 sitting days after the tabling of the report. These are similar provisions as those applying to reports by the Ombudsman and the Police Integrity Commission.

It would also be valuable for the Inspector to be empowered to report to the Parliament at any time on any matter relating to the functioning of the Commission or the Inspector. The Committee's proposal therefore contains provision for the Inspector to publish Special Reports, and for these to be tabled in Parliament. In addition, the Committee believes that the Inspector should be required to publish an Annual Report, to place on the public record the details of the activities undertaken over the past year. The Annual Report should include reference to the complaints investigated in the reporting period.

#### **3.3.4 Powers: Recommendations**

## **Recommendation 11**

The Committee recommends that the Inspector be empowered to:

- investigate any aspect of the Commission's operations and any conduct of the Commission's officers;
- access and have copies made of all records of the ICAC;
- require Commission officers to supply information, documents or other items;
- call Commission officers to produce information, documents or other things;
- recommend disciplinary action or criminal prosecutions against Commission officers where appropriate; and
- any other thing necessary to fulfill the Inspector's functions.

The Committee recommends that the Inspector be empowered to make and hold inquiries, with all of the powers, authorities, protections and immunities of a Commissioner under the *Royal Commissions Act 1923*.

The Committee recommends that the Inspector be empowered to issue investigation reports and Special Reports. The Committee recommends that the distribution of these reports be determined by the Inspector's assessment of the public interest. In the event that the Inspector determines not to investigate a complaint, he or she should advise this fact and the circumstances of it to the complainant and include it in the Annual Report.

The Committee recommends that the Inspector be empowered to issue "default in consequent action" reports where there is inadequate response to his/her recommendations. Such reports should be tabled in the Parliament, with the Minister being required to make a statement in the House in response to the report within 12 sitting days after its tabling.

The Committee further recommends that the Inspector be required to submit an Annual Report to Parliament on the performance of the Inspector's functions.

### **3.4 Eligibility for appointment as Inspector**

The position of Inspector will inevitably involve questions of a legal nature, particularly with allegations of illegal use of powers. Consequently, the Committee considers it important that the Inspector have a legal background, though not necessarily a judicial background.

It is common in New South Wales and other jurisdictions for positions of this kind to be filled by individuals who either are, have been, or are qualified to be a judge of any court or a Justice of the High Court. In practice, this would include any person who:

- is a legal practitioner of at least 7 years standing; or
- is a judicial member of the Industrial Relations Commission; or
- is a magistrate; or
- has been enrolled as a barrister or solicitor, as a barrister and solicitor, or as a legal practitioner, of the High Court or of the Supreme Court of a State or Territory for not less than 5 years.

The Committee further considers that the independence of the Commission and the Inspector necessitates the exclusion of all sitting Members of Parliament of all States and Territories, and of the Commonwealth Parliament. This reflects the current situation for the Commissioners of the ICAC and the PIC, as well as the Inspector of the PIC.

The Committee sees no reason why the position of Inspector of the ICAC cannot be filled by the same person filling the position of Inspector of the PIC, particularly since each is a part-time position. This proposal was put to Commissioner Moss, who noted that while the positions should remain separate, the same person be appointed to undertake both functions:

*I do not think it would be a good idea if the role were merged, say, with the PIC Inspector. That in itself would present a whole range of other problems, because the PIC Inspector I understand is funded by the Ministry of Police, and ICAC is within the portfolio of the Premier. It needs to be separate so that it has that separate focus. It could produce a lack of focus if it was all merged into one. Having said that, I do not think it really matters if it is one person doing the two functions, so long as the roles themselves are quite separate (Evidence, 17 March 2000).*

### **Recommendation 12**

The Committee recommends that a person be eligible for appointment as Inspector if he or she: is or was qualified to be appointed as a Judge of any court in New South Wales or any other State or Territory; or, is or was qualified to be a Judge of the Federal Court or a Justice of the High Court of Australia.

### **Recommendation 13**

The Committee recommends that a person be ineligible for appointment as Inspector if he or she is a Member of Parliament in New South Wales or any other State or Territory, or is a Member of the Commonwealth Parliament.

