

# Issues Paper



COMMITTEE ON THE ICAC

**REVIEW OF THE ICAC STAGE III:**

**THE CONDUCT OF ICAC HEARINGS –  
A COMPARISON WITH THE CONDUCT OF HEARINGS  
BY OTHER COMMISSIONS OF INQUIRY**

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## 1. INTRODUCTION

This discussion paper compares the conduct of investigations by the NSW Independent Commission Against Corruption (NSW ICAC) with the conduct of investigations by a number of other current or proposed commissions of inquiry in Australia and internationally.<sup>1</sup> They are:

- a) the National Crime Authority (NCA);
- b) the NSW Crime Commission (NSW CC);
- c) the Queensland Criminal Justice Commission (QLD CJC);
- d) the Queensland Crime Commission (QLD CC);
- e) the proposed Queensland Crime and Misconduct Commission (QLD CMC);  
and
- f) the Hong Kong Independent Commission Against Corruption (Hong Kong ICAC).

The key issue examined in this paper is the differing functions performed by these commissions of inquiry. Fundamentally, the Hong Kong ICAC, the NCA, the NSW CC, the QLD CC, and to a lesser extent the QLD CJC, are required by their enabling legislation to assemble in private admissible evidence for prosecution of corrupt individuals by appropriate law enforcement or prosecution agencies. By contrast, the NSW ICAC is directed under s.13 of the *Independent Commission Against Corruption Act 1988* (NSW) towards public exposure of corruption as one of its principal functions. The compilation of admissible evidence for prosecutions by the Director of Public Prosecutions (DPP) pursuant to s.14 is a secondary function.

Various commentators have defended the focus of NSW ICAC upon public exposure of corruption on the grounds that public hearings encourage higher standards of public behaviour in the future, as opposed to prosecutions, which may take several years to reach the courts. Public hearings have also been defended on the basis that they encourage witnesses with information relevant to a particular inquiry to come forward, they change community attitudes about public sector corruption and fraud, and they increase the accountability of ICAC for its actions.

At the same time, however, public hearings also have the potential to cause great inequities, including irreparable damage to the reputations of the individuals that are being investigated. This may occur through the placing of erroneous allegations on the public record, and sensationalist media reporting of those allegations. Accordingly, it is particularly important that the NSW ICAC observes the rules of procedural fairness in its hearings to avoid unwarranted damage to the reputation of individuals.

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<sup>1</sup> It should be noted that the paper does not specifically consider the WA Anti-Corruption Commission (ACC). The WA AAC can conduct preliminary investigations into corruption, but if it wishes to exercise coercive powers, it must appoint a special investigator using the powers of the *Royal Commissions Act 1968* (WA). In effect therefore, the ACC is basically a mechanism for establishing Royal Commissions.

## 2. COMMISSIONS OF INQUIRY DISCUSSED IN THIS PAPER

In the last two decades, legislatures throughout Australia and internationally have increasingly created commissions of inquiry that possess similar powers to Royal Commissions, but exist on a permanent rather than an ad hoc basis to conduct ongoing investigations. The following commissions of inquiry are discussed in this paper.

### 2.1 The NSW ICAC

The NSW ICAC was established under s.4 of the *Independent Commission Against Corruption Act 1988* (NSW) following a decade of controversy about government corruption in NSW. It has investigative, corruption prevention and educative functions under s.13 of the ICAC Act, however it is its investigative function that is the focus of this paper. It is headed by a single Commissioner, who may delegate some functions to Assistant Commissioners. The NSW ICAC is assisted by an Operations Review Committee, and is overseen by the Parliamentary Committee on ICAC.

### 2.2 The NCA

The NCA is a joint Commonwealth and state body, formed in 1984 under the *National Crime Authority Act* (Cth) following a series of Royal Commissions at a federal level into organised crime in the late 1970s and early 1980s.<sup>2</sup> Its role is to investigate serious crime such as tax evasion, money laundering, drug dealing, extortion and violence. It is constituted by a Chairperson and two other full-time members, although additional special members may be appointed for particular investigations. The NCA is supervised by an intergovernmental committee which consists of ministers from the Commonwealth and each state.

### 2.3 The NSW CC

The NSW CC was established (originally as the State Drug Crime Commission) under s.5 of the *NSW Crime Commission Act 1985* (NSW). It consists of a Commissioner and Assistant Commissioners. Its principal objective is to reduce the incidence of illegal drug trafficking. It is controlled by a management committee, consisting of the NSW Minister for Police, the NSW Commissioner of Police, the Chair of the NCA and the Commissioner of the NSW CC.

### 2.4 The QLD CJC

The QLD CJC was established under s.2(a)(11) of the *Criminal Justice Commission Act 1989* (Qld) following the Royal Commission into Commercial Activities of Government and other Matters (the Fitzgerald Inquiry). Its role is now exclusively the investigation of ‘official misconduct’ defined under s.2(a)(v) of the QLD CJC Act, provided that that role cannot be effectively discharged by the police service or other agencies of the state under s.23(f)(iii). It is constituted by a full-time Chairperson, and four part-time members.

### 2.5 The QLD CC

The QLD CC was established by s.11 and s.13(1) of the *Crime Commission Act 1997* (QLD). The Commission was established to take over the investigative functions of the Queensland CJC other than those related to ‘official misconduct’. This was done because the

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<sup>2</sup> For example the Royal Commission into the Australian Meat Industry (1982) (Woodward Commission) and the Royal Commission of Inquiry into Drug Trafficking (Stewart Commission).

Government's view at the time was that investigation of official misconduct should be undertaken independently of general law enforcement. The Commission is supervised by a nine-member management committee including the Queensland Crime Commissioner and Commissioner of Police.

## 2.6 The QLD CMC

As of 1 January 2002, the QLD CJC and the QLD CC will be merged to form a new organisation, called the Crime and Misconduct Commission. This paper also considers where appropriate the proposed operation of the CMC.

## 2.7 The Hong Kong ICAC

The Hong Kong ICAC was established in 1974 under the *Independent Commission Against Corruption Ordinance*. It was established due to very high levels of corruption at the time at virtually all levels in both the public and private sectors. The Commission is divided into three branches: operations, prevention and education, and is headed by a Commissioner who is appointed, and can be dismissed, by the Chief Executive.

Like the NSW ICAC, the conduct of Hong Kong ICAC investigations is overseen by an Operations Review Committee to advise on how each complaint or report of corruption should be handled, and to consider the Commission's decision to investigate a particular matter. The membership of the Committee includes Members of the Legislative Council, the Executive Council (ie cabinet), community members, and the Commissioner. The Committee is chaired by a member of the community.<sup>3</sup>

## 3. INQUISITORIAL AND ADVERSARIAL JUDICIAL SYSTEMS

A number of countries around the world adopt inquisitorial systems of justice, as opposed to the adversarial judicial process adopted in common law countries such as Australia, the UK and the US. The following is an overview of some features of both systems, and a discussion of their relevance to the functioning of commissions of inquiry. A fuller discussion is provided in *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison* (November 1994).

