

**PARLIAMENT OF NEW SOUTH WALES**

**COMMITTEE ON THE ICAC**

***R E P O R T     O N***

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**OPERATIONS REVIEW COMMITTEE**

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***AND***

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**ASSISTANT/DEPUTY COMMISSIONERS**

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***Together with Minutes of Proceedings***

## **COMMITTEE MEMBERSHIP AND STAFF**



**MJ Kerr MP  
(Chairman)**



**BJ Gaudry MP**



**JE Hatton MP**



**PR Nagle MP**



**AA Tink MP**



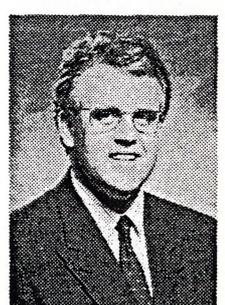
**JH Turner MP**



**Hon JC Burnwoods MLC**



**Hon DJ Gay MLC  
(Vice-Chairman)**



**Hon SB Mutch MLC**



**Ms R Miller  
(Clerk)**



**Mr DM Blunt  
(Project Officer)**



**Miss GC Penrose  
(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***

***T***his brief report deals with two outstanding issues which arose during the Committee's "Inquiry into Matters Raised by Paul Gibson MP".

The first of these, the Operations Review Committee, is particularly important and goes to the heart of the ICAC's accountability. The Committee hopes that this report will contribute to the further refinement of the ICAC as an institution and improve its accountability.

The Committee took evidence in relation to these issues in February and March. The reason for the delay in finalising this report has been the need to ensure that any recommendations for reform of the Operations Review Committee are workable. The Committee was assisted in the process by careful consideration of the Operations Review Committee model in Hong Kong.



M J Kerr MP  
Chairman

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# TABLE OF CONTENTS

COMMITTEE MEMBERSHIP .....	i
COMMITTEE'S FUNCTIONS .....	ii
CHAIRMAN'S FOREWORD .....	iii
SUMMARY OF FINDINGS AND RECOMMENDATIONS .....	iv
1 INTRODUCTION .....	2
<i>PART ONE - OPERATIONS REVIEW COMMITTEE</i>	
2 FUNCTIONS OF THE OPERATIONS REVIEW COMMITTEE .....	4
Role of the Operations Review Committee .....	4
Membership .....	9
Value .....	11
Section 59(1) of the ICAC Act .....	11
Conclusions .....	13
3 COMPLAINTS VS INFORMATION .....	14
Bayeh Matter .....	14
Sturgess Files .....	16
Categorisation of Matters by the ICAC .....	18
Conclusions .....	22
4 WORKLOAD AND PROCEDURE .....	24
Operations Review Committee Workload .....	24
Hong Kong Model: Sub-Committee to Deal with Minor Matters .....	25
Random Audit .....	25
Hong Kong Model: Other Relevant Issues .....	30
Conclusions .....	30

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5	DISSATISFIED COMPLAINANTS .....	32
	Arguments in Favour of Giving Reasons .....	32
	ICAC Response .....	33
	Conclusions .....	35
6	REPORTING .....	37
	Need for Operations Review Committee to Report .....	37
	Dotted-Line .....	38
	Conclusions .....	39

***PART TWO -  
ASSISTANT/DEPUTY COMMISSIONERS***

7	ASSISTANT/DEPUTY COMMISSIONERS .....	41
	Background .....	41
	ICAC Response .....	42
	Conclusions .....	47
	APPENDIX ONE .....	49
	Opinion of Mr Brian Sully QC (now his Honour Mr Justice Sully of the Supreme Court), dated 13 March 1989, concerning s.59(1)(a) of the ICAC Act and the question of whether investigation of a complaint can be conducted without prior reference to the Operations Review Committee.	
	APPENDIX TWO .....	58

Minutes of the Proceedings of the Committee

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## ***SUMMARY OF FINDINGS AND RECOMMENDATIONS***

