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Appendix edited Minutes

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 Megarryt MP

Mr M Richardson MP

Secretariat

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

Ms T van den Bosch - Project Officer
Ms N 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

Society has long struggled to achieve a balance between adequate law enforcement powers on the one hand, and the protection of civil and personal liberties on the other. This enduring dilemma is at the heart of the Committee's consideration of the ICAC's proposed amendments to its powers.

In establishing the Independent Commission Against Corruption, the Parliament regarded it as necessary to vest the Commission with extraordinary covert and coercive powers to enable it to fulfil its functions.

The Committee on the ICAC has consistently supported the Commission's need to access such powers. There is little point in giving the Commission functions and objectives if it is not sufficiently empowered to achieve them.

However, the Committee's deliberations have also emphasised the necessity of ensuring accountability for the use of those powers by the Commission. The Committee has also been mindful of the importance of providing safeguards to ensure that the Commission's powers are used appropriately and with propriety.

The Committee has been pleased to have the opportunity to consider the proposals for changes to the Commission's powers and procedures. The Commissioner is to be commended for adopting a consultative approach in bringing her proposals into a public forum for debate. This has benefited the policy development process and enhanced the outcome for the community.

The Committee's decision-making on these matters has been strengthened by the input of relevant agencies and interest groups, and through on-going dialogue with the Commission. I would like to thank those agencies and organisations that prepared submissions for the inquiry, and the witnesses who attended and gave evidence at the public hearing.

I am grateful also to my colleagues on the Committee for their attendance and participation, and to the Secretariat for its assistance to the Committee in the course of this Inquiry.

**HON JOHN HATZISTERGOS MLC
CHAIRPERSON**

Summary of Recommendations

Recommendation 1

The Committee recommends against conferring police powers on civilian investigators at the ICAC at this time.

The Committee recommends that the Commission and the Police Service attend a round table conference convened by the Committee to discuss means of minimising any problems experienced by the Commission in conducting its operations within the statutory framework currently imposed on its use of police powers under the *ICAC Act 1988*.

The Committee further recommends that the Commission and the Police Service work together to identify and overcome impediments to police officers seeking secondments with the ICAC.

The Committee recommends that the Commissioner of the ICAC report back to the Committee about any on-going problems it experiences related to current provisions concerning police powers.

Recommendation 2

Conditional on the establishment of an Inspector of the ICAC, the Committee recommends that the *Listening Device Act* be amended to enable ICAC officers to apply for listening device warrants over the phone.

Recommendation 3

The Committee recommends against empowering the Commission to compel non-public officials to provide information to the ICAC under section 21.

Recommendation 4

The Committee recommends the continuation of the current restrictions on delegating the power to issue an arrest warrant.

Recommendation 5

The Committee recommends that the *Criminal Procedure Act 1986* be amended to apply to property in the custody of the Commission connected with an offence.

Recommendation 6

The Committee recommends the retention of the current provisions relating to the admissibility of Commission transcripts in committal proceedings.

Introduction

On 29 February 2000 the ICAC Commissioner, Ms Irene Moss AO, wrote to the Committee seeking support for a number of proposed amendments to the *ICAC Act* and other Acts that relate to the Commission's powers and jurisdiction. The proposals were to:

1. invest suitably qualified Commission investigators with police constable powers;
2. amend the definition of corrupt conduct in the *ICAC Act* so that breaches of local council codes of conduct may be investigated by the ICAC;
3. extend the validity of listening device warrants from 21 days to 90 days;
4. enable ICAC officers to apply for listening device warrants over the phone;
5. enable the ICAC to require non-public officials to provide statements of information;
6. enable the Commissioner to delegate to an Assistant Commissioner the power to issue an arrest warrant;
7. provide procedures for disposal of seized money;
8. enable Commission transcripts to be admitted for committal proceedings;
9. alter the provisions relating to the admission of Commission transcripts in criminal prosecutions; and
10. enable the Commissioner for Police and the Attorney General's representative to delegate their responsibilities relating to the Operations Review Committee meetings.

The Committee welcomes the ICAC Commissioner's initiative in bringing the proposed amendments to the *Independent Commission Against Corruption Act 1988* to the Committee for consideration. The Committee on the ICAC has developed an expertise in relation to this statute and the work of the ICAC and it is appropriate that the Committee should have an opportunity to comment on legislative proposals affecting the Commission and its operations.

The proposals put forward by the Commission raised public interest issues which in the opinion of the Committee warranted a process of full public consultation. Consequently, the Committee used its inquiry powers to hold a public hearing, held on 15 June 2000, with witnesses representing the Council for Civil Liberties and the ICAC.

In light of the arguments put to the Committee in evidence, further submissions and advice were sought from the NSW Bar Association, the Law Society of NSW, and the Inspector and the Commissioner of the Police Integrity Commission. Where the proposals could affect the responsibilities of a Minister, the Committee sought the relevant Minister's advice and took his or her views into account when deliberating upon its report.

The Committee is uniquely placed to conduct such an exercise and considers that the inquiry into the Commission's legislative proposals has resulted in a thorough, comprehensive and open examination of their implications. The inquiry alerted the Committee to a number of operational and administrative difficulties confronting the

ICAC which the Committee intends to monitor. The Committee has valued this opportunity to closely examine the proposals put forward by the ICAC and considers that it should continue to be consulted on future significant legislative proposals affecting the Commission.

Accounting for powers

In May 2000, the Committee tabled a report on the accountability of the ICAC. The Committee concluded that, while the Commission is accountable for its policies and procedures, the absence of a mechanism for ensuring it acts with legality and propriety is a serious flaw. The Committee consequently recommended the establishment of an Inspector of the ICAC.

The Committee has considered the ICAC's proposals in the context of the current absence of any complaints-handling mechanism for considering allegations of abuse of powers by Commission officers. **It is the Committee's opinion that, without the safeguard of an Inspector to investigate complaints, there should be no expansion of the ICAC's already extensive powers.**

1. Police Powers

Proposal: To amend the ICAC Act to invest suitably qualified Commission investigators with police constable powers

1.1 Background

At present it is necessary for the Commission to second police officers if it is to use police powers (such as power of arrest and search). The Commission originally sought an amendment to the Act to enable Commission officers who are 'approved former police officers' to be invested with the powers of a NSW police constable. In a later submission, the Commissioner specified the powers sought as being powers of: stop; search; seize; detain; arrest; and convey seized firearms and narcotics for testing, analytical and evidentiary purposes. These powers were intended to be exercised only "in relation or directly incidental to the lawful conduct of an ICAC investigation" (Submission 12: 1-2).

