Briefing Note

The Independent Commission Against Corruption: An Overview

by

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INTRODUCTION

This Briefing Note aims to give an overview of the Independent Commission Against Corruption (ICAC), from its inception to the present. In the first section, the background to the setting up of this body, along with its enabling legislation, is discussed. The amendments which have been made to date to the Independent Commission Against Corruption Act 1988 are outlined in the second section. The third section looks at criticisms which have been made about ICAC, with proposals for changes to its operations and legislation being put forward in section four. The final section looks at possible future directions for the ICAC.

1 BACKGROUND

1.1 Policy Origins

A central plank of the Liberal/National Party platform in the 1988 State election campaign was the introduction of a permanent body which would investigate corruption in and around the Government of New South Wales and ensure integrity of public administration.

Details on this body, the Independent Commission Against Corruption, were provided in January 1988. The ICAC would:

- be answerable directly to Parliament, giving it structural independence from the Executive Government of the day;
- be able to initiate its own investigations and report publicly, without supervision or direction from the Executive Government;
- be able to investigate criminality and impropriety and to present evidence to the Director of Public Prosecutions and make recommendations to the relevant disciplinary bodies for appropriate action;
- be able to investigate public officials in all State government departments and instrumentalities, whether Ministers of the Crown, members of Parliament, public servants or police. This power would extend also to the judiciary and employees of local government;
- have Royal Commission powers when conducting formal hearings;
- be able to approach the Supreme Court to seek injunctions and restraining orders freezing the assets of persons involved in systematic corruption;
- be able to make recommendations directly to the Attorney-General for the granting of indemnities and to make arrangements for the granting of witness protection;
- hold its hearings in public as a general rule;
- be staffed by hand-picked police officers and legal, accounting and technical experts.[1]

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[1] NSW Leader of the Opposition, Press Release, 15 January 1988

Two months after winning the election, Premier Greiner said:

> We have a clear mandate to establish an Independent Commission Against Corruption. The people expect decisive and positive action to restore the integrity of public administration in this State, and the new Independent Commission is an important part of the Government's overall programme to ensure fair and honest Government in this State.[2]

He went on to announce that the introduction of enabling legislation was a priority for the new Government.

The features foreshadowed in January 1988 were reflected in the Independent Commission Against Corruption Bill which was introduced by the Premier and read a second time in the Legislative Assembly on 26 May 1988.[3]

1.2 Original Legislation

Main features of the Bill as outlined in the Second Reading speech.[4]

Rationale

The rationale behind the establishment of the ICAC was to counter:

> a general perception that people in high office in this State were susceptible to impropriety and corruption ... from this time forward the people of this State will be confident in the integrity of their Government, and that they will have an institution where they can go to complain of corruption, feeling confident that their grievances will be investigated fearlessly and honestly.[5]

Composition

The ICAC was to be constituted as a statutory corporation consisting of a single Commissioner, who would have total direction and control of the Commission - section 4. To be appointed as Commissioner, or Assistant Commissioner, a person would need to be either eligible for appointment as a Supreme Court judge or a retired judge. Practising judges would not be eligible for appointment - section 103 and Schedule 1, clause 1. The reason given for this approach was to ensure that resources of the judiciary were not diverted from judicial work. This was in accord with Government policy to avoid adverse impacts on the work of the courts.

The Commissioner would be appointed for no more than 5 years (section 103 and

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[2] NSW Premier, Press Release, 24 May 1988

[3] Hansard, Legislative Assembly, 26 May 1988, p672

[4] Ibid, pp672-678

[5] Ibid, p673

Schedule 1, clause 4) and could only be removed by the Governor on the address of both Houses of Parliament - section 103 and Schedule 1, clause 6(2). Although it was said that an Assistant Commissioner would be subject to the same conditions of appointment as the Commissioner, an Assistant Commissioner could be removed by the Governor for incapacity, incompetence or misbehaviour - section 103 and Schedule 1, clause 6(3).

Functions

The general functions of the ICAC are set out in Part 4, Division 1, sections 12 to 15. The Commission's paramount concern in exercising its functions is to be the public interest - section 12.

While the ICAC was set up to prevent corruption and enhance integrity in the public sector, it was not envisaged that it be a purely investigatory body. In the short term, its focus would be on investigating allegations and complaints of corrupt conduct. But its functions would also include advisory and educative functions and reviewing practices and procedures of public bodies - section 13.