### 3.1 The Inquisitorial System

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

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

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<sup>3</sup> Hong Kong ICAC, *Hong Kong ICAC: The Facts*, (Hong Kong Information Services Department, 1998). See also J.Hatzistergos & A.Fraser, 'Comparative Study of the Hong Kong ICAC: Delegation's Report to the Committee on the ICAC', (October 1999).

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

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

Following from an investigation, an inquisitorial trial is essentially a process of public confirmation of the results of an investigation. In general terms, the investigation already conducted prior to the inquisitorial trial is designed to have established guilt. Accordingly, in France in particular, the criminal trial is a demonstration of guilt, rather than an inquiry into guilt.

As such, the process has been described as an audit of the dossier, to confirm with witnesses, judges and lawyers the veracity of evidence compiled in the dossier. The inquisitorial trial is presided over by a presiding judge who has the dossier to hand, and who can interrogate the accused, call any witnesses he or she thinks necessary, and generally ‘run the show’.

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

Throughout this process, the notion of the burden of proof, familiar to lawyers in common law countries, has little relevance, since the presiding judge leads the evidence in inquisitorial systems.<sup>4</sup>

### **3.2 The Adversarial System**

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

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

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

Finally, unlike the inquisitorial judicial process, the burden of proof under the common law system means that if the prosecution does not prove the charge it has brought against the accused to the required standard, then the accused is entitled to be acquitted.<sup>5</sup>

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<sup>4</sup> Independent Commission Against Corruption, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, (Sydney: ICAC, November 1994), pp 1-8

### 3.3 The Status of Commissions of Inquiry

Commissions of inquiry such as the NSW ICAC do not follow closely either the inquisitorial or adversarial judicial models. Fundamentally, both inquisitorial and adversarial systems are concerned with the determination of whether a person has committed an offence and how that person should be punished. Commissions of inquiry are not ultimately concerned with either of these matters. Rather, they are concerned with getting to the truth through investigations.

That said, it may be argued that commissions of inquiry have an inquisitorial function to the extent that they gather information to determine of the truth of a particular matter or situation. In this regard, it is relevant to note s.17 of the NSW ICAC Act:

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

It follows therefore that ICAC does not passively determine truth on the basis of the evidence that those before it choose to adduce. Rather, the ICAC is active in the gathering of documentation, the pursuit of leads and the summoning and examining of witnesses.

To perform this inquisitorial function, commissions of inquiry have coercive powers to obtain information by forcing reluctant witnesses to cooperate. These coercive powers are distinctive from those of the police. In addition, commissions of inquiry also have non-coercive powers, principally search powers, which also differ from those of the police. These coercive and non-coercive powers are considered in Attachment A.

Given that commissions of inquiry perform an inquisitorial function when gathering information, it should also be noted that in the latter stages of an inquiry, the NSW ICAC in particular performs much of its investigative work by way of public hearings. Unlike the inquisitorial system, these hearings may potentially go well beyond what may be accomplished in private investigations. As such, they have similarities with the adversarial model of court proceedings.<sup>6</sup>

### 3.4 The Grand Jury in the US

A US grand jury consists of 23 jurors (in most states) who are summonsed and empanelled to exercise both indicting and investigative powers. Importantly, a US grand jury operates in an inquisitorial rather than adversarial manner, in contrast with most other legal processes in the US.

The most contentious aspect of the US grand jury is its indicting function. Prosecutors are permitted to offer evidence to grand juries which would not be admissible at trial. The result is that defendants can be indicted and sent to trial on evidence that would not amount to a *prima facie* case of guilt.

A US grand jury is also responsible for investigating and publicly reporting on official misconduct. In exercising this function, a US grand jury has been likened to a “roving

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<sup>5</sup> *Ibid*, pp 23-28

<sup>6</sup> *Ibid*, pp 30-38



ombudsman” which may propose new laws, protest against abuses of government, perform administrative tasks, and generally look after the welfare of their community.

There is clearly a similarity between the investigative and reporting functions of the US grand jury and the investigative and reporting functions of commissions of inquiry here in Australia. That said, grand jury proceedings are entirely in secret, and are overseen by the courts, while NSW ICAC hearings are generally in public and are independent of the courts. A grand jury must also rely on the courts for access to coercive powers.

There are also similarities between the indicting functions of US grand juries and commissions of inquiry. While the NSW ICAC for example has no indicting power, it nevertheless can exercise coercive powers to facilitate the finding of indictments by the DPP. It also has the power to form an opinion in a report to parliament whether consideration should be given to the prosecution of an individual, and to communicate that opinion to the DPP.<sup>7</sup>

#### **4. THE PURPOSE OF COMMISSIONS OF INQUIRY**

Donaghue<sup>8</sup> notes four reasons commonly advanced for the use of commissions of inquiry: they are independent of the executive; they can assist where existing law enforcement mechanisms are inadequate; they can suppress crime by private or confidential investigation leading to the prosecution of corrupt individuals; and they can engage in public investigations to publicly expose crime. The latter two of these reasons are considered below.

##### **4.1 Prosecution of Corrupt Individuals**

The NCA, the NSW CC, the QLD CC, the Hong Kong ICAC, and to a lesser extent the QLD CJC, are primarily responsible under their enabling legislation for gathering admissible evidence for use in subsequent prosecutions of corrupt individuals. They are generally judged according to the success of prosecutions arising from their investigations.

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

The role of these commissions in supplementing traditional law enforcement mechanisms is apparent in their enabling legislation, which prevents them from investigating a matter unless it has been specifically referred to them for investigation by the relevant governing committee, on the basis that normal law enforcement methods are unlikely to be effective:

- 1) The NCA may initiate general investigations using normal policing and investigative powers. However, it may only conduct special investigations using coercive powers following referral of such an investigation from the Intergovernmental Committee on the NCA under s.11(2) of the NCA Act. The NCA is also able to request such a referral under s.10 of the NCA Act.

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<sup>7</sup> *Ibid*, pp 38-44

<sup>8</sup> S.Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, (Sydney: Butterworths, 2001)

2) The NSW CC requires referral of an inquiry into ‘relevant criminal activity’ by the management committee under s.6(1)(a) of the NSW CC Act.

3) The QLD CC requires referral of an inquiry into ‘relevant criminal activity’ and ‘major crime’ by the management committee under ss.4(1)(a) and 28(1)(a) of the QLD CC Act.

The QLD CJC differs somewhat from the above three commissions. It is similar in that it must investigate and report on a matter referred to it by the Parliamentary Committee on the CJC under s.118E of the CJC Act. However, under s.29(2) of the CJC Act, the QLD CJC can also commence its own investigations of ‘official misconduct’ using coercive powers without the need for a reference or notice from an external body.<sup>9</sup>

As noted earlier, the QLD CC and CJC are being merged to form the new QLD CMC. However, the proposed enabling legislation of the CMC, the Crime and Misconduct Bill 2001 (Qld), retains the essential focus of the QLD CC and CJC on gathering evidence for prosecutions. Specifically, under s.26 of the bill, the new QLD CMC may only act on major crime referred to it by the reference committee, with the major objective ‘gathering evidence for the prosecution of persons for offences and the recovery of proceeds of major crime’.