1.2 Commentary

The Commission argues that the inability of its officers to exercise police powers has limited its operational flexibility:

The absence of these powers can place considerable restrictions on the management of operations. Presently, only officers with police powers can make an application for a listening device warrant over the telephone. From our experience this can remove a great deal of flexibility from the management of operations (Submission 4: 3).

The Commission provided a number of examples of actual or potential operational difficulties arising as a result of the inability of civilian investigators to use police powers:

We have had at least one controlled operation which we have had [to] modify to take account of the fact that we would not have an investigation officer with the necessary powers to obtain a listening device warrant over the telephone.

In other circumstances, we may be mounting a controlled operation involving a large sum of cash or a prohibited article. In order to be sure of retrieving the money or article, we may need to effect an arrest at the time the transaction occurs. This is not possible if our officers do not have constable powers.

A summons issued under the Justices Act in relation to an indictable offence must be served by a constable. Many of the prosecutions arising out of Commission investigations involve indictable offences and if no

seconded police officer is available to the Commission, arrangements must be made with the Police Service for a police officer to serve such summonses (Submission 4: 3 - 4).

Further illustrations of difficulties imposed by the current provisions were provided in the Commission's final submission on these matters, including the following:

... In another matter two persons of interest were under surveillance. One of them had obtained a large sum of money from a bank, and was observed going to a restaurant to meet a public official. The handover is believed to have occurred in the toilets. Both persons of interest left the restaurant and were unable to be stopped and searched by Commission officers, as [Commission officers have] no power of personal search, either by detaining or arresting the individuals (Submission 7: 2).

While the ICAC has provided the Committee with anecdotal evidence of difficulties and potential problems arising from the absence of police powers for Commission officers, there is insufficient information available for the Committee to be able to gauge the full extent of the resultant operational difficulties. The Committee notes the Commissioner's advice that to a large extent the Commission has avoided compromising investigations and the safety of investigators by planning investigations around the current limitations.

A related issue for the Commission is that the need for police powers to be exercised by a seconded police officer places constraints on recruitment at the ICAC:

... we want to select the best person for the position at any one time. We do not want to select a New South Wales police officer for secondment simply because we need to access the powers; we would still want to select the best person available at the time. ... We might select a person with very good police skills and background who has left the Police Service [and] may not be able to exercise the powers of a police officer (Feneley: Evidence: 15 June 2000).

Obtaining seconds from the Police Service has been a further problem with the current provisions. Mr Feneley explained to the Committee:

There have been difficulties from time to time in getting seconds, but we would also question whether it is always appropriate to have to rely on a New South Wales police officer, or for that matter an officer from another police service, being seconded to the ICAC so that the Commission is able to fulfil its functions (Evidence: 15 June 2000).

This difficulty intensified in the lead up to the Olympics, as the Police Service did not approve any secondments of police officers due to staffing needs for the Olympics. The Commission has advised that, as a result, there will be no seconded police officers employed at the Commission between August and December 2000. The Commission submitted that:

Notwithstanding the cooperation of the Service in the past, there can be no guarantee that the Service will always be able to provide officers on the occasions required by the Commission (Submission 7: 2).

The Committee is concerned about the potential impact on the ICAC's effectiveness caused by this temporary inability to second police officers, although it notes no evidence of any adverse operational impact. The Committee will follow this up with the Minister for Police as a matter of priority.

The Commission argued that the changes it has proposed would reflect the provisions already in place at the Police Integrity Commission, where approved former police officers are vested with the powers of a police constable. (The final proposal submitted by the Commission refined the request so that only specific police powers were sought, rather than all the powers of a police constable.) Under the *PIC Act 1996*, an 'approved former police officer' is defined in section 7 as:

The Commission may designate an officer of the Commission as an approved former police officer for the purposes of this Act if:

- (a) *the officer has served for at least 5 years in one or more of the following capacities*
 - i. *a member of the Australian Federal Police*
 - ii. *a member of the Police Force of another State or Territory*
 - iii. *a member of the Police Force of any country prescribed by the regulations for the purposes of this Act, and*
- (b) *the Commission is satisfied after inquiry that the officer's service in any such capacity was satisfactory, and*
- (c) *the officer is not a police officer or former police officer of NSW.*

The Committee notes, however, that the Police Integrity Commission's provision for police powers should be considered in the context of the statutory prohibition on the PIC seconding or employing current and former NSW police officers. The prohibition is in place to avoid the possibility of such police officers compromising PIC investigations into the Police Service. The need for approved civilian investigators at the PIC to possess police constable powers is therefore more clear-cut. The Committee further notes that the same prohibition on the

employment of serving and former NSW Police Officers does **not** apply to the ICAC, and the ICAC has no jurisdiction over the NSW Police Service.

The Commissioner of the Police Integrity Commission, Judge Paul Urquhart QC, submitted that the PIC's jurisdiction over police creates "unique reasons" for PIC officers to possess police powers. This is based on the importance of ensuring that:

any agency charged with the responsibility to investigate police corruption ... not employ New South Wales police officers. This being so, the only means by which the Commission could arm itself with the necessary investigative ability to detect police corruption was to employ or second highly qualified interstate and overseas police officers, and to invest them with appropriate powers (Submission 9: 1).

Commissioner Urquhart contrasted the circumstances of the ICAC, which:

neither investigates police corruption, nor do there appear to exist any compelling reasons in principle to proscribe the involvement of seconded New South Wales police officers in its investigations. In further contrast to [the PIC], which largely functions on the strength of its own investigative resources, section 16 of the Independent Commission Against Corruption Act 1988 requires the ICAC, as far as practicable, to work in co-operation with law enforcement agencies (Submission 9: 2).

Commissioner Urquhart advised that the Police Integrity Commission has seldom exercised a general police power, and had never carried out an arrest.

Ms Pauline Wright, the Vice-President of the NSW Council for Civil Liberties expressed the Council's opposition to the extension of police powers to non-police officers:

Powers of arrest and search and powers to apply for telephone listening devices are powers that ought properly to reside with the Police Service. We oppose them being brought into the ICAC arena (Evidence: 15 June 2000).

Ms Wright noted that, while the current provisions may place some restrictions on ICAC operations:

... we submit that those restrictions are not undue in the sense that they are not so serious as to warrant the increase of power just for the sake of efficiency. ASIO does not have arrest powers and we do not see that ICAC ought to have those powers either.

...You have to balance the public interest that is being sacrificed in increasing the powers, as against the public interest in increasing efficiency (Evidence: 15 July 2000).

Similarly, the Bar Association expressed concerns about the proposal:

... The Bar Association is of the opinion that only police should have the power of arrest in NSW. ICAC is an organisation with already extensive compulsive powers. ... The Bar Association opposes the proposal that s.101B of the ICAC Act be amended as proposed (Submission 6: 3).