### ***OPERATIONS REVIEW COMMITTEE***

#### ***Functions of the Operations Review Committee***

- 2.5.1 The Operations Review Committee (ORC) plays a crucial, if limited, role in relation to the ICAC's investigations. Its purpose is to ensure, by advising the Commissioner on the action to be taken on complaints from the public, that there are no cover-ups, no failures by the ICAC to pursue matters that should be investigated. As such it is a bold innovation contained in the ICAC Act, and one which could well be replicated in other agencies which receive complaints and have the discretion to determine whether or not they are investigated.
- 2.5.2 The Committee is concerned that s.59(1)(a) of the ICAC Act is not sufficiently clear in setting out the functions of the ORC. The Committee believes it is not appropriate that a QC's opinion is necessary to clarify whether or not the ICAC may commence an investigation before consulting the ORC. The Committee therefore recommends that s.59(1)(a) be amended to clearly state the functions of the ORC and provide for an orderly manner in which investigations can commence.

#### ***Complaints vs. Information***

- 3.4.1 It is clear that the ICAC receives information from a wide range of sources. It is appropriate for the Commission to be able to categorise some of this information as other than "complaints" or "s.11 reports" which are the only two categories specifically mentioned in the ICAC Act. The procedures developed by the Commission to ensure consistency in the categorisation of information received, as they are set out in chapter two of the Investigation Manual, appear to be appropriate.
- 3.4.2 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 (3.1 and 3.2, the Bayeh matter and Sturgess files respectively), the ICAC seems to have left itself open to criticism in this regard. In each case the Committee would have thought that, for more abundant caution, these matters should have been defined as complaints and referred to the ORC. It is essential that the ICAC not only do the

right thing but also be seen to be doing the right thing. [The Committee notes that the ICAC has itself emphasised that "the appearance of impartiality should be respected and maintained, as well as impartiality in fact."]<sup>1</sup> The Committee would therefore encourage the ICAC to err on the side of caution and, where there is any doubt, categorise the matter as a "complaint" so that it is referred to the ORC.

- 3.4.3 With the ICAC having the discretion to categorise information received from members of the public in different ways, it is important that members of the public understand the implications of the way in which they frame the material they are presenting to the Commission and the ways in which it may consequently be categorised. The Committee was therefore pleased to note that a brochure is being prepared for complainants explaining how information received may be used by the Commission. The Committee believes it is essential that complainants also be informed of the role of the ORC. Where a complainant expresses a view that information provided should be reviewed by the ORC, such a view should be taken into account.

#### *Workload and Procedure*

- 4.6.1 The Committee is concerned about the high workload faced by the ORC and the consequences for the level of scrutiny which it is able to give to each complaint. The Committee recommends that consideration be given to adoption of the Hong Kong model in terms of the establishment of a sub-committee, chaired by a non-official member (an outsider) on a rotating basis, to meet a few days before the ORC each month to consider minor complaints. This will relieve the ORC of a substantial workload in respect of minor matters and enable it to focus on more serious complaints.
- 4.6.2 The Committee shares the concerns expressed by two former members of the Operations Review Committee about the limits upon what it can look at. The Committee believes that the functions of the ORC would be assisted by the addition of a random audit role in relation to the categorisation of matters as "complaints" and "information" by the ICAC. In order for the ORC to be able to effectively fulfil such a role it is recommended that the ICAC follow the Hong Kong ICAC's practice in preparing daily record sheets of information received, with notations made as to the categorisation of each matter. These sheets should be provided to the ORC to enable ORC members to easily identify particular matters to audit.
- 4.6.3 The Committee recommends that the Hong Kong ICAC's practice be followed in two further ways. Firstly, the ORC should be able to call for ICAC staff to appear at ORC meetings to justify the recommendations contained in their reports. Secondly, the ICAC should adopt a formalised procedure for notifying the subjects of investigations when an investigation has been discontinued on the advice of the ORC.

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ICAC, North Coast Report, 1990, p.656; ICAC, 1990 Annual Report, p.95.