It was expected that these functions would be more important in the prevention of corruption in the longer term than its investigatory function and that its primary role would become more and more one of advising departments and authorities on strategies, practices and procedures to enhance administrative integrity.

Jurisdiction

While "corrupt conduct" was defined very broadly (sections 7 to 9) it was intended to enforce only those standards established or recognized by law. Its focus was on conduct of public officials or those who although not public officials acted in such a way as to have an impact on public administration.

"Public official" was also broadly defined to give the ICAC jurisdiction across the entire ambit of the public sector, including Ministers, members of Parliament, the judiciary and the Governor - section 3(1).

Its jurisdiction would extend to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal - section 9.

It would be able to investigate corrupt conduct occurring before the commencement of the legislation - section 8(3). However when deciding whether or not to investigate a matter, the Commission was to take into account whether the conduct occurred at too remote a time to justify the investigation.

The Commission would have the discretion to decide what to investigate and how - section 13(1)(a). The only matters it had to investigate were those referred to it by resolution of both Houses of Parliament - section 13(1)(b).

Its focus was to be public corruption and it was to co-operate with law enforcement agencies in pursuing corruption - section 16. It would have the power to refer matters to other investigatory agencies to be dealt with - section 53. It was envisaged that the majority of matters would be dealt with in this way, with ICAC monitoring those

investigations and retaining only the most significant and serious allegations of corruption.

Powers

The ICAC would have very formidable powers, some of which are similar to the coercive powers of a Royal Commission. It would be able to:

- obtain statements of information (section 21) and inspect documents (section 22) and premises (section 23) of public authorities or public officials when investigating a matter

- override claims of privilege by public officials in obtaining documents and information - section 24

- obtain documents and other things from private persons where these may be relevant to the investigation - section 22

The Commissioner would have the power to:

- issue a search warrant or apply to a justice for one - section 40

- apply for warrants for listening devices - section 19(2)

- apply for an injunction from the Supreme Court in circumstances where conduct which is about to occur could cause irreparable harm - sections 27-28

- summon persons to give evidence or produce documents - section 35. A person summoned to give evidence would be obliged to answer questions notwithstanding any ground of privilege or any other ground - section 37

- issue a warrant for the arrest of recalcitrant witnesses - section 36

- recommend to the Attorney-General that a witness assisting the Commission be granted an indemnity - section 49

The Commissioner would **not** be able to punish for contempt. In cases where contempt occurs, it may be certified to a judge of the Supreme Court who would then deal with the matter - section 99.

The ICAC would **not** have the power to conduct prosecutions for criminal offences or disciplinary offences or to take action to dismiss public officials - section 13(3) and section 14(1). Where the Commission reaches the conclusion that corrupt conduct has occurred, it will forward its conclusion and evidence to the appropriate person or body to consider action. It can make recommendations but these are not binding - section 53. However it can require a report back on what action was taken - section 54. Where it considers that due and proper action was not taken, it can report to Parliament - section 55.

Hearings would in general be held in public unless the Commission was satisfied that it was in the public interest that the hearing be held in private (due to the subject-matter of

the investigation or the nature of the evidence to be given) - section 31. Only Assistant Commissioners would be able to assist the Commissioner in running hearings and exercising many of the Commissioner's Royal Commission type powers.

Mechanisms to safeguard rights of individuals

There was an acknowledgment that concerns may be raised of the effect of these powers on civil liberties. It was emphasised however, that tension between the rights of individuals who are accused of wrongdoing and the rights of the community at large to fair and honest government was inevitable. Strong powers were considered necessary, as evidence about corruption can be difficult to obtain. The legislation contained mechanisms to ensure the rights of individuals, who may be the subject of allegations, were safeguarded. Namely:

- although the ICAC was able to investigate corrupt conduct of private individuals which affects public administration, the focus was on public administration and corruption connected with public administration

- it would need to make definite findings about persons directly and substantially involved

- an Operations Review Committee (ORC) would be established to advise the Commission on action to be taken in relation to complaints. The Commissioner would consult the ORC before refusing to investigate a complaint or before deciding to discontinue investigation of a complaint - section 59. This Committee would include the Commissioner and an Assistant Commissioner, the Commissioner of Police, a nominee of the Attorney General and 4 persons appointed to represent community views - section 60.

- ICAC's activities would be monitored and reviewed by a Parliamentary Joint Committee (PJC), which would look at the overall effectiveness of its strategies - section 64.