The Committee notes that, except for the PIC (which is prohibited from employing current and former state police officers), only at the Queensland CJC are civilian investigators provided with powers of arrest and search.

The Minister for Police opposed the ICAC's proposal, and submitted that the ICAC had not made an adequate case for its investigators being granted the powers of a police constable. Mr Whelan stated:

The ICAC proposal appears predicated on resource and operational limitations, rather than justification on policy grounds (Submission 10: 2).

While the Minister was sympathetic to the problems faced by the ICAC due to the non-availability of police for secondment in the Olympic and Paralympic periods, he submitted that these were extraordinary circumstances that were not indicative of the usual situation relating to secondments. The Minister preferred to resolve administrative problems rather than confer new powers on the ICAC:

Perhaps an initial step would be for the Police Service and the ICAC to jointly examine ways to improve the planning of investigations requiring the assistance of police to ensure investigations run as smoothly as possible (Submission 10: 2).

Commissioner Moss acknowledged that arrangements could be made to second officers for particular planned operations, but submitted that her proposal focuses on the need for police powers to be used in spontaneously arising situations:

The Commission acknowledges that the use of NSW Police may be arranged in respect of 'planned' operations. However, this is not our major concern. The Commission argues that it needs to be in a position to respond instinctively and immediately to urgent and exigent circumstances that may arise in the course of an investigation.

The Commission does not foresee the situation where the ICAC will enjoy the services of several seconded NSW Police at any given time. As the Service moves towards the concentration upon core business, this

prospect is indeed most unlikely. In any event, a small number of seconded officers from the Police Service cannot be involved in every aspect of every operation. Therefore, it is increasingly unlikely that a seconded officer would always be available to exercise police powers in those urgent circumstances where it is necessary to minimise potential harm to the officers concerned or to the community generally, or to take necessary measures to adequately investigate and obtain evidence in relation to corrupt conduct (Submission 12: 3).

Both the Police Minister and the Commissioner of the PIC raised concerns about the potential impact on civil liberties if the ICAC were to be granted police powers. Mr Whelan submitted:

Police powers are essentially powers of lawful coercion against individuals and their property. One of society's enduring issues is attempting to find the best ways of overseeing the use of those powers and ensuring police are accountable. A considerable body of legislation regulates the use of police powers. For example, if it is envisaged that ICAC officers would carry out arrests without police involvement, then consideration would need to be given to the common law and statutory principles and requirements (including those set out in Part 10A of the Crimes Act 1900) concerning the detention of arrested persons.

As you would be aware, a range of structures have been established to oversight the use of these powers by officers of the NSW Police Service. Police officers are accountable to the Police Commissioner and are subject to his directions and discipline. Further, Internal Affairs and the PIC can investigate misconduct. There is also an Inspector of the PIC, who is charged with dealing with complaints about the Commission and a Parliamentary Joint Committee that monitors and reviews the exercise by the Commission and Inspector of their functions. These accountability mechanisms seek to balance the granting of police powers. No mention is made in the ICAC proposal of the oversight and accountability mechanisms that would apply to ICAC investigators who would be invested with all the powers of a police constable.

... Furthermore, NSW police officers may be subject to integrity tests, alcohol and drug testing, and the submission of financial statements. They are required to undertake Mandatory Continuing Police Education Course annually and pass the Computerised Assessment System prior to receiving a salary increment. ... Police in today's NSW Police Service undergo constant education, and must continue to meet specified standards. This is considered important in the exercise of their powers. This issue has not been addressed in the ICAC submission (Submission 10: 2).

On the issue of civil liberties, Ms Moss noted:

The ICAC is acutely aware of the responsibilities that come with the exercise of police powers, as well as the statutory provisions regarding the exercise of those powers. It should be noted that presently, ICAC officers have lawful authority to carry firearms, set up telephone intercepts, install listening devices and conduct controlled operations. There is nothing to indicate that the ICAC has not properly and responsibly exercised those powers.

The Commission has policies and procedures to ensure that each of its formal powers are only exercised when it is legally justified, appropriate and ethical to do so, and are not exercised improperly or capriciously.

The managerial structure adopted by the Commission means that investigators report to and are accountable for their actions to their direct supervisors and through them to the Director, Investigations, and, ultimately, to the Commissioner (Submission 12: 3).

The Commissioner also noted that the performance of Commission officers is subject to scrutiny by management and periodic performance reviews, and that the proper use of certain specified powers (such as listening devices and telephone interceptions) is overseen by the Ombudsman and courts. The Commissioner indicated that ongoing training of officers would be addressed by the ICAC's management and training of its staff.

1.3 Conclusion and recommendations

The Committee recognises that the absence of police powers for civilian investigators has the potential to create operational limitations on the ICAC at times. The Committee is also mindful of the importance of equipping the Commission with the powers requisite for it to perform the functions conferred on it by the Parliament.

However, vesting non-police officers with police powers is a significant step. The anecdotal evidence provided by the Commission of the impact on ICAC operations has failed to persuade the Committee that conferring police powers on ICAC investigators is an appropriate response at this stage, or that proper accountability mechanisms are in place to oversee the exercise of police powers by civilian investigators. The Committee notes that none of the submissions it received (aside from those from the ICAC) was supportive of this proposal.

The Committee would like to see further attempts made to address the problems identified by the ICAC through a review of the Commission's operational procedures. The Committee also recommends that the Commission discuss with the Police Service initiatives to overcome difficulties related to secondments of

police officers, and proposes to convene a round table conference with representatives of the ICAC and the Police Service for this purpose.

In addition, the Committee considers that it would be useful if the Commission and the Police Service were to identify any reasons for a lack of interest among NSW and interstate police officers in being seconded to the ICAC, with a view to attracting more police officers to the Commission.

The Committee will follow this issue up with the Commissioner as part of the General Meeting program. Should difficulties continue for the Commission after the conclusion of the Olympic and Paralympic period, the Committee will consider the issue further.

Recommendation 1

The Committee recommends against conferring police powers on civilian investigators at the ICAC at this time.

The Committee recommends that the Commission and the Police Service attend a round table conference convened by the Committee to discuss means of minimising any problems experienced by the Commission in conducting its operations within the statutory framework currently imposed on its use of police powers under the *ICAC Act 1988*.

The Committee further recommends that the Commission and the Police Service work together to identify and overcome impediments to police officers seeking secondments with the ICAC.

The Committee recommends that the Commissioner of the ICAC report back to the Committee about any on-going problems it experiences related to current provisions concerning police powers.

2. Local Councillors

***Proposal:* To amend the definition of corrupt conduct in the ICAC Act so that breaches of local council codes of conduct may be investigated by the Commission**

2.1 Background

Under the *ICAC Act*, findings of corrupt conduct can be made only if both section 8 and section 9 of the Act are met. Under section 9, for conduct to be found corrupt, it must be a criminal offence, a disciplinary offence, reasonable grounds for dismissal of a public official, or (for MPs) the breach of a Ministerial or Parliamentary code of conduct.