The collection of admissible evidence for possible prosecution is also the primary responsibility of the Hong Kong ICAC. The Hong Kong ICAC does not prosecute offenders itself, but pursuant to s.31 of the *Prevention of Bribery Ordinance*, it forwards the relevant information to the Department of Justice for prosecution. Some 12 percent of complaints about corrupt conduct made to the Hong Kong ICAC result in prosecution.<sup>10</sup>

Finally, although not specifically discussed elsewhere in this paper, the Committee notes that the NSW Ombudsman also conducts all investigations in private. The Ombudsman is responsible for investigating and reporting on complaints about the conduct of a NSW agency or their employee, and as such may investigate illegal activities, including potentially corruption.

#### **4.2 Public Exposure of Corruption**

By contrast with the other commissions discussed in this paper, the NSW ICAC is primarily responsible under s.13 of the ICAC Act for exposing unconscionable conduct and encouraging high standards of behaviour in public officials, even if that conduct cannot be proven to be criminal. The compilation of admissible evidence for prosecutions by the Director of Public Prosecutions (DPP) pursuant to s.14 is a secondary function.

Importantly, unlike the NCA, the NSW CC and the QLD CC, the NSW ICAC may conduct investigations under s.20 of the NSW ICAC Act at its own initiative, possibly based on a complaint by a member of the public or a report by a public authority. As such, the NSW ICAC can exercise coercive powers at its own discretion, and need not be bound by externally set terms of reference. The ICAC must also respond to a reference for an inquiry from Parliament.

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<sup>9</sup> Donaghue, *op cit*, pp 20-22

<sup>10</sup> Hong Kong ICAC, *Hong Kong ICAC: The Facts*, (Hong Kong Information Services Department, 1998). See also J.Hatzistergos & A.Fraser, ‘Comparative Study of the Hong Kong ICAC: Delegation’s Report to the Committee on the ICAC’, (October 1999).

This approach of the NSW ICAC emphasising public exposure of corruption is similar to the approach adopted by the Fitzgerald Commission of Inquiry, which granted indemnities to corrupt witnesses not simply for the purposes of pursuing ‘bigger fish’, but in order to get to the truth. Fitzgerald justified this by arguing that it was vital:

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

Significantly, the approach of the NSW ICAC to investigations is in many ways inconsistent with that of the NCA, the NSW CC, the QLD CC, and the Hong Kong ICAC. In order to publicly expose corruption and encourage high standards of behaviour in public officials, the ICAC may be required to offer indemnities which would hamper prosecutions. By contrast, the other commissions considered in this paper are largely required by their enabling legislation to conduct their hearings in private and rarely if ever release public reports exposing corruption.<sup>11</sup>

## **5. EARLIER REFORM OF THE CONDUCT OF HEARINGS BY ICAC**

The conduct of public hearings by the NSW ICAC has been the subject of much scrutiny and discussion since the Commission’s inception. In 1990-1991, the Committee on ICAC conducted an inquiry into issues relating to the conduct of public and private hearings, commission procedures, and the rights of witnesses. This inquiry subsequently led to amendments to the NSW ICAC Act in late 1991 to provide the Commission with greater flexibility in determining whether to hold a hearing in public or in private. The ability of NSW ICAC to hold private hearings was also considered in 1993 by the NSW Court of Appeal in *ICAC v Chaffey* (1993) 30 NSWLR 21.

### **5.1 Inquiry into Commission Procedures and the Rights of Witnesses**

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

- a) To review the exercise by the Commission of its functions relating to witnesses and other interested parties who appear at Commission hearings or who otherwise assist the Commission in its investigation; and
- b) to report to both Houses of Parliament on any changes which should be made to Commission procedures or the *Independent Commission Against Corruption Act 1988* (with particular reference to, but not restricted to, matters relating to Commission hearings and the rights of witnesses).

Concurrent to announcing these terms of reference, the Hon Duncan Gay tabled a discussion paper in the Legislative Council entitled *Openness and Secrecy in Inquiries into Organised*

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<sup>11</sup> *Ibid*, pp22-23

*Crime and Corruption: Questions of Damage to Reputations.* This paper was based on two documents prepared for the Committee on ICAC by the Hon Athol Moffitt.<sup>12</sup>

Following receipt of over 60 submissions and the conduct of two public hearings, the Committee on ICAC published two reports in November 1990 and February 1991. Importantly, the Committee listed in its first report the perceived benefits and risks involved with public hearings.

On the one hand, the Committee noted in its first report a number of statements of support for the continuation of public hearings from the Hon Athol Moffitt, Mr Costigan QC, Mr Fitzgerald QC and from the former ICAC Commissioner, Mr Temby. A number of arguments were advanced:

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

On the other hand, however, the Committee on ICAC also noted in its first report concern that public hearings may result in unnecessary damage to reputations. For example, unsupported assertions may be made in the course of an open hearing, which may later turn out to be groundless, but which are give sensational media coverage. In addition, the revelation of the identity of informers in public hearings may endanger their lives and destroy the informer system. Indeed the Committee noted just such an example of that occurring in the case of Mr Brian Preston.<sup>13</sup>

Given these competing issues, the Committee on ICAC recommended in its first report in November 1990 that 'the principle of public hearings should be adhered to'. At the same

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<sup>12</sup> Mr Moffitt is a former Supreme Court Judge, having retired from the NSW Court of Appeal in 1984. In 1973 and 1974, he conducted the first Royal Commission into organised crime in Australia, the Royal Commission into Allegations of Crime in Clubs.

<sup>13</sup> The "Preston Matter" arose during the NSW ICAC's North Coast Inquiry. In evidence to the inquiry, Mr Frank, a land-owner on the NSW north coast, alleged that Mr Preston attempted to solicit a bribe from him during a visit to his property. This was in return for the termination of proceedings against Mr Frank which Mr Preston's clients were bringing in the Land and Environment Court. The allegations were aired on television news that night, without Mr Preston even being aware of them.

time however, the Committee recommended the implementation of safeguards relating to the conduct of hearings in an attempt to prevent a repeat of the Preston matter:

- a) the Commission’s document “Procedures at Public Hearings” should be amended to note that the Commission will hear and consider applications for private hearings; and
- b) section 31 of the NSW ICAC Act should be amended to provide the Commission with greater discretion as to whether to conduct a hearing in public or in private.<sup>14</sup>

## 5.2 The ICAC (Amendment) Act 1991

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

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

The bill before the House gives effect to the recommendations of the Committee [on ICAC]. It ensures that the Commission has greater flexibility in determining whether to hold a hearing in public or in private. This does not mean that public hearings will cease to be the norm. Mr Temby QC in his submission to the Joint Committee indicated that the Commission would sit in private only a little more than it does at present. The touchstone for making the decision to sit in private or in public is the public interest and the public interest is usually best served by sitting in public.<sup>15</sup>

## 5.3 Chaffey’s Case

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

In its decision, the NSW Court of Appeal rejected this proposition, finding that commissions have a discretionary power to determine whether they sit in public or private. While reputation is an interest that attracts the operation of the rules of procedural fairness, those rules do not guarantee that no harm will be done to reputations in the course of an investigation. They merely require that a person whose reputation is at risk be given an opportunity to be heard. As stated by Mahoney JA at 60:

Where a proceeding is heard in public, a party to it may suffer harm from the publicity of it. That harm may range from mere embarrassment to grave damage to reputation.