Independent Commission Against Corruption Bill (No 2)

On 3 June 1988 a new version of the ICAC Bill was introduced and read a second time in the Legislative Assembly.[6] This Bill was substantially the same as the original Bill but "incorporated a number of amendments to meet concerns that have been raised with the Government".[7] The two most significant amendments were as follows:

- the test for corrupt conduct was to be an objective one and not one which depends upon the opinion of the Commission. Conduct would not be corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissal.

- where proceedings are taking place in a court, tribunal or other body, the

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[6] Hansard, Legislative Assembly, 3 June 1988, pp1548-1550

[7] Ibid, p1548

Commission should hold its hearings in private so far as the hearing relates to, or may affect, matters before that court, tribunal or other body. This amendment makes it clear that investigations before the Commission are not to interfere with the rights of persons to a fair trial in the courts or the proper administration of justice - section 18.

In the Second Reading speech, the Attorney General on behalf of the Premier, emphasized the need for the ICAC not to become politicized. For that reason no provision was inserted in the legislation which required parliamentary ratification of the Commissioner's appointment. Consultation would take place however with the Leader of the Opposition before recommending the appointment of the Commissioner.[8]

The original ICAC Bill had been debated extensively in the Legislative Assembly and introduced into the Legislative Council. It was allowed to lapse and the second Bill, incorporating various changes resulting from the Parliamentary debate, was introduced. Having been passed by both Houses of Parliament this Bill was assented to by the Governor on 6 July 1988 with commencement to be on a date to be proclaimed. The Government had undertaken that certain further amendments would be made to the legislation before it commenced. To this end the ICAC (Amendment) Bill was introduced and read a second time in the Legislative Assembly on 2 August 1988.[9] The amendments made at this time included:

A limited legal professional privilege power was introduced, which was confined to communications made between a lawyer and a client for the purpose of receiving or providing legal services for appearances at hearings before ICAC - section 37.

A religious confessional privilege power, which authorized a member of the clergy to refuse to divulge to the ICAC the contents of a confession, unless the person agrees, or a criminal purpose was involved, was also introduced. This amendment was achieved in the Evidence (Religious Confessions) Amendment Act 1989 which was assented to on 19 December 1989.

The scope of the contempt provision was narrowed to ensure that criticisms of the ICAC could be made without a person being guilty of contempt; the secrecy provision was clarified to ensure ICAC officers could give evidence or produce documents in relation to a prosecution instituted as a result of an ICAC investigation (section 111); a new section was inserted to ensure privileges of Parliament would not be compromised (section 122) and the eligibility criteria for appointment as a Commissioner or Assistant Commissioner were extended to persons eligible for appointment as a judge of the Supreme Court of any State or Territory, the Federal Court or the High Court - Schedule 1, clause 1(1)(a).

This Bill was assented to on 9 August 1988 with a commencement date to be proclaimed. Proclamation of both the main legislation and the amending legislation appeared in the Government Gazette No. 30 on 10 March 1989. The commencement date for both was 13 March 1989. It was on this date that the ICAC came into being and the appointment of Mr Temby QC, which had been announced in Parliament on 13 September 1988, took

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[8] Ibid, p1549

[9] Hansard, Legislative Assembly, 2 August 1988, pp2271-2273

effect.

2 AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

There have since been a number of amendments to the ICAC Act and the major changes are detailed below.

2.1 1989 Amendments

In 1989 two Bills were introduced and passed to "enhance the efficient and effective operation of the ICAC".[10] These were the Independent Commission Against Corruption (Amendment) Bill 1989 and the Defamation (ICAC) Amendment Bill 1989. The provisions introduced at this time related to: the appointment of part-time Assistant Commissioners, the employment of staff of the ICAC and the provision of a defence for the publication of a fair report of proceedings at a public hearing of the Commission. These changes were a result of recommendations made by the ICAC.

2.2 1990 Amendments

In 1990 the ICAC (Amendment) Bill was introduced and read a second time by the Attorney General, on behalf of the Premier, in the Legislative Assembly on 21 November. The main purpose of this Bill was to clarify the Commission's powers in relation to the contents of its reports to Parliament required under section 74.

The need for this amendment arose out of the *Balog and Stait v ICAC* case, which was ultimately determined by the High Court.[11] In the original proceedings commenced in the NSW Supreme Court, Mr Balog and Mr Stait, sought a declaration that the ICAC could not make any finding or state any conclusion arising out of an investigation that a person, being substantially and directly interested, was guilty of a criminal offence or of conduct which might constitute a criminal offence. The matter eventually went to the High Court by special leave. On 28 June 1990 the High Court handed down its unanimous decision, which was a restrictive interpretation of ICAC's reporting powers.