The Commission points out that, since the *Local Government Act 1993* came into force, local councils no longer operate under a disciplinary instrument. As a result, unless the Council has adopted a code of conduct as a disciplinary instrument, councillors can only be found to have acted corruptly if they have committed a criminal offence.

The Commission seeks an amendment to section 9 so that breaches of local council codes of conduct are brought within the Commission jurisdiction.

2.2 Commentary

The Committee is of the opinion that similar standards should apply to local councillors as those that apply to other elected officials, and that this may require some modification to the *ICAC Act* in relation to Council codes of conduct. However, the Committee would prefer to consider this in the context of the Commission's jurisdiction more generally. The Committee currently is conducting a review of the ICAC's jurisdiction and related issues, and has sought submissions from interest groups on this matter. The Committee therefore will defer expressing its opinion on this proposal until the completion of the Review.

In the meantime, the Committee intends facilitating discussions between the ICAC and the Department of Local Government, with a view to identifying issues of importance for the Review.

3. Listening Device Warrant Duration

Proposal: To extend the validity of listening device warrants

3.1 Background

The Commission's proposal seeks to extend the period for which a listening device warrant remains valid. Currently, s.16(4)(c) of the *Listening Devices Act 1984* provides a maximum of 21 days for each listening device warrant. Additional applications must be made to the Supreme Court if the device is to continue beyond 21 days. The Commission argues that the requirement to obtain a new warrant each 21 days is time-consuming, and seeks an amendment so that warrants remain in force for 90 days.

The Commission's submission on this proposal noted the operational difficulties that could arise from the 21 day limit:

The current 21 day maximum period can be operationally limiting. Some of the 21 days can be taken up with covert surveillance to obtain an opportunity to install the device. If there is a substantial delay in the installation of the device then extensions need to be sought at the end of the 21 day period (Submission 4: 5)

The Commissioner notes that the proposal seeks an increase in the **maximum** duration of a listening device warrant, and that the timeframe for each warrant would be assessed and determined on an individual basis.

3.2 Commentary

The requirement for the Commission – in common with all investigative agencies – to reapply for any listening device warrant that is needed beyond 21 days serves as a check on a covert power that has a great potential for misuse. The Committee considers that there would need to be weighty reasons to justify extending this fourfold as proposed by the Commission. Such an extension would have wider implications for the use of listening devices by all agencies.

The Commission submitted that obtaining extensions for warrants imposes "significant costs in time and resources" (Submission 4: 5). The necessary procedures are detailed in the submission:

Additional documentation needs to be prepared, including further affidavits. A notice needs to be served on the Attorney General and a reply obtained before proceeding with the application for extension. It is then necessary to attend on an eligible Judge to apply for extension (Ibid: 5).

The ICAC obtained a total of 17 listening device warrants in 1999, of which 5 were renewed. The preceding year had 51 warrant applications and 11 renewals (Submission 7: 4).

The Commission points to several jurisdictions that allow agencies' listening devices to remain in place for longer than 21 days, such as South Australia, and Commonwealth investigators for ASIO and the Customs Service. The ICAC also notes that the Final Report of the Police Royal Commission (Volume 2: 454) recommended an extension of the maximum duration of a listening device to ninety days, thus bringing listening devices into line with telecommunications intercepts. The submission from the Minister for Police indicated his in-principle support for the proposed changes to listening device warrants (Submission 10: 3).

A number of interest groups have stated their opposition to the proposed extension to the validity of listening device warrants. The Law Society of New South Wales expressed opposition to the proposal, and submitted:

Listening device warrants are an extremely valuable investigative tool. However, because they target premises rather than particular people, they are also an extremely intrusive invasion of privacy. As such, the existing requirement for Supreme Court scrutiny of applications for additional warrants, while it may represent a resources issue for the Commission, is a very necessary and appropriate protection that should not be removed (Submission 5: 1).

The Council for Civil Liberties tabled a submission that outlined its opposition to the Commission's proposal:

There are good reasons why the Listening Devices Act 1984 provides that the period for which a listening device remains in force is limited and subject to a fresh application after 21 days. It is our view that warrants ought to be reviewed regularly and that the 90 day period suggested is excessive. NSW CCL strongly opposes this proposed amendment (Submission 3: 2).

The NSW Bar Association also expressed its opposition to the proposal, arguing that the 21 day limit is appropriate:

It cannot be overlooked that a listening device by its very nature constitutes a gross invasion of privacy. It is for this reason that Parliament requires an application for such a device to be carefully and regularly scrutinised before approval is given. It is for this reason, also, that any such application requires approval by a Supreme Court Justice.

No adequate argument has been propounded as to why the extension to 90 days without judicial scrutiny is warranted. The Commissioner states that "additional applications are largely based on the same grounds as the original application" and goes on to declare this is "a time-consuming task". ... These arguments fail to address at all the reason at the heart of the requirement for judicial review of a listening device warrant after three weeks has expired. It is proper for a party seeking to continue such intrusive powers beyond a 21 day period, to be required to satisfy a Supreme Court Judge that the need for an extension beyond that period is justified in all of the circumstances (Submission 6: 1-2).

The Committee notes that the NSW Law Reform Commission is considering the *Listening Devices Act* as part of its inquiry into surveillance. In 1997, the Law Reform Commission published its Issues Paper on Surveillance (Issues Paper 12), which identified as an issue the length of time a listening device warrant should be in force.

The LRC noted:

The Commission believes that the intrusive nature of a listening device requires a high degree of accountability for its use, and one way this can be done is to place a time limit on the period during which a warrant may be in force. However, this safeguard has to allow a realistic time frame for the installation, monitoring and removal of the listening device. Currently under the LDA a warrant has a life of 21 days. In many cases this period of time is insufficient to effect covert entry, installation and removal of the equipment.

The 21 day period in New South Wales is mirrored in Victoria and the Northern Territory. Other States, for example Tasmania, have longer periods, and Western Australia has no statutory maximum. At a federal level, the ASIO Act and the Customs Act 1901 (Cth) permit a warrant for a listening device to remain in force for 6 months. The Interception Act has a 90 day limit.

In suggesting any increase to the time limit, the Commission is mindful of the type of intrusion that the warrant authorises. One option may be to increase the initial time authorised by the warrant to say, 30 days, with the option of renewing the warrant for up to 60 days (Issues Paper 12: at 5.32).

3.3 Conclusion

The Committee again notes the absence of an appropriate accountability regime, and is consequently reluctant to support this proposed extension to the validity of the Commission's listening device warrants. The Committee also is disinclined

to support the proposal on the basis of the limited quantitative data available on this issue.