## **3.5 Oversight of the Inspector**

### **3.5.1 General oversight**

While the Committee is aware of the need for the Inspector to be accountable for his or her actions, this needs to be balanced against the maintenance of the Inspector's independence and the undesirability of creating ever increasing layers of accountability.

General monitoring of the role and functions, policies and procedures of the Inspector would appropriately be performed by this Committee, in much the same way that the Committee oversees the Commission. The Committee's function would be to ensure that the office of the Inspector operates effectively and provides the accountability role envisaged by the legislation.

The relationship between the Committee and the Inspector should mirror that of the Committee and the Commission. That is, the Committee should:

- monitor and review the exercise by the Inspector of his/her functions;
- report to Parliament on any matter relating to the Inspector;
- examine the Inspector's reports; and
- inquire and report on any question in connection with the Inspector's functions, structures and procedures.

In addition, it is important that the Committee have the power to refer matters to the Inspector. From time to time complaints are made to the Committee that it is unable to deal with due to limits to its statutory jurisdiction. Where appropriate, the Committee could refer these matters to the Inspector to be investigated or otherwise dealt with.

The Committee emphasises that it does not intend that its role be to review the Inspector's decisions about investigating complaints, or his/her findings and recommendations. The Inspector should be the final arbiter on whether a matter is investigated, and what the outcomes of the investigation are: such functions

should be specifically excluded from the Committee's jurisdiction.

#### **Recommendation 14**

The Committee recommends that the Committee's jurisdiction be extended to include the proposed office of Inspector.

The Committee further recommends that its functions in relation to the Inspector be:

- to monitor and review the exercise by the Inspector of his/her functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Inspector or connected with the exercise of his/her functions;
- to examine each annual and other report of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- to report to both Houses of Parliament any change which the Committee thinks desirable to the functions, structures and procedures of the Inspector; and
- to refer any matter relating to the Inspector's functions to the Inspector for investigation.

#### **Recommendation 15**

The Committee recommends a statutory prohibition on the Committee reconsidering the Inspector's decision to investigate, not to investigate or to discontinue investigation of a particular complaint. Reconsideration of the findings, recommendations and determinations of the Inspector should also be prohibited.

## **CHAPTER FOUR**

### **PERFORMANCE MEASURING**

## **4.1 Principles of performance accountability**

Accountability for performance forms an essential part of the accountability regime for public sector agencies. It is generally recognised that there are inherent difficulties in performance measurement for independent watchdogs within the public sector. Those performance indicators which are easily quantifiable are generally crude indicators of activity rather than effectiveness. In relation to the ICAC for instance, statistics on numbers of arrests or use of powers do little to reveal whether ICAC's actions have exposed and reduced corruption. The difficulties in assessing existing levels of corruption, which by its very nature is a secretive activity, makes it extremely difficult to assess the real impact of the activities of the ICAC.

The NSW Audit Office has recommended that agencies "should concentrate on reporting effectiveness and efficiency, through key performance indicators (KPIs)" (Audit Office, August 1999, p 12). The Office maintains that performance reporting "needs to be at an appropriate level, concentrating on reporting against the primary purposes of the agency, program or activity". Performance indicators serve as an indicator of agency performance rather than an exact measure of achievement and it is the view of the Audit Office that in order to be useful, performance measures must exhibit the following characteristics: appropriateness, relevance, accuracy, timeliness, completeness and comprehensiveness (ibid, p 2).

From a broader perspective, the Office argues that the advancement of public performance reporting at an agency level in NSW depends upon three significant and fundamental issues:

- what indicators will be used?
- where will they be published?
- how will they be validated? (Ibid, p18)

The Committee has endeavored to address these issues in its examination of the performance reporting of the Independent Commission Against Corruption and is firmly of the view that the Commission should adhere to the performance accountability principles advocated by the Audit Office for public sector agencies.

## **4.2 Examination of ICAC performance to date**

### **4.2.1 General Meetings with the Parliamentary Committee**

In preparation for General Meetings with the ICAC, the Committee regularly submits Questions on Notice to the Commission requesting activity statistics on the following areas:

- matters received: s.10 complaints, protected disclosures, s.11 reports, information, inquiry, dissemination, referral from Parliament, outside jurisdiction, own initiative.
- classification of matters: preliminary investigation, outside jurisdiction, initial inquiry, immediate closure.
- percentage of matters that are subject to preliminary investigation, full investigation, declined, outside jurisdiction, referred to other authorities, or result in findings of corruption.
- investigations involving public hearings; number of days of public hearings.