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<sup>14</sup> Committee on the ICAC, *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*, First Report of the Inquiry into Commission Procedures and the Rights of Witnesses, (November 1990)

<sup>15</sup> Legislative Committee Hansard, 4 December 1991, pages 5437 - 5444

However, the fact that harm will result if the discretion be exercised in favour of a public hearing does not mean that the party has not been dealt with with procedural fairness. In some cases, the public interest or other ends to be served by the discretion may outweigh the rights of the individual not to be harmed by the proceedings.

Accordingly, Chaffey's case left it open to commissions of inquiry such as the NSW ICAC to continue to hold public hearings, even if they may cause damage to the reputations of individuals.<sup>16</sup>

## **6. DAMAGE TO REPUTATION FROM COMMITTEE HEARINGS**

As noted above, commissions of inquiry such as ICAC which are established to publicly expose corruption have the potential to significantly damage the reputation of individuals. A number of issues relating to the conduct of public hearings, and their impact on the reputation of individuals, are discussed below.

### **6.1 The Decision to Undertake a Hearing in Public or in Private**

Commissions of inquiry have the capacity to damage the reputation of individuals through the placing of adverse material on the public record, and sensationalist media reporting of that material. Individuals in turn have no way or redressing the damage done to their reputation or career as the law of defamation cannot be used against commissions.

To prevent the public disclosure of material adverse to the interests of individuals, the NSW ICAC has discretion to sit either in public or in private under s.31(1) of the ICAC Act. This discretion extends to allow it to conduct hearings partly in public and partly in private, or to hear closing submissions in private under s.31(2). In practice, the ICAC conducts approximately two-thirds of its hearings in public.

Consistent with its brief to publicly expose corruption, the NSW ICAC is obliged under s.32(3) of the NSW ICAC Act to have regard to 'any matter which it considers to be related to the public interest' when deciding whether to sit in public or private. In that regard, the ICAC "Procedures at Hearings" notes that public hearings are an opportunity for the public to see and hear about the Commission at work, to educate the public about corruption, and to increase the provision of information to the Commission.

However, ICAC hearings are held in private if, for example, there is a danger to the personal safety or well-being of a witness, if it is necessary to protect an informant's identity, or if an individual's reputation may be unfairly or unnecessarily damaged by anticipated evidence. Private hearings may also be held under s.18(2) to avoid prejudicing current criminal proceedings (discussed in part 8).

By contrast with the NSW ICAC, the QLD CJC and the QLD CC generally hold hearings in private, although they may, in certain circumstances, hold hearings in public. Similarly, the QLD CMC Bill to establish the QLD CMC also provides that the CMC will generally sit in private, although it may sit in public if doing so will assist the investigation and 'would not be unfair to a person or contrary to the public interest'. The NCA and the NSW CC are

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<sup>16</sup> Donaghue, *op cit*, pp 194-195

required by legislation to hold all their hearings in private. This is consistent with their function of compiling admissible evidence for prosecutions.<sup>17</sup>

The Hong Kong ICAC also conducts all its investigations in private, although it does not conduct formal hearings. Indeed, it is an offence to disclose the names of those subject to investigation by the Hong Kong ICAC. The Commission has advised that this is partly to prevent the destruction of evidence and the flight of suspects, but also to prevent destroying the reputations of innocent people.<sup>18</sup>

## 6.2 Suppression of Evidence taken in Public

Commissions of inquiry which hold their hearings in public may mitigate the potential damage to reputations that may be caused by their hearings by prohibiting the publication of evidence.

The NSW ICAC may prohibit the publication of evidence taken in public under s.112(1) of the ICAC Act. That said, under s.112(1A), the ICAC may only use this power where it is satisfied that such a direction is necessary or desirable in the public interest. The QLD CJC has similar powers.

The QLD CC Act goes further. It provides that it is an offence for a person to publish an answer or document produced at a QLD CC hearing, or anything about the answer or document. It is also an offence to publish information that might enable the existence or identity of a person who is about to give or has given evidence before the QLD CC to be ascertained.

The QLD CMC Bill to establish the QLD CMC also provides at s.180(3) that the presiding officer may prohibit the publication of an answer at a Commission hearing, or anything about the answer, or information that might allow the identity of a person appearing or having appeared before the Commission to be ascertained.

## 6.3 Disclosure of Evidence taken in Private

The NCA, NSW CC, QLD CC and QLD CJC Acts make it an offence for a member of staff of the commission to make a record of any information or to divulge or communicate any information received, unless they do so for the purposes of an investigation under the Act. There is no such specific provision in the NSW ICAC Act.

However, the NCA, NSW CC, QLD CC and QLD CJC Acts all permit the disclosure of evidence to give effect to the purposes of the Acts. This is to facilitate disclosure of evidence at the completion of an investigation to prosecution agencies, and disclosure to affected persons if disclosure is required as a matter of procedural fairness.

The High Court ratified the provisions of these Acts relating to public disclosure of the transcripts of a private hearing in *Johns v ASC* (1993) 178 CLR 408. The court considered there to be a 'general rule that where a body has statutory powers to compel the provision of

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<sup>17</sup> *Ibid*, pp 154-159

<sup>18</sup> Hong Kong ICAC, *Hong Kong ICAC: The Facts*, (Hong Kong Information Services Department, 1998). See also J.Hatzistergos & A.Fraser, 'Comparative Study of the Hong Kong ICAC: Delegation's Report to the Committee on the ICAC', (October 1999).

information to it, it should not disclose the information except for the purposes for which the powers were conferred.’<sup>19</sup>

## 7. THE REQUIREMENT OF PROCEDURAL FAIRNESS

As noted above, hearings held in public have the potential to significantly damage the reputation of individuals. Accordingly, it is particularly important that commissions of inquiry, especially ICAC, observe the rules of procedural fairness when conducting public hearings so as to avoid undue damage to the reputation of individuals.

### 7.1 The Rules of Procedural Fairness

The two central rules of procedural fairness are the rule against bias and the hearing rule. The main form of bias that is alleged against commissions is bias by reason of prejudgement. However, in the context of commissions of inquiry, the courts have recognised that the operation of the rule against bias is limited, because commissions necessarily have suspicions before they exercise their coercive powers.