As the Law Reform Commission has not yet issued its final report on the Surveillance reference, the Committee has resolved to defer final consideration of this proposal until it has had an opportunity to consider the LRC's findings. The relevant extracts of the transcripts of the public hearing will be forwarded to the Law Reform Commission for its consideration.

4. Listening Device Warrants – Telephone Applications

***Proposal:* To enable ICAC officers to apply for listening device warrants over the phone**

4.1 Background

The second proposed amendment to the *Listening Devices Act 1984* is to enable ICAC officers to apply for listening device warrants over the phone or radio in urgent situations. Currently, the *Listening Devices Act* permits police officers (including those seconded to the ICAC) to make applications over the phone or radio in an urgent situation. The Commission notes that there may be urgent circumstances under which no seconded police officer is available to apply for a listening device over the phone, with a potential loss of evidence resulting.

4.2 Commentary

The NSW Council for Civil Liberties has advised of its opposition to this proposal. The CCL submitted:

... NSW CCL considers that the current powers of a seconded police officer are adequate for making telephone warrant applications. Such applications ought to only be made in urgent situations. If the situation is urgent and there is no seconded police officer available, then the Commissioner may approach the police service for another officer to make the application by telephone or radio. If there is good reason for making the request, no doubt that police officer will comply with the Commission's request (Submission 3: 2-3).

It appears to the Committee that this alternative identified by the CCL is time-consuming and therefore impractical for urgent circumstances requiring rapid response.

Commissioner Moss' response to the CCL's suggestion was as follows:

Acceptance of the Council's suggestion that the Commission approach the Police Service for another officer to make the application by telephone would serve only to negate the purpose and practical effect of telephone applications for listening devices: speed and efficiency. By its very nature, and as required by the legislation governing such applications, a telephone application is intended to be used in only the most urgent of circumstances. It defies logic to introduce cumbersome procedures to

enable access to streamlined procedures in those limited circumstances where such an application is necessary (Submission 4: 6).

4.3 Conclusion and recommendation

The Committee notes the CCL's opposition to this proposal, but nevertheless considers the proposed amendment to be a practical alteration to the procedures for obtaining a listening device warrant in urgent circumstances. The Committee further notes the in-principle support of the Minister for Police for the proposal. Providing there is an Inspector to oversight the Commission's use of powers, the Committee supports this proposed amendment.

Recommendation 2

Conditional on the establishment of an Inspector of the ICAC, the Committee recommends that the *Listening Device Act* be amended to enable ICAC officers to apply for listening device warrants over the phone.

5. Section 21 of the ICAC Act

Proposal: To amend the ICAC Act to enable the Commission to obtain information from non-public officials

5.1 Background

Under s.21, the Commission can require a public official to provide information for the purpose of an investigation. This enables the ICAC to obtain information without the necessity of summoning an official to give evidence at a hearing. Assistant Commissioner Feneley explained the process to the Committee:

Under section 21 we send out a notice which contains specific questions which the person is required to answer. They can seek legal advice in respect of it and provide those answers, which are then assessed as part of the investigation. We go forward from there. There is certainly an opportunity for a person to pause and reflect on the questions before providing the answers. There are provisions of the Act which allow them to take certain objections when producing the information and to be represented at the time the document is produced (Evidence: 15 June 2000).

The penalty for failing to comply with a section 21 notice is 20 penalty units or 6 months imprisonment, or both.

The Commission seeks an amendment to enable it to require a person who is **not** a public official to provide information as directed for the purpose of an investigation. According to the Commission, an expansion of the power to obtain information in this way would streamline the process of gaining information by removing the need to undertake a hearing if a person (who is not an official) is unwilling to provide information. Commissioner Moss submits that summoning a person to give evidence is:

... not only likely to be more onerous to the individual involved but, due to the extra resources required for hearings (whether public or private) the process of obtaining such information by this means is considerably less efficient (Submission 1: 2).

Ms Moss further noted:

I personally believe what we seek makes sense and would be less onerous to people. ... In my short time there I have seen that if they need a statement from a non-public official they go to the trouble of serving the summons on that person and bringing that person in for possibly a small piece of information. Sometimes in the witness box it takes 15 or 20 minutes to find out one or two specific facts.

If power were given to obtain section 21 statements and investigators were allowed to go out, that would be a much more effective and efficient way of gathering information rather than having to go to the trouble of having people take time off work or be inconvenienced (Evidence: 15 June 2000).

5.2 Commentary

Concerns were raised about this proposal by the Council for Civil Liberties. The CCL's submission to the Committee noted:

New South Wales CCL strongly opposes this proposed amendment to allow the issue of notices to produce statements of information by persons other than those contemplated by the legislation. The Commission was set up to investigate corruption within public bodies. It would be onerous on individuals to require them to provide statements as though they were parties to litigated proceedings.

It is the view of the ... CCL that the proper way to obtain evidence from persons other than those against whom the legislation was directed, is by way of summons. ... It is quite conceivable that more people in the community may be imposed upon for the sake of mere fishing expeditions as a result of the suggested amendments. The present summons process ensures that individuals are only called upon when necessary (Submission 3: 3-4).

The Minister for Police also expressed concerns about this proposal, noting that it could be viewed as "outside the publicly accepted jurisdiction of the ICAC":

The broadness of s.21, which permits the ICAC to require a public authority or official to produce a "statement of information" ... may be acceptable and necessary for public servants, given the role of the ICAC.

However a power to demand that a private individual submit a "statement of information" is perhaps unprecedented in NSW law, particularly where judicial proceedings have not commenced. The argument that a s.21 'notice to produce' is less onerous and costly to individuals than a summons also seems to overlook the fact that an individual can voluntarily submit information to the ICAC when requested, if so inclined (Submission 10: 3).

The power to obtain statements of information is also available to other investigative agencies. In the cases of the ICAC, the Police Integrity Commission and the National Crime Authority, this power is limited to obtaining information from public officials. The Queensland Criminal Justice Commission and the Western Australian Anti-Corruption Commission may also require non-public officials to provide statements.

5.3 Conclusion and recommendation

The Committee has reservations about empowering the Commission to **oblige** non-officials to provide statements as required by the Commission, particularly in the absence of an Inspector to monitor the propriety and legality of the Commission's actions.

The Committee recognises that non-public officials may be involved in corruption investigations if they participate in, or witness, the corruption of a public official. The Committee also acknowledges that the power to require statements can be a valuable investigative power. However, this needs to be balanced against the costs to an individual of such intrusive coercive powers.