Information obtained on the Commission's use of its powers includes:

- number of notices issued under sections 21 (obtaining information), 22 (obtaining documents or other things) and 23 (entering premises) of the ICAC Act.
- listening device warrants and search warrants obtained and executed.

#### **4.2.2 Annual Reports**

The Commission's annual report for 1998-9 includes a table containing performance indicators and an evaluation of its performance against these measures. The table is reproduced below, with an additional column of the Committee's comments on the indicators:

Measure	Performance 1998-9	Comment
<p>In our reports and in each annual report, provide a description and analysis of the corruption and corruption opportunities we have identified and addressed.</p>	<p>Eight investigation reports have been published, describing corruption opportunities exposed and recommending action to address them.</p> <p>Five corruption prevention reports have been published with corruption and corruption opportunities addressed in receipt of gifts, benefits or bribes; and staff recruitment and selection.</p>	<p>The measure seeks to determine if investigations are identifying corruption.</p> <p>The performance evaluation does not indicate whether the ICAC's 13 reports have actually addressed the corruption and corruption opportunities identified. The evaluation notes the action taken, but not whether it was successful.</p>
<p>Evaluate the extent to which ICAC services, products and advice are used in and beyond NSW.</p>	<p>Seven research reports produced, analysing preventative strategies. Visits by 16 delegations from overseas Over eighty presentations to conferences and workshops by ICAC officers. Commissioner and/or delegate accepted 20 invitations from 20 overseas agencies or conferences. Director of Corruption Prevention and Education is supporting the PNG Ombudsman Commission institutional strengthening project, funded by AusAID.</p>	<p>It would be more useful to measure the quality of the services and products provided, together with their use by NSW agencies, and the implementation of the programs recommended. Measurement of use outside of NSW is inappropriate.</p> <p>The performance evaluation is merely an activity report. There is no indication of success.</p>
<p>Monitor and report on community perceptions of the ICAC and its effectiveness</p>	<p>Community and Journalists Attitude Survey 1999 found high awareness and support for the ICAC.</p>	<p>Using community perceptions as a measure is problematic due to the lack of knowledge of some sections of the community.</p>

<p>Identify and recognise agencies that develop products and processes to inform their staff and clients of their anti-corruption strategies.</p>	<p>An investigation report recognised efforts of Wollongong and Sydney City Councils to develop corruption prevention strategies in managing waste.</p> <p>An investigation report recognised efforts of Department of Corrective Services and Corrections Health Service to address issues exposed.</p>	<p>Recognising agencies that develop such products and services does not in itself help to meet ICAC objectives of exposing and preventing corruption. The information needs to be distributed to stakeholders in an accessible form to enable replication of anti-corruption strategies in other Departments and agencies.</p>
<p>Public sector agencies evaluate ICAC guidance as timely, practical and relevant.</p>	<p>Although this has not been measured substantially during the year, unsolicited feedback both formal and informal indicates the response to advice provided is positive.</p>	<p>Inadequate evaluation of performance on this measurement.</p>
<p>Recognise and acknowledge agencies that implement change strategies designed to lead to the minimisation of corruption.</p>	<p>While acknowledgment has been given directly to agencies, a project to publicly recognise &gt; best practice initiatives will commence next year.</p>	<p>Recognising and acknowledging such agencies would have little impact on preventing corruption without the distribution of 'best practice' initiatives.</p>
<p>Appraise and report on our dealings with individuals and groups with whom we work and affect</p>	<p>A successful round of consultations with:          Aboriginal communities to implement recommendations contained in <i>Report into an investigation into Aboriginal Land Councils in NSW: Corruption Prevention and Research Volume</i>; unions representing public sector employees; people from non-English speaking background; Design students (MYDA).          Assistance to members</p>	<p>This measure would be useful in determining whether stakeholders consider the services provided as useful and credible, and to appraise the Commission's service provision. The consultation would need to be directed toward such feed back.</p> <p>The performance evaluation is merely an activity report. Assessment as 'successful' is subjective.</p>

The Committee notes that this performance information essentially provides a record of the activities undertaken by the Commission in relation to each of its performance measures. The table provides a quantitative measure of the Commission's performance but lacks the qualitative dimension essential for a meaningful assessment of performance. Consequently, the performance measures included in the annual report do not indicate whether the ICAC's activities successfully furthered its objectives.