The hearing rule has greater applicability to commissions of inquiry. It requires that a witness be given an opportunity to be heard. That said, *Cornall v AB* [1995] 1 VR 372 suggests that the rules of procedural fairness apply only if the commission’s investigation has ‘immediate consequences of ... such importance to the individual investigated’ that procedural protection is required.

Accordingly, the specific applicability of the rules of procedural fairness to the conduct of hearings by commissions of inquiry varies with the publicity that may be given to the activities of commissions, and whether those activities may damage reputation.

### 7.2 Specific Procedural Rights

Individuals who are affected by commission inquiries may have procedural rights arising either from specific provisions in commission legislation, or from the rules of procedural fairness. The main rights that may exist are discussed below.

#### 7.2.1 *The Right to Notice of a Matter under Investigation*

The right to notice of a matter under investigation enables an individual or organisation to prepare for and participate in a hearing. However, there is no common law obligation to provide notice of a decision to commence an investigation, nor is there a requirement that witnesses be given particulars of the matter under investigation. Accordingly, the requirements of procedural fairness have been supplemented in the enabling legislation of commissions discussed in this paper by certain requirements for the giving of notice.

The NSW ICAC Act is the least specific in this regard. The ICAC Act simply provides at s.30(4) that ‘a person appearing before the Commission is entitled to be informed of the general scope and purpose of the hearing’. The NCA and NSW CC Acts require any summons to appear to be accompanied by a copy of the notice by which the matter under investigation was referred to the NCA or NSW CC. In addition, the NCA, NSW CC and QLD CC Acts all require that, provided it will not prejudice an investigation, a summons

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<sup>19</sup> *Ibid*, pp 159-160



must set out the general nature of the matters on which the commission wishes to question the witness.<sup>20</sup>

### 7.2.2 *The Right to Disclosure of Adverse Material*

Procedural fairness normally requires that all material that becomes available to a decision-maker and reflects adversely on an individual should be made available to the individual to allow a credible response. This question does not arise when commissions conduct their hearings in public, since all evidence received is on the public record, however it does arise where evidence is taken by commissions in private.

Given the requirement of disclosure of adverse material, the courts have nevertheless accepted that in private proceedings, disclosure may be delayed in order to ensure the integrity of the investigation process. As Mason, Wilson and Dawson JJ observed in *NCSC v News Corporation Ltd* (1984) 156 CLR 296 at 323-4:

It is the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.

This limited duty of disclosure means that suspects do not have the right to attend early private hearings of a commission, or to see transcripts of the evidence taken. Similarly, commissions can claim public interest immunity to resist attempts to subpoena material that may reveal the progress of an investigation to date.

### 7.2.3 *The Right to Legal Representation*

Witnesses standing before the commissions of inquiry considered in this paper generally have a statutory right to legal representation, although the rules of procedural fairness do not confer entitlement to legal representation.

That said, the legal representation provisions of the NSW ICAC Act are slightly ambiguous. Section 32 gives the Commission power to authorise a person to appear at a hearing, and s.33 gives the Commission the power to authorise that person to have legal representation. However, read together, these provisions fall short of a water-tight statutory right to legal representation. Having said that, the NSW ICAC invariably gives leave for witnesses to be legally represented if they wish.

By contrast the NCA Act, the NSW CC Act and the QLD CC Act are worded almost identically to the effect that ‘a person giving evidence may be represented by a legal practitioner’. In addition, each Act provides that ‘if, by reason of the existence of special circumstances, the authority/commission consents to a person who is not giving evidence being represented by a legal practitioner – the person may be so represented’. The new QLD CMC Bill also preserves the right to legal representation at s.181.<sup>21</sup>

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<sup>20</sup> *Ibid*, pp 173-175

<sup>21</sup> A.Leaver, *Investigating Crime: A Guide to the Powers of Agencies Involved in the Investigation of Crime*, (Sydney: LBC Information Services, 1997), pp 314-320

#### 7.2.4 *The Right to Call Witnesses*

In Australia, procedural fairness does not require that people who may be adversely affected by an investigation should have the right to call witnesses. Accordingly, the legislation of commissions of inquiry in Australia does not confer a right on interested persons to call witnesses to give further evidence to the commission.

That said, in most cases it is likely that time permitting, a commission would be willing to call witnesses who are in a position to give evidence relevant to an inquiry. It is standard practice for a party that wishes to have a witness called to inform counsel assisting of the evidence that the witness could provide, and for counsel assisting to subsequently require the witness's attendance, using coercive powers if necessary.

### 8. COMMISSION INTERFERENCE WITH COURT PROCEEDINGS

Commissions of inquiry have the potential to interfere with pending criminal proceedings in the courts through the use of their coercive powers against the accused or possible witnesses. There are three main ways in which a commission of inquiry may interfere with the conduct of pending court proceedings:

- 1) Commissions may generate publicity that is prejudicial to pending trials if they conduct public hearings or issue public reports;
- 2) Commissions may compel an accused to reveal incriminating material when criminal charges are pending; and
- 3) Commissions may use their coercive powers to acquire procedural advantages for the prosecution in court which would not otherwise be available.

The leading case concerning the use of coercive powers after charges have been laid is *Hamilton v Oades* (1989) 166 CLR 486 (*Hamilton*). In this case, the High Court overturned an earlier judgement of the Court of Appeal, and allowed the coercive examination of Mr Oades by liquidators, notwithstanding the fact that it would result in the disclosure of material relevant to criminal charges against Mr Oades.

In reaching its decision, the High Court noted that the statutory abrogation of the privilege against self-incrimination removed the right of Mr Oades to withhold answers, notwithstanding the fact that Mr Oades' answers might tend to incriminate him. It then, by a majority of three to two, found that neither the High Court's powers to give directions nor its inherent power to protect its processes could be used to counteract the effect of the statutory abrogation of the privilege.

The High Court did acknowledge that coercive questioning could be restrained if it was primarily for use against the accused in the bringing of criminal charges rather than for the pursuit of legitimate investigations. As it was, however, the High Court found that the questioning of Mr Oades was primarily designed to enable the liquidator to assemble information for the wind-up of the company, and therefore was entirely appropriate.

Based on *Hamilton*, a commission of inquiry exercising coercive powers conferred by legislation for the purposes of carrying out criminal investigation is largely entitled to use those powers against an accused, even after charges have been laid in court. This is because the abrogation of the privilege against self-incrimination is generally based in statute.

Furthermore, any procedural advantages gained by a prosecution as a result of coercive questioning by a commission of inquiry of either an accused or a third party is not contempt of court if the advantage is an incidental side effect of the use of coercive powers for their intended purpose.

However, a commission will be in contempt of court if it uses its coercive powers primarily for the collection of evidence against an accused for use in court rather than for the legitimate pursuit of its investigations.<sup>22</sup>

## 9. CONCLUSION

Of the commissions of inquiry examined in this paper, the NSW ICAC stands out in terms of its role and purpose under its enabling legislation. Specifically, it is focused on exposing corruption and airing matters in the public domain, as opposed to assembling admissible evidence through private investigations with a view to future prosecutions.