The ICAC is able to request non-public officials voluntarily to provide information, and any person wilfully making a false statement or seeking to mislead the Commission may be subject to a penalty of 50 penalty units or 12 months imprisonment, or both. The Committee suggests that a non-public official who wishes to avoid the inconvenience of attending an unnecessary private hearing could provide that information voluntarily. A private hearing would therefore only be necessary in circumstances where a non-public official is unwilling to cooperate with the Commission. The Commission did not identify any instances where private hearings were held merely because a non-public official was unwilling to answer questions voluntarily.

Given that non-public officials can voluntarily provide information, and that where necessary the Commission can compel non-public officials to attend a hearing and answer questions, the Committee is unconvinced that the Commission requires an extension to its section 21 powers as proposed. The Committee does not support the proposal.

Recommendation 3

The Committee recommends against empowering the Commission to compel non-public officials to provide information to the ICAC under section 21.

6. Powers of Assistant Commissioners

Proposal: To amend the ICAC Act to enable the delegation of the power to issue an arrest warrant

6.1 Background

Pursuant to ss 36 and 100 of the *ICAC Act*, the Commissioner has limited powers to issue an arrest warrant. Section 36 relates to the arrest of a person who fails to attend the Commission in answer to a summons, or of a person whose evidence is required by the Commission (whether or not a summons has been issued) but who probably will not attend. Section 100 empowers the Commissioner to issue a warrant for the arrest of a person alleged to be in contempt of the Commission. The Commission reports that since March 1995, two s.36 warrants and three s.100 warrants have been issued (Submission 7: 6).

While the Commissioner has general powers of delegation, section 107(4) places restrictions on the power to delegate. Section 107(4)(c) states that the power of the Commissioner to issue a warrant for the arrest of a person under section 36 or 100 may not be delegated.

The Commission seeks an amendment to this section so as to enable the Commissioner to delegate to an Assistant Commissioner the power to issue an arrest warrant. Ms Moss argued that this is necessary because:

... it is possible that the inability to issue such warrants, due to the absence of the Commissioner, might have an adverse effect on a Commission investigation. Although this power is exercised rarely, the inability to issue a warrant due to the absence or illness of the Commissioner may mean that the Commission loses the opportunity to obtain relevant evidence in particular investigations (Submission 1: 3).

In evidence, the Commissioner commented further:

The Assistant Commissioner who is sitting at the time is the person in receipt of the full information and is familiar with that matter. So that person probably is in the best position to make those decisions anyway ... (Evidence: 15 June 2000).

6.2 Commentary

The Council for Civil Liberties objects to the proposed amendment. The Vice-President of the NSW Branch explained to the Committee that the existing provisions of the Act are sufficient:

The Act specifically provides that if the Commissioner is not available, an Acting Commissioner is appointed. To me, that is sufficient. It may well be the case that the Acting Commissioner who is appointed is in fact the Assistant Commissioner. I think you are probably right to say that the Commissioner would be taking advice from the Assistant Commissioner in ordinary circumstances. But the fact is that, in the end, the power to make that order sits with the Commissioner. It is not just a rubber stamp; it is a consideration of the advice of the Commissioner and the making of a decision. ... Obviously there are circumstances in which the Commissioner would not be available for some unforeseen reason, and that is why the Act provides for the appointment of an Acting Commissioner (Wright: Evidence: 15 June 2000).

In considering this proposal, the Committee noted that notwithstanding the prohibitions on the delegation of certain powers detailed in section 107(4), including the issuing of an arrest warrant, provision is made under sections 107(6) and (7) to allow for those powers to be delegated in certain circumstances. Subsection (6) states:

The functions referred to in subsection (4) may however be delegated to an Assistant Commissioner (and to an Assistant Commissioner only) if the Commissioner is of the opinion that there would or might be a conflict of interest or that it would be in the interests of justice to do so.

Pursuant to subsection (7):

No person shall be concerned to inquire whether circumstances exist warranting a delegation under subsection (6), and a statement in the instrument of delegation of the Commissioner's opinion referred to in that subsection is sufficient.

The Committee has also noted that the Act currently identifies a number of the Commissioner's powers that may be delegated only to an Assistant Commissioner. These are detailed in section 107(5):

- (a) *the power to require a public authority or public official to produce a statement of information under section 21*
- (b) *the power to require a person to attend and produce a document or other thing under section 22*
- (c) *the power to authorise an officer of the Commission to enter premises under section 23*
- (d) *the making of an application for an injunction under section 27*

- (e) the powers of the Commission or the Commissioner under Division 3 of Part 4 [hearings] at or in connection with a hearing, except the power to issue a warrant for the arrest of a person under section 36
- (f) the powers of the Commissioner under Part 10 [contempt] at or in connection with a hearing.

The Committee considers it significant that the Commissioner's powers of arrest were specifically omitted from those powers that may be delegated to an Assistant Commissioner. This suggests that the Parliament regarded the power of arrest to be extreme, and to be exercised with great caution.

In the public hearing on this matter the possibility of a compromise position was discussed, whereby, following consultation with the Commissioner, the power to issue an arrest warrant under section 36 (non-appearance of a witness) could be delegated to the Assistant Commissioner presiding over the hearing. This would differentiate section 36 arrest warrants from section 100 arrest warrants (for contempt), the latter power remaining with the Commissioner only.

When this proposal was suggested to Ms Wright, Vice President of the NSW Council for Civil Liberties, she responded:

Certainly I would be more comfortable with that. And I do agree with you, Mr Chair, that the power to arrest on a contempt matter is a different and far more serious matter. I agree with you on that point. I would be far more comfortable with it just relating to non-appearance, if there were that requirement to consult (Evidence: 15 July 2000).

Commissioner Moss gave qualified support to the compromise proposal:

To have a compromise situation in which the Assistant Commissioner is able to consult and then go ahead and make that decision is probably better than not having that power at all. ... If the Commissioner is available and is there, perhaps the Commissioner should be consulted before a decision is made. But if the Commissioner is unavailable, ill or uncontactable overseas or interstate then the power to make the decision can reside with the Assistant Commissioner. I am sure that a compromise situation can be worked out (Evidence: 15 July 2000).

6.3 Conclusion

After considering the proposals, the Committee has come to the conclusion that it would be preferable for the power to issue an arrest warrant to remain in the hands of the Commissioner. As issuing an arrest warrant is a significant power, it is appropriate for the Commissioner to remain accountable for its use.

The Commission argued it was necessary to provide for the arrest warrant power to be delegated so as to prevent loss of evidence in the event that the

Commissioner is ill, or otherwise uncontactable. In the Committee's view, the compromise proposal detailed above would clearly be unworkable because consultation would be impossible if the Commissioner is unavailable due to illness or absence. If the Commissioner is available for consultation, then the Commissioner would be able to issue the arrest warrant personally, making the delegation unnecessary.