For example, the first measure of performance does not indicate whether the reports produced by the Commission were successful in helping to address corruption and opportunities for corruption. There is no evaluation of the quality of the services and products provided by the ICAC, the extent of their use and implementation by NSW agencies. Furthermore the Committee seriously questions the value of measuring the use of ICAC services outside of New South Wales. This is not part of the Commission's statutory objectives, and the evaluation fails to measure the impact of the activities. The extent to which public sector agencies consider ICAC guidance to be timely, practical and relevant is inadequately evaluated. It also is unclear as to how identifying and recognising agencies that develop products and processes about anti-corruption strategies would assist the Commission to fulfil its objective of exposing and preventing corruption.

In its General Meeting Report tabled in early 2000 (Report 1/52), the Committee considered the Commission's performance indicators and made the following recommendations:

*Recommendation 5:*

*The Committee recommends the Commission examine the appropriateness, relevance, accuracy, timeliness, completeness and comprehensiveness of its current performance indicators and, if necessary produce new key performance indicators for the ICAC.*

*Recommendation 6:*

*The Committee recommends that, in examining its performance indicators, the Commission seek expert advice from the Audit Office, and consult with the Committee concerning the development of key performance indicators.*

*Recommendation 7:*

*The Committee recommends that the Commission regularly report on its key performance indicators to the Committee as part of the program of General Meetings conducted between the Committee and the Commission (Committee on the ICAC, 1/52, p 7).*

The Committee heard at its hearing with Commissioner Moss that the Commission had taken a number of steps to enhance the Commission's performance measurement:

*On the topic of the Commission's performance and performance indicators, we are embarking on a path of improvement in these areas. To this end, I had my deputy, Mr Feneley, establish and work with a small group within the Commission to work on performance issues.*

*We will be focusing on two areas: first, external performance indicators drawing on work previously done by the Commission and information available from like organisations around Australia; and, second, developing a better understanding of work flow pressures, turnaround times, benchmarking etc. In relation to performance indicators, I proposed to you, Mr Chair, the idea of a panel or a steering committee, and I understand that two representatives of this Parliamentary Committee will participate as observers. Others on the steering committee will be myself, an Audit Office representative, and Mr Chris Wheeler from the Ombudsman's Office.*

*We are gathering material together, including comparisons from other organisations. If possible, I hope to be able to organise a meeting of the steering committee within the month. The work on the internal performance indicators will be undertaken in consultation with like agencies with a view to agreeing on best practice in like functions and activities (Moss, Evidence, 17 March 2000).*

**The Committee commends the Commissioner for the actions taken by the Commission to improve its performance indicators.** The revised KPIs should enable an assessment of the extent to which the Commission has successfully achieved its objectives and performed its statutory functions, and they also should facilitate evaluation of the Commission's performance over time.

### **4.3 Developing Appropriate Key Performance Indicators**

The Audit Office's report *Key Performance Indicators* (August 1999) outlines the following conditions to assist in achieving robust accountability results:

- desired or anticipated results being specified in advance (at program and agency level, and where possible also at whole-of-government level)
- resources and authority commensurate with responsibility
- performance information being generated or otherwise obtained (for outcomes as well as for inputs and operations)
- performance information being relevant, and related to the goals specified
- performance information being used to assess the adequacy of results achieved

- relevant KPIs being externally (publicly) published
- a regime of incentives and penalties operating to stimulate desired performance (perhaps even to the extent of performance based funding)
- relevant KPIs being independently evaluated

Dr David Brereton, Director of Research at the Criminal Justice Commission, commented on the difficulties in developing satisfactory performance indicators:

*There are several problems. One of those, I think, is simply that of defining the role of anti-corruption bodies such as the CJC or ICAC. As the Committee would appreciate, these anti-corruption bodies are quite complex in terms of the range of functions that they perform... That is one of the issues because .. There is often a good deal of discussion about what is the primary role of this body and by what should it be judged (Evidence, 14 February 2000).*