### *Dissatisfied Complainants*

- 5.3.1 The Committee accepts that some complainants whose complaints are not investigated by the ICAC will never be satisfied with the ICAC's decision (based upon the advice of the ORC). The Committee also recognises that it would be extremely resource intensive, and largely fruitless, for the ICAC to be required to persuade some of these complainants of the correctness of the ICAC's decisions in relation to their complaints.
- 5.3.2 However, the Committee is firmly of the view that, in the interests of public accountability and fairness, the ICAC should provide complainants with reasons for its decisions. The Committee therefore recommends that s.20 of the ICAC Act be amended to include a provision along the lines of s.2.24(4) of the Criminal Justice Act 1989.
- 5.3.3 In putting forward this recommendation the Committee acknowledges that the ORC is the appropriate body to objectively assess complaints and advise the ICAC whether or not they should be investigated. The Committee believes that there is a clear distinction between requiring the Commission to provide reasons (which is the recommendation) and requiring the Commission to persuade or satisfy complainants that its decisions are correct (which is not being recommended). Once reasons are given for a decision the ICAC need not enter into further correspondence with a complainant unless further information is provided by the complainant. In that case the matter should be referred to the ORC for further consideration.

### *Reporting*

- 6.3.1 The Committee agrees with the comments of Michael Bersten that, in order for the ORC to be a credible accountability mechanism, it is important for it to report on its activities. The Committee accepts the ICAC's (and the ORC's) contention that the Parliamentary Joint Committee and Operations Review Committee should be viewed as separate accountability mechanisms and should not be placed in any sort of hierarchy. Therefore, whilst the two Committee's will meet together at least annually, the ORC should not report to the Parliamentary Joint Committee.
- 6.3.2 It may be that the most appropriate mechanism for the ORC to report would be to require it to provide an Annual Report to Parliament. [If this is to happen the Parliamentary Joint Committee should also be required to provide an Annual Report to Parliament on its activities.] The Committee would like to discuss the matters to be included in these Annual Reports with the ORC, when the two Committee's next meet.
- 6.3.3 Whilst initially attracted to Professor Fisse's "dotted-line" proposal the Committee accepts the ICAC's assurances in relation to the mechanisms for dealing with contention within the ICAC. The Committee notes Mr Temby's statement that, where there is disagreement between ICAC officers about how a matter should proceed, contending views are put before the ORC. Similarly, the Committee notes

Mr Temby's assurance that the ICAC would not stand in the way of staff coming to either the Police or the Parliamentary Joint Committee with concerns about internal corruption, fraud or other misconduct. Finally, the Committee also notes the policy on "Notification of Corrupt Conduct and Complaints against Staff" incorporated in the ICAC Code of Conduct and published in the Commission's 1990 Annual Report.

***ASSISTANT/DEPUTY COMMISSIONERS***

- 7.3.1 The Committee believes that, through the written answers to the questions on notice from the 31 March public hearing, the ICAC has effectively addressed the concerns raised by Mr Roden concerning Assistant/Deputy Commissioners.
- 7.3.2 The Committee notes Mr Temby's advice that he is not opposed to the idea of an Assistant Commissioner being appointed to effectively act as his deputy and that he would be surprised if such a person was not appointed at some point during the next few years. The Committee welcomes this advice and reaffirms the desirability of there being a person fulfilling a role as deputy to the Commissioner of the ICAC.
- 7.3.3 The Committee notes the ICAC's advice that the delegation provisions contained in s.107 of the ICAC Act, which enable the delegation of powers to Assistant Commissioners, are presently broad enough and do not require expansion. The Committee notes the ICAC's advice that the provisions of s.6(3) of the ICAC Act setting out the functions of Assistant Commissioners are sufficiently broad and enable an Assistant Commissioner to deputise for the Commissioner. The Committee also notes the ICAC's advice that the title "Assistant Commissioner" conveys the role that they are required to play under the ICAC Act, and that there is no need for a change in this title.