The Committee considers that the current provisions for appointing an Acting Commissioner, together with the delegation powers under sections 107(5) and 107(6), are sufficient to cater for any emergencies of the nature described in the Commission's submissions.

Recommendation 4

The Committee recommends the continuation of the current restrictions on delegating the power to issue an arrest warrant.

7. Property in Custody

Proposal: To establish procedures for the disposal of seized money

7.1 Background

Under s. 47(2) of the *ICAC Act*, money and other things seized in the course of executing a search warrant may be returned to their lawful owner, or delivered to the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken with it. However, there are no provisions for dealing with money seized by the ICAC by other means. The Commission submitted that:

In the course of investigations, Commission officers sometimes seize monies which are suspected of being connected to an offence, such monies usually being secret commissions paid during the course of corrupt transactions. The Commission has no express power under the ICAC Act to deal with such monies except when these are seized during the execution of a search warrant (Submission 1: 4).

The Commission proposes that the procedures for disposing of seized money under the *Criminal Procedure Act 1986* be extended to the ICAC. Pursuant to Part 6 of the *Criminal Procedure Act*, a court may order that money and property connected to a criminal offence that is seized by the Police Service be delivered to the person lawfully entitled to it. In the absence of such an order, any seized money is forwarded to the Treasurer for payment into the consolidated fund.

7.2 Commentary

The NSW Council for Civil Liberties suggested as an alternative an amendment so that all monies seized by the ICAC be dealt with pursuant to section 47 of the *ICAC Act*:

... rather than amending Part 6 of the Criminal Procedure Act 1986, that section 47(2) of the ICAC Act be amended so that it applies to any monies which are suspected of being connected to an offence and which are seized, whether or not they are seized pursuant to a search warrant (Submission 3: 5).

The Commissioner considered the alternative recommended by the CCL, and raised concerns about what the Attorney General and the Director of Public Prosecutions would then do with any cash delivered up under section 47(2). Commissioner Moss submitted:

While [the proposal] has some merit, it does not address the question of what the Attorney General or the Director of Public Prosecutions then does with the seized item. Section 47 appears to have been primarily intended to deal with documents and other like instruments.

However, if s.47 were appropriately amended to allow the ICAC the discretion to deliver the monies to the police if it were not appropriate to be delivered to the Attorney General or the Director of Public Prosecutions, then that would bring about a similar effect to the amendments proposed for Part 6 of the Criminal Procedure Act (Submission 4: 7).

The Assistant Commissioner gave evidence that:

We often have property volunteered to us. ... We sometimes have a conundrum over what to do with it, because it is not always possible to identify the person who is entitled to it. The suggestion that we might be able to provide that property or money to the Police Service would be useful. At present the Director of Public Prosecutions does not see himself or his office having any role in these matters. I am not sure that the Attorney General would welcome receiving from us money at the end of an inquiry with a request that the Attorney General deal with it. Some provision whereby we can send money to the Police Service and have them deal with it would be useful (Feneley: Evidence: 15 June 2000).

7.3 Conclusion and recommendation

While the proposal of the Council for Civil Liberties (for all seized money and other items to be dealt with according to section 47) would have the advantage of ensuring consistency with the other provisions of the ICAC Act relating to seized items, the impracticality of having the Attorney General or the Director of Public Prosecutions receiving potentially large sums of cash needs to be addressed.

The Committee notes that the *Criminal Procedure Act* is intended to deal with property relating to a criminal offence, and its return at the conclusion of criminal proceedings. The Committee further notes that the ICAC conducts investigations rather than criminal proceedings. However, the difficulty remains that the Commission needs a practical means of dealing with seized money.

The Committee considers that the *Criminal Procedure Act* provides an established and convenient procedure for the disposal of money related to an offence. The ICAC's compromise, which would have seized money being delivered to the police if it is not practical to deliver it to the Attorney General or the DPP, appears to the Committee to introduce an unnecessary additional step in the disposal process. The Committee therefore supports the Commission's original proposal for amendments to the *Criminal Procedure Act*.

Recommendation 5

The Committee recommends that the *Criminal Procedure Act 1986* be amended to apply to property in the custody of the Commission connected with an offence.

8. Transcripts of Commission Hearings

Proposal: Amendment of the Justices Act 1902 to enable admission of Commission transcripts in committal proceedings

8.1 Background

Transcripts of ICAC evidence are not admissible in committal proceedings. Statements in the format under the *Justices Act 1902* must be obtained for all prosecutions, which involves Commission witnesses providing or adopting a statement reflecting the part of their evidence relevant to prosecution. The Commissioner submits that:

This can impose a severe resource and workload commitment on the Commission in preparing briefs of evidence. With some matters, it can effectively mean that the Commission essentially reinvestigates the matter in order to obtain the required statements. It is not uncommon for witnesses who have given evidence before the Commission to be reluctant to go through the process of adopting a statement ... (Submission 1: 3).

The Commissioner seeks amendment to the *Justices Act* to enable Commission transcripts to be admitted in committal proceedings.

8.2 Commentary

The Commission's proposal has received little support from witnesses and submissions to the Committee. The Council for Civil Liberties opposed the suggested amendment, arguing that:

If evidence given to the Commission does not comply with the rules of evidence to make it admissible in Court, then it ought properly to be excluded from committal hearings (Submission 3: 6).

Mr John North, President of the Law Society of NSW, favoured the retention of the current legislative provisions, and advised that the Law Society Criminal Law Committee:

... cannot support a proposal that would enable transcripts of hearings that are conducted under compulsion and without the evidentiary and other safeguards of criminal proceedings to be admitted into evidence. Commission hearings are quite broad-ranging and therefore, of necessity, transcripts would cover issues that would not be relevant to a prosecution. If such a transcript were to be admitted in its entirety, then

hearsay, irrelevant and inadmissible material would be put before the Court (Submission 5: 2).

The NSW Bar Association considers the proposed amendments to be contrary to the interests of justice:

The Bar Association also opposes any relaxation of the requirements of the Justices Act in relation to committal proceedings. In particular Section 48C Justices Act is fundamental to the administration of justice. The court and all parties involved are entitled to be informed that the witness is both willing and able to give evidence in the committal hearing and therefore at trial in accordance with their written statement or in accordance with a transcript of their evidence taken before ICAC.

To accede to the proposals of the Commissioner could lead to a person being committed for trial with the Court and the parties under the misapprehension that the witnesses called before ICAC are willing to give the same evidence at the trial. Given the fact that people are under compulsion to give evidence at ICAC even when that evidence might tend to incriminate them, it is common for witnesses to resile from, alter or add to their ICAC testimony when called in criminal proceedings. It is in the interests of justice that all parties know by way of written statement from the witness precisely what they will say in their evidence in the criminal proceedings (Submission 6: 2).