Both models of operation have positive and negative aspects. On the one hand, commissions that operate in the public such as the NSW ICAC can potentially preempt corruption and encourage higher standards of public behaviour in the future by institutionalising procedures against corruption. However, they can also cause great unfairness, including irreparable damage to the reputation of the individuals they investigate. It is therefore particularly important that they operate in a manner that is procedurally fair, so that they minimise the risk of damage to reputations.

On the other hand, commissions that operate in private can ensure through prosecutions that criminals do not profit from their illegal operations, while largely avoiding concerns relating to the reputation of individuals. However, they may equally be said to be secretive and unaccountable, and ineffective in changing the culture of the public sector towards one of openness, honesty and integrity. As such, they may not root out the seeds of corruption in the future.

There is the option of altering the *Independent Commission Against Corruption Act 1988* (NSW) to recast the NSW ICAC in the mode of commissions that operate in private. That said, the Committee on ICAC largely rejected this option in 1991 in favour of amendments fine-tuning the operation of the NSW ICAC in its current mode.

## 10. ISSUES FOR CONSIDERATION

- 1) Are public hearings the best means of exposing and preventing corruption?
- 2) Should the ICAC continue to be able to initiate its own inquiries, or if not, how should inquiries be initiated?
- 3) Have the 1991 amendments to the ICAC Act given the Commission sufficient discretion to protect individuals from unnecessary damage to reputation through exposure to public hearings?
- 4) If not, should the requirements of procedural justice be changed to further protect the rights of individuals before the Commission in public hearings?

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<sup>22</sup> *Ibid*, pp 260-270, 296-298

- 5) Should the coercive powers of the Commission be changed to prevent public hearings from potentially interfering with pending criminal proceedings?

## APPENDIX A:

### THE INVESTIGATIVE POWERS OF COMMISSIONS OF INQUIRY

#### A.1 The Coercive Powers of Commissions of Inquiry

The coercive powers of commissions of inquiry are constrained by the legislative power of the parliament that confers them. Notably, the coercive powers of state commissions are for the most part limited by the territorial boundaries of the state. Within this jurisdictional limit, commissions of inquiry nevertheless may exercise a broad range of coercive powers.

##### *A.1.1 The Power to Require Documents prior to Hearings*

The NSW ICAC may by notices require any person to attend an ICAC office to provide any documentation under s.21(1) of the ICAC Act. However, this power is subject to some constraints. In particular, production of documents to the ICAC may be resisted under s.24(2) of the ICAC Act on the ground of privilege if such grounds would be upheld in a court of law. Grounds of privilege, including privilege against self-incrimination, legal professional privilege and parliamentary privilege are discussed later.

Similar provisions are enforced by the QLD CJC and QLD CC under ss.69(1)(b) of the QLD CJC Act and s93(1) of the QLD CC Act respectively. Again, however, these powers are subject to various exceptions, including the claims of privilege noted above. In addition, the power to require documents prior to hearing may not be exercised by the QLD CJC if to do so would compel a person to breach an agreement of confidentiality, unless the notice is approved in advance by a supreme court judge under s.75(1) of the QLD CJC Act.

The QLD CMC Bill to establish the QLD CMC also provides under s.72(2) that the Commission Chairperson may, by notice of motion, require the provision of oral and written statements, or documents relevant to a crime investigation. A person must comply with the notice ‘unless the person has a reasonable excuse’.

By contrast, the NCA and NSW CC have absolute power to compel the production of documents. In particular, the NCA has the power under s.20(2), (4), (5) of the NCA Act to require the production of documents from Commonwealth agencies, subject to certain secrecy provisions that relate primarily to taxation.

The powers of the Hong Kong ICAC in this regard are extraordinary. It has the power to issue warrants for the search of a person or premises, to seize and detain evidence, and access the records, books and other documents of any government department of public body. The Hong Kong ICAC may also apply to a magistrate to have the travel documents of any suspect surrendered.

##### *A.1.2 The Power to Require Information prior to Hearings*

The NSW ICAC has the power under s.21(2) of the NSW ICAC Act to require, by notice in writing, the provision of information by public officials in the form of a signed written statement. These powers are similar to those relating to the provision of documents, but again cannot be used (subject to further caveats) if the public official required to produce the statement has a ground of privilege.

The NCA, the NSW CC and QLD CC have similar powers to compel the provision of information, again by notice in writing, served on public officials. These powers are at s.20(1) of the NCA Act, s.10(1) of the NSW CC Act, and s.73(2) of the QLD CC Act respectively. Again, however, these powers are subject to claims of privilege.

By contrast, the QLD CJC has the power under s.69(1)(a) of the QLD CJC Act to require the provision of information from any person, not just public officials. As with the provision of documents, however, this power may not be exercised by the QLD CJC if a person would be compelled to breach an agreement of confidentiality, unless the notice is approved in advance by a supreme court judge under s.75(1) of the QLD CJC Act.<sup>23</sup>

### *A.1.3 The Power to Require Attendance at Hearings*

The commissions of inquiry discussed in this paper all have the power to summon witnesses to attend before them, and to continue to attend from day to day. The powers of NSW ICAC in this regard are set out under s.35(1) and 35(4) of the ICAC Act. The power of other commissions discussed in this paper are at s.28(1) of the NCA Act, s.16(1) of the NSW CC Act, s.95(1) of the QLD CC Act and s.74(1)(a) of the QLD CJC Act. The QLD CMC Bill to establish the QLD CMC includes power to require attendance at hearings at s.72(3).

The NSW CC has additional powers under s.16(1A) to require the immediate attendance of a person at a hearing if there are reasonable grounds to believe that delay in attendance might result in the commissioning of an offence, the loss or destruction of evidence, or otherwise seriously prejudice the investigation. The QLD CC has a similar power, although it must apply to the Supreme Court to invoke it under s.95(2) of the QLD CC Act.<sup>24</sup>

### *A.1.4 The Power to Arrest*

Each Australian commission of inquiry discussed in this report may issue a warrant for the arrest of individuals who fail to appear before them. However, the NSW ICAC and the NSW CC are distinguished by being able to arrest a person before a hearing commences. Specifically, under s.36(2) of the ICAC Act, the Commissioner may issue a warrant if satisfied by evidence on oath or affirmation that it is probable that a person whose evidence is desired and is necessary and relevant to an investigation ‘will not attend ... to give evidence unless compelled to do so’ or ‘is about to or is making preparations to leave the state’.

The Hong Kong ICAC has extraordinary powers in this respect. It has the power to arrest a person suspected of corruption offences without a warrant, and to detain a suspect for up to 48 hours under the *Prevention of Bribery Ordinance*, the *Independent Commission Against Corruption Ordinance* or the *Corrupt and Illegal Practices Ordinance*.