The merits of a range of possible performance measures for the Commission were discussed with witnesses to the review. In evidence to the Committee on 14 February 2000, Dr Tim Prenzler of Griffith University stressed the difficulties involved in performance evaluation and reporting in this area and noted that current reporting and evaluation really concerns activity as distinct from success or productivity. Some systemic reasons for this include:

- the oversight body being evaluated is trying to detect something that in itself is difficult to uncover and locate e.g. corruption and misconduct is a secretive activity which is difficult to prove
- the large amount of complaints concerning misconduct and corruption have extremely low substantiation rates and raise considerable problems in actually achieving any substantial outcomes in terms of actual convictions.

He went on to identify seven basic performance indicators which he considers important for judging the effectiveness of police and oversight bodies, namely:

- public surveys
- regular complainant surveys
- case file audits
- regular reviews of legal outcomes
- an inspector
- international benchmarking
- periodic open reviews

Dr Prenzler considered that these seven measures should form part of a package applied to review the performance of an oversight body at different points and

times. However, in identifying these indicators Dr Prenzler also noted their shortcomings. In his opinion public surveys possessed limited validity and were the weakest performance indicator. They gave no indication of the extent of a survey participant's knowledge about the law and government organisations prior to the survey. Nevertheless, he felt that public surveys were worth doing every few years to survey members of the constituency about their knowledge of the body's jurisdiction, their rights and options in relation to the body, the process for complaining about the body and the investigation process, and their confidence in the body.

According to Dr Prenzler, regular complainant surveys gave the opportunity to seek answers from complainants to more penetrating questions concerning their satisfaction level and opinion about the investigation process. Despite the inevitable dissatisfaction felt by a proportion of complainants and the consequent limitations on the performance information available through such surveys Dr Prenzler considered that the complainant surveys could reveal scope for systemic improvement within a body. He identified case file audits, focussing on the quality and outcomes of investigations, as a " rich source of information about the quality of work done by an oversight body. Regular reviews of legal outcomes also provide a learning tool for improving future case management and prosecution strategies.

Dr Prenzler also advocated that any parliamentary watchdog examining the performance of an oversight body would need to have a mechanism for reviewing complaints and investigating problems within the agency. Therefore, he proposed that parliamentary committees should have a person serving as an inspector who could access files, investigate complaints and report back to the parliamentary watchdog on necessary action or remedies. The current trend towards international benchmarking also offered a valuable source of performance information to parliamentary committees. Periodic open reviews of an oversight body by a parliamentary committee offered an additional mechanism for review of performance.

In discussion with the Committee, Dr Prenzler agreed that surveys of organisations or individuals who have been the subject of complaints would form a useful additional type of survey. He also acknowledged the value of a performance measure which looks at the impact of an oversight body's investigative findings and agreed that such a measure was preferable to concentrating on legal outcomes.

#### **4.4 Validation of performance information**

The Committee notes the importance of agencies having performance information independently assessed, or validated. In its report entitled *Key Performance Indicators* (August 1999), the NSW Audit Office claims that "most performance reporting systems in public sector jurisdictions lack adequate independent

assessment and validation of performance information". The Office claims to have found performance indicators published by public sector agencies which were wrong, misleading, in conflict with other indicators, and irrelevant to the task of performance assessment. The Office also found performance indicators which were changed from year to year (Audit Office, August 1999, p 12)

The Audit Office has advanced independent verification of performance information as a "key feature" of best practice models for performance accountability and claims:

*Independent verification can assist users by interpreting the information provided and confirming that the information presented meets the desired characteristic for indicators; appropriate, relevant, timely, accurate, comprehensive and complete (ibid, p 22)*

The Audit Office also recommended that the "relevance of indicators should be reviewed and endorsed outside of the individual agency, either by the Minister in conjunction with stakeholders and beneficiaries, or by an appropriate independent body" (ibid). The Committee notes examples cited by the Audit Office of authorities in the United Kingdom that are legally required to have their performance information validated by an accredited reporter, and of New Zealand and Western Australia where the Auditor-General has the mandate to audit the accuracy of performance reporting.