The Director of Public Prosecutions advised the Committee that the proposed amendments would create further inefficiencies in the justice system:

The courses proposed ... in my view, would result in a great deal of unusable material having to be examined and sifted by the prosecution and the court and a great deal of court time being consumed uneconomically and unproductively. There would be additional costs of time and money to all participants in the criminal justice system (Submission 2: 1).

The Commission indicated in the public hearing that it has accepted the opinion of the DPP that the proposed changes were impractical. Mr Feneley advised the Committee that the Commission was altering internal procedures to deal with this matter:

... during the course of the inquiry we are attempting where possible to take statements and records of interview in an admissible form to ensure that following a public inquiry, for example, we have admissible evidence available. There will always remain the difficulty that those who give evidence in a public inquiry, and give it honestly, subsequently will not want to reduce that evidence into statement format (Feneley: Evidence: 15 June 2000).

8.3 Conclusion and recommendation

The submissions received by the Committee overwhelmingly indicate broad opposition to the Commission's proposal for the admission of Commission transcripts in committal proceedings. The Committee shares the concerns of the Council for Civil Liberties, the DPP, the Law Society and the Bar Association regarding the likely impact of the proposal on the efficiency of the justice system. The Committee notes that the Commission has accepted the views of interest groups opposing the proposed changes. The Committee therefore supports the retention of the provisions of the *Justices Act* relating to the admissibility of ICAC transcripts in committal proceedings.

Recommendation 6

The Committee recommends the retention of the current provisions of the *Justices Act* relating to the admissibility of Commission transcripts in committal proceedings.

9. Proof Requirements for Commission Transcripts

Proposal: To alter proof requirements necessary for the admission of evidence from Commission hearings as evidence in criminal prosecutions

9.1 Background

The Commission sought the Committee's support for proposed changes to the *Evidence Act* to change the proof requirements needed for the admission of evidence from Commission hearings as evidence in criminal prosecutions. Evidence before the Commission is admissible in prosecutions, and is of particular relevance in prosecutions for offences of giving false or misleading evidence to the Commission.

Pursuant to sections 48(1)(c) and 170 – 173 of the *Evidence Act*, where the accuracy or content of a transcript is disputed by a defendant, it is necessary to tender an affidavit from the producer of the transcript confirming the contents. The Commissioner submits that this requirement can lead to difficulties, particularly if unavoidable delays occur before trial, and the person who provided the transcript has moved on.

9.2 Commentary

Representatives from the legal community were opposed to legislative amendments to these provisions.

After considering the Commission's proposal, the Council for Civil Liberties submitted that the requirements were "not unduly onerous" (Submission 3:7). The Bar Association considers the current provisions to be appropriate:

Offences in the nature of perjury require precision in the terms of the charges alleged. It is vital that the court know with certainty that the transcript of the proceedings before ICAC is accurate and reliable. The result of giving false testimony at ICAC is usually a sentence of imprisonment. The Bar Association does not see any great burden placed on the resources of ICAC to properly authenticate the accuracy of the transcripts to be tendered in criminal proceedings, given that the transcript is created by officers of ICAC (Submission 6: 2)

9.3 Conclusion

The Committee understands that the Commission is in the process of instituting internal procedures that aim to address the problem identified. The Committee

will follow this up with the Commissioner in subsequent hearings to determine whether any outstanding matters relating to the admissibility of transcripts remain. In the meantime, the Committee does not support any changes to the provisions relating to Commission transcripts.

10. Operations Review Committee Membership

Proposal: To enable the Commissioner for Police and the Attorney General's representative to delegate their responsibilities relating to Operations Review Committee meetings

10.1 Background

The Commission has identified difficulties in obtaining a quorum for ORC meetings. The Commissioner advises that this causes delays in finalising matters and increases the workload for subsequent ORC meetings. The Commissioner has proposed that the Commissioner of Police and the Attorney General's representative be permitted to delegate their duties to improve numbers and achieve a quorum.

10.2 Commentary

The Committee's report, *Accounting for Extraordinary Powers*, tabled in May 2000, examined the problems relating to attendance at ORC meetings. The Committee acknowledged the difficulties experienced in obtaining a quorum due to the unavailability of the Commissioner for Police. The Committee recommended the removal of the ICAC Act's requirement for the Commissioner of Police to be a member of the ORC. Instead, the Committee recommended that the Minister, with the concurrence of the Commissioner, appoint to the ORC an individual with an investigative background. Such an individual could be a high level police officer or civilian investigator from such agencies as the NSW Crime Commission, the Police Integrity Commission, or the Office of the Ombudsman.

As the Commissioner has indicated her support for the Committee's recommendations on this matter, further consideration of the proposal by the Committee is unnecessary.

11. Conclusion

The proposed changes to the legislation governing the ICAC and its use of powers have been given careful consideration by the Committee.

The Committee is of the opinion that, while the ICAC may find it convenient to have certain changes made to the procedures and provisions relating to the Commission's powers, these procedures often serve as safeguards against abuse. The Committee believes that the legislative protections ought not to be downgraded unless the Commission's ability to fulfil its functions have been greatly affected. That the provisions may cause the Commission inconvenience cannot of itself justify the removal of statutory safeguards.

In the case of several of the Commissioner's proposals, the Committee does not believe that an adequate case has been made to justify the changes requested. The Committee does not support the proposals to confer police powers on certain ICAC investigators, to extend the application of section 21 notices to non-public officials, to delegate the power of arrest to an Assistant Commissioner, or to alter procedures relating to the admissibility of Commission transcripts in criminal proceedings. It is the Committee's opinion that the current provisions relating to these powers are appropriate, and that the Commission should attempt to overcome any difficulties administratively before changes to powers are contemplated.

The Committee's support for the Commissioner's proposal relating to applying for listening device warrants over the phone is predicated on the implementation of the Committee's recommendations from its previous report concerning the establishment of an Inspector of the ICAC. The Committee recognises the limitations that the absence of these powers has had on the ICAC's operations, but considers that the existing deficiency in the oversight of the Commission's use of powers must be addressed before any additional powers can be afforded to the ICAC.

The Committee's consideration of two of the proposals has not been finalised. The proposal relating to the ICAC's jurisdiction over local councils will be considered in detail as part of the second phase of the Committee's Review of the ICAC, which will focus on jurisdictional issues. The Committee has deferred coming to a conclusion on the proposal that listening device warrants be valid for up to 90 days, as it wishes to consider the outcome of the inquiry by the Law Reform Commission.

Finally, the proposal for changes to the Operations Review Committee has been superseded by the Committee's previous report, which examined the functioning of the ORC and made appropriate recommendations.