By comparison, the NCA, QLD CC and QLD CJC may not issue arrest warrants themselves. Rather, the NCA must apply to a Federal Court or a relevant state Supreme Court judge for an arrest warrant under s.31(1)(c) of the NCA Act, while the QLD CC and QLD CJC must apply to a Queensland Supreme Court judge under the s.97(1) of the QLD CC Act and s.79(1) of the QLD CJC Act respectively. The QLD CMC Bill preserves this requirement at s.167(1).<sup>25</sup>

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<sup>23</sup> Donaghue, *op cit*, pp 50-56

<sup>24</sup> *Ibid*, pp 57-58

<sup>25</sup> *Ibid*

### *A.1.5 The Power to Require Documents at Hearings*

All the commissions of inquiry discussed in this paper have the power to notify a witness in a summons to a hearing of a requirement to produce a book, document or other material during the hearing. This power can be particularly useful against third parties such as bankers and accountants, who could otherwise be required by their duty of confidentiality to their clients to keep such material confidential.

Importantly, however, witnesses before the NCA, the NSW CC, the QLD CJC and the QLD CC can refuse to produce documents that are ‘discovered’ during the course of questioning. This is the case even if the witness does not have a reasonable excuse for refusing to provide the document. Accordingly, a further summons or notice would be required in order to compel the witness to produce the document.

By comparison, the NSW ICAC’s powers are not limited in this way. Under s.35(2) and s.80(b) of the ICAC Act, it has the power to require the production of a document by a witness appearing at a hearing, regardless of whether that document was specified in the summons to the hearing.<sup>26</sup>

### *A.1.6 The Power to Require Answers to Questions at Hearings*

The power to collect oral evidence is one of the major sources of information for all commissions of inquiry. Oral examinations assist in the identification of relevant facts, the disclosure of the existence of documents that can be produced, and the interpretation of documents already supplied.

Donaghue suggests however that the practice of the NCA, the NSW CC and the QLD CC has generally been to avoid compulsory oral examinations of principal suspects in a criminal investigation, on the basis that it is unfair and can complicate subsequent prosecution by way of evidential immunities.

By contrast, Donaghue suggests that the NSW ICAC appears to have taken a different approach, frequently using its powers of oral questioning against primary suspects under investigation. He argues that this approach is consistent with ICAC brief to public expose corruption, as opposed to collection of admissible evidence for use in prosecutions.<sup>27</sup>

## **A.2 The Non-Coercive Powers of Commissions of Inquiry**

For the main part, the non-coercive powers of commissions of inquiry in Australia are similar to those of state or federal police. Thus for example, commissions often have the power to apply for telephone interception warrants under s.39 of the *Telecommunications (Interception) Act 1979* (Cth).

The main respect in which the non-coercive powers of commissions of inquiry differ from those of the police is in relation to search warrants. In particular, commissions of inquiry in Australia often have access to specific search powers in addition to general search provisions in the relevant jurisdiction.

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<sup>26</sup> *Ibid*, pp 58-59

<sup>27</sup> *Ibid*, pp 61-62

Importantly, the search warrant provisions of ICAC (s.40 of the ICAC Act) are wider than those of other commissions of inquiry in Australia. Notably, there is no requirement under the ICAC Act for there to be reasonable grounds to suspect that an offence has occurred before a warrant may be issued.

In addition, the NSW ICAC can itself issue search warrants in conjunction with investigations, although there is a statutory requirement under s. 40 for warrants to be issued ‘as far as practicable’ by a Justice. It is also the stated policy of the NSW ICAC. A search warrant may be extended to the search of a person discovered on premises being searched if there is a reasonable suspicion that the person may be in possession of relevant documents.

By contrast, the NCA and NSW CC do not possess the power to issue their own search warrants, but must seek them from an authorised justice under s.22 of the NCA Act and s.11 of the NSW CC Act respectively. In addition, applications for search warrants must be based on reasonable ground for suspecting the presence of relevant evidence, and must specify the type of things authorised to be seized.

Similarly, the QLD CJC is required to seek a warrant from a Justice of the Supreme Court to enter, search and seize documents on private premises. Under s.71(1) of the CJC Act, the justice may not issue a warrant unless there are reasonable grounds to suspect that there exists on the premises records or things relevant to the investigation, and that an offence has been committed or is suspected on reasonable grounds to have been committed, or that there are reasonable grounds for suspecting that an offence will be committed.

Section 86 of the QLD CMC Bill to establish the QLD CMC also provides for the issuing of search warrants by a magistrate or Supreme Court Judge, provided he or she is satisfied that there are reasonable ground for suspecting evidence of major crime or misconduct.<sup>28</sup>

### **A.3 Limitations on the Investigative Powers of Commissions of Inquiry**

Given the significant coercive and search powers of commissions of inquiry in Australia, there are nevertheless a number of privileges witnesses may claim against answering questions or producing documents. They are claims of ‘reasonable excuse’, privilege against self-incrimination, legal professional privilege, public interest immunity, and parliamentary privilege.

#### *A.3.1 Reasonable Excuse*

The phrase ‘reasonable excuse’ is defined in s.1B of the Royal Commissions Act as ‘an excuse which would excuse an act or omission of a similar nature by a witness or a person summonsed as a witness before a court of law’. Where an individual claims a ‘reasonable excuse’ against the coercive powers of an investigative commission, the matter reverts to the courts, which must weigh up the competing interests of the individual and the commissions of inquiry.

The NSW ICAC Act deals with reasonable excuse at ss.86 and 99. Section 86 of the Act states that reasonable excuse is an acceptable defence against failure to attend hearings, produce documents and answer questions before the Commission. In addition, s.99 of the Act also accepts reasonable excuse as a defence against contempt.

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<sup>28</sup> *Ibid*, pp 73-78



Examples of reasonable excuses against attending hearings include physical or practical difficulties in meeting the commission's directions such as illness, injury or unavoidable delay, or the commission's failure to pay reasonable travel and other expenses. Similarly, reasonable excuse against producing documents and answering questions before the Commission include: that the notice is unreasonable based on the amount of information required or the time allowed to furnish it; that the witness is unable to locate the document after making reasonable efforts; or that the witness holds an honest belief that the documents are not relevant.<sup>29</sup>

### A.3.2 Privilege against Self-incrimination

At common law, the privilege against self-incrimination operates so that an individual cannot be compelled to answer any question, or produce any material, if to do so may tend to bring him or her into peril and the possibility of a criminal conviction. This principle is preserved in legislation in each Australian jurisdiction, notably the *Evidence Act 1995* (Cth) which forms the basis for national uniform evidence legislation.

Almost all legislation establishing commissions of inquiry considered in this paper deal expressly with the applicability of the privilege against self-incrimination. For example, individuals appearing before ICAC are entitled to claim privilege against self-incrimination under s.26 of the NSW ICAC Act where there is a risk that a witness will be compelled to expose him or herself to prosecution and conviction.