In NSW the Auditor-General does not possess a mandate to audit performance information as part of the financial auditing process although the Auditor-General may undertake a special audit of agencies' performance reporting. In evidence to the Committee, the NSW Auditor-General, Mr Bob Sendt, advised that the Audit Office had not conducted performance audits of watchdog bodies. Mr Sendt also indicated that any recommendation from a Parliamentary Committee that a performance audit be conducted would be considered as a high priority by the Audit Office. The Committee considers that it would be valuable and appropriate for a performance audit to be conducted of the Commission by the Audit Office. Although the Commission is a small budget item in comparison to other agencies, its activities are significant and the State needs to be confident that it is performing effectively.

**Recommendation 16**

The Committee recommends that the Independent Commission Against Corruption be the subject of a special audit, otherwise known as a performance audit, by the NSW Audit Office under section 38 of the *Public Finance and Audit Act*.

**Recommendation 17**

The Committee further recommends that the Audit Office be provided with additional funding to undertake the special audit.

The Committee also considers that, in addition to the benefits to be gained from a performance audit of the ICAC by the Audit Office, more frequent reviews of the ICAC's performance reporting would ensure the continued validity of the performance information published by the Commission and enhance the Commission's accountability. As the ICAC is an independent statutory body, accountable to Parliament, it would be most appropriate for the Committee to play a key role in validating the Commission's performance reporting. The Committee could engage expert assistance for this purpose and a number of precedents exist for such an arrangement. For example, the Committee on the Office of the Ombudsman included a review of the performance measures used by the NSW Ombudsman's Office during the management review of the Office in 1992. The assessment of performance measures was conducted by KPMG Peat Marwick who were the consultants engaged by the Committee to undertake the management review.

**Recommendation 18**

The Committee recommends that the Commission's performance indicators and performance information be independently assessed and verified on a regular basis and that the results of the assessment be made available to the Committee.

**Recommendation 19**

The Committee further recommends that the independent assessment be carried out by a consultant engaged by the Committee and that additional funding be made available for this purpose.

## 4.5 Comparative benchmarking

Of equal importance to establishing appropriate means of measuring performance is determining a basis of comparison. Dr Brereton explained to the Committee:

*Another set of problems, which are more technical in nature, relate to the difficulties of comparing like with like. A performance measure at any given time does not tell you anything. To give you an*

*example, to know that an organisation is achieving 20% of its investigations resulting in someone being charged, what does that statistic mean? ... You can address that only by either comparing that rate with the performance of a similar organisation or by comparing that with how the organisation was performing a couple of years ago, to see whether it was getting better or worse (Evidence, 14 February 2000).*

The Committee acknowledges that varying jurisdictions and recording practices increases the difficulties for ICAC in benchmarking its performance. However, it is aware of recent benchmarking initiatives by Ombudsman Offices throughout Australia and is supportive of a similar initiative by the ICAC and investigative agencies with an anti-corruption focus.

In his evidence for the review, the Auditor-General, Mr Bob Sendt, acknowledged that the ICAC has limited opportunity to benchmark against other organisations and that the Queensland CJC would probably serve as the closest Australian organisation against which the ICAC could endeavour to conduct a benchmarking exercise .

Dr Brereton commented that this was problematic:

*Everyone thinks that it is a good idea to be able to benchmark organisations like the CJC and the ICAC against each other on some of these criteria to see whether one is performing better than the other. But that is very difficult, also. If you take the example of measuring investigative effectiveness, the CJC and ICAC deal with different types of matters, they use different criteria to determine what they investigate and I suspect they probably do not use the same counting rules either. So even if you get two statistics, interpreting what they mean is far from straightforward. We have found difficulties even within Queensland in measuring our own performance over time using some apparently straightforward statistical measures like substantiation rates and that is because, as an organisation, we have changed the business rules that are used to determine what matters are investigated and what are not. ... So you cannot even look at some raw statistics and draw obvious conclusions about whether performance is improving or deteriorating (Brereton, Evidence, 14 February 2000).*

The Committee notes that the Commission has recently been working towards benchmarking against like agencies, and recognises the difficulties in devising comparable activities and statistics. The Committee will monitor the development of the Commission's key performance indicators and its attempts to identify

benchmarks in the course of its regular General Meetings with the Commissioner.

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