However, the privilege against self-incrimination is frequently abrogated in commission legislation by provisions that control the meaning of the term self-incrimination. Importantly, the privilege is frequently abrogated where the answer, document or thing demanded 'might' tend to incriminate the witness. For example, s.37(2) of the NSW ICAC Act and s.18B(1) of the NSW CC Act state that:

A witness summoned to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or other thing on the grounds that the answer or production may incriminate or tend to incriminate the witness, or on any other grounds of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

The privilege against self-incrimination is not, however, abrogated under ss.24(2) and 26(2) of the NSW ICAC Act in relation to the power to obtain information or documents prior to hearings.

The privilege against self-incrimination is similarly abrogated in under ss.105(2) and 107(3) of the QLD CC Act. These sections provide that a person is not entitled to remain silent, or to refuse to answer questions or produce a document at a hearing on the grounds of privilege, other than legal professional privilege. The privilege against self-incrimination is therefore clearly abrogated during QLD CC hearings.

The QLD CJC Act is more complex. Section 94(2) of the Act provides that a person in attendance before the commission is not entitled to remain silent, or to fail to answer a question, or to fail to produce a record or thing, on the grounds that to comply with the commission's requirements would incriminate the person. However, under s.94(2A), this

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<sup>29</sup> Leaver, *op cit*, p 317.

provision does not apply if the person has been charged with an offence and the charge has not been finally dealt with.<sup>30</sup>

### A.3.3 Legal Professional Privilege

Legal professional privilege operates so that confidential communications passing between a client and a legal adviser need not be given in evidence, thereby enabling the client to obtain legal advice. It extends to third parties acting as agents of either the client or the lawyer, and to documents which pass between a lawyer and client.

At common law, legal professional privilege applies in non-judicial proceedings, including proceedings before commissions of inquiry. That said, there are a number of types of evidence to which legal professional privilege does not attach which are particularly relevant to commission investigations:

- a) Legal professional privilege does not protect against disclosure of communications between a client and lawyer in crime or fraud cases. This means that if a commission investigating a crime can establish that legal advice was in some way connected with the furtherance of crime, the commission can compel the disclosure of that advice, even if the lawyer was not aware of the illegal purpose.
- b) Legal professional privilege does not prevent the disclosure of facts that are observed by a lawyer in the giving of legal advice, even if the lawyer would not have observed those facts had he or she not been retained to give legal advice. For example, the client's name and address is not normally privileged, allowing the lawyer to give some assistance in locating a client.
- c) Legal professional privilege does not apply to documents showing financial transactions, as these documents are not concerned with the giving or receiving of advice, and were not prepared for anticipated litigation. As a result, legal professional privilege generally does not interfere with the ability of commissions to investigate money trails.

Furthermore, as with the privilege against self-incrimination, the legislation that confers coercive powers on commissions of inquiry discussed in this paper is capable of abrogating legal professional privilege.

As before, s.37(2) of the ICAC provides that a witness summonsed to attend or appearing before the ICAC at a hearing is not excused from answering any question or producing any document or any other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other grounds of privilege. This provision is easily wide enough to cover legal professional privilege.

Section 18B(1) of the NSW CC Act is similar to the NSW ICAC Act in excluding a claim of privilege on the basis of self-incrimination 'or any other grounds of privilege'. However, it seems that in the NSW CC Act, this provision does not abrogate legal professional privilege. This is because of the additional s.18B(4) which provides that if 'a legal practitioner or other person is required to answer a question or to produce a document or thing at a hearing before the Commission, and to do so would disclose a privileged communication, 'the legal

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<sup>30</sup> Leaver, *op cit*, p 317. Donaghue, *op cit*, pp 83-87

practitioner or other person is entitled to refuse to comply with the requirement unless the privilege is waived by a person having authority to do so’.

By contrast, as noted earlier, the QLD CC Act expressly preserves legal professional privilege. Section 107(3) of the act provides that a ‘person is not entitled ... to refuse to answer [a] question on a ground of privilege, other than legal professional privilege’. Similarly, s.77 of the QLD CJC Act also recognises legal professional privilege as an excuse for failing to comply with a notice to produce any information, record or any thing if it found by a Supreme Court Judge that the claim is valid.<sup>31</sup>

#### *A.3.4 Public Interest Immunity*

Public interest immunity prevents the compulsory disclosure of evidence if that disclosure would be contrary to the public interest. Common examples of classes of evidence in relation to which there may be a public interest of non-disclosure include cabinet papers, minutes of discussions between heads of government departments, diplomatic dispatches, and other documents relating to the framing of government policy at a high level.

Public interest immunity can be claimed to resist the coercive powers of most commissions of inquiry discussed in this paper. However, most commission legislation does not provide clear guidance in relation to whether public interest immunity limits the coercive powers that are conferred by that legislation. The exceptions are the QLD CJC Act, and the NSW ICAC and CC Acts.

The QLD CJC Act states at s.77(b) that a lawful basis for non-compliance with the Commission is a claim of public interest immunity if ‘it is found by the Supreme Court ... that on balance the public interest is better served by withholding the information, record or thing than by disclosure of it’. Accordingly, the QLD CJC's coercive powers are specifically limited by claims of public interest immunity.

By contrast however, s.24(3) and 13(2) of the NSW ICAC Act, and also s.18B(1) of the NSW CC Act, provide that a witness is not excused from answering questions or producing documents on the grounds of a duty of secrecy or other restriction on disclosure. Therefore, it is clear that at hearings of the NSW ICAC and NSW CC, public interest immunity may not be claimed to justify a failure to comply with the commission’s directions.<sup>32</sup>

#### *A.3.5 Parliamentary Privilege*

Parliamentary freedom of speech is enshrined in s.49 of the Commonwealth Constitution, which reproduces article 9 of the English Bill of Rights. Article 9 states that ‘the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament’.

Accordingly, commissions of inquiry in Australia are, on the whole, unable to investigate the truth of statements made in parliament or the existence of evidence to support them. The only instance where this would not be the case would arise if parliament waived parliamentary privilege to give willing members of parliament an opportunity to give evidence to a commission.

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<sup>31</sup> Leaver, *op cit*, p 320. Donaghue, *op cit*, pp 100-108

<sup>32</sup> Leaver, *op cit*, p 321. Donaghue, *op cit*, pp 114-123

The only legislation establishing a commission of inquiry in relation to which a possible question arises concerning the relationship between the legislation and parliamentary privilege is the NSW ICAC and CC Acts. As before, both provide that:

A witness summoned to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or other thing on the grounds that the answer or production may incriminate or tend to incriminate the witness, or on any other grounds of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

These provisions are very widely drawn, and raise the possibility that a witness before a parliamentary committee could be compelled to give evidence that was previously protected by parliamentary privilege. That said, it seems clear that Parliament did not intend that witnesses before the NSW ICAC and the NSW CC should be compelled to infringe Parliament's own privilege.<sup>33</sup>

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<sup>33</sup> Donaghue, *op cit*, pp 123-125

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