In essence the Court held that the Commission was not able to make a finding that a criminal offence may have been committed or that there had been corrupt conduct on the part of any person involved in an ICAC investigation. All the Commission was legitimately able to do under the section was to state whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.

This distinction is very fine and "even from the legal standpoint, it is not unfairly

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[10] Hansard, Legislative Assembly, 5 April 1989, p5987-5898

[11] (1990) 64 ALJR 400

arguable that the difference is one of words, but not of substance".[12] To put beyond doubt the scope of what the Commission could and could not include in its report to Parliament, a legislative change was necessary.

This Bill gave the Commission "a clear and wide power to make and report findings and opinions based on the results of its investigations and to make recommendations for the taking of further action".[13] (This was reflected in section 74A). It also clarified in section 74B that the Commission does not have power to recommend prosecution, but it would be able to state its opinion as to whether or not consideration should be given to prosecution for a criminal or disciplinary offence. Other amendments made in this Bill, which was assented to on 4 December 1990 and commenced on 7 December, were:

- to widen the scope of what could be investigated by the Commission by including in its principal functions (section 13) consideration of whether laws, practices and procedures and methods of work have created a situation where there is a potential for corrupt conduct to occur.

- to limit the restrictions relating to the exercise of the Commission's functions while court proceedings are on foot - section 18.

This provision was originally put in place to protect those involved in criminal proceedings where a jury verdict would be handed down. However the section was open to abuse by its extension to civil proceedings. It encouraged persons directly involved in an investigation to institute proceedings so that ICAC was compelled to delay the release of its report to Parliament. The amendment will mean that the restrictions only apply to criminal proceedings for indictable offences that are to be tried by a jury. In this situation the Commission will be required to conduct hearings in private, suppress the publication of evidence and defer presenting its report to Parliament to the extent necessary to protect an accused's right to a fair trial.

A number of amendments of a procedural nature were made arising from recommendations of the Commission. These were:

- to protect the confidentiality of complaints made to the Commission by prisoners - section 10

- to enable a summons to appear before the Commission to be issued by a judge or magistrate and served outside the State - section 35(6) and (7)

- to ensure that agencies which the Commission assists are subject to the secrecy requirements of the Act in relation to information received from the Commission on a confidential basis - section 16

- to enable documents required to be produced to the Commission to be received by an authorised officer of the Commission - sections 21 and 22

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[12] 'Current Topics', *Australian Law Journal*, Vol 64, Oct 1990, p617

[13] Hansard, Legislative Assembly, 21 November 1990, p10200

2.3 1991 Amendments

On 23 October 1991 a further ICAC (Amendment) Bill was introduced and read a second time by the Attorney General, on behalf of the Premier, in the Legislative Assembly.[14]

"The principal object of the Bill was to give effect to the recommendations of the Parliamentary Joint Committee regarding public and private hearings of the Independent Commission Against Corruption".[15]

The PJC had held an inquiry into Commission procedures and the rights of witnesses. In its first report the importance of public hearings was recognized by the Committee. Exposure was seen as a necessary measure in the fight against corruption and holding public hearings ensures that the way in which ICAC operates is open to public scrutiny and enhances its public accountability. The Committee recommended therefore that ICAC continue to hold the majority of its hearings in public.

However the Committee was also concerned with unnecessary damage to reputations which may result from public hearings. Both the Committee and the ICAC Commissioner expressed concern in relation to media reporting of closing submissions, where the assumption was often made that the closing submissions of counsel assisting the Commission were representative of the provisional views of the Commission. The Commission recommended that the Act be amended to give it greater discretion to determine whether to hold a hearing in public or in private. In making this determination the Commission should have regard to the public interest. As was said in the Second Reading speech: "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".[16]

The Bill does not contain an exhaustive list of factors relevant to the public interest, as these may vary depending on the individual circumstances of each inquiry - section 31(1). However the Commission has produced a document entitled "Procedure at Hearings" which outlines the criteria the Commission will take into consideration. The Bill also authorises the Commission to hear closing submissions in private - section 31(2). The aim of these reforms was to assist in ensuring that unwarranted damage to reputations is avoided. A number of minor amendments of a procedural nature were also made, arising from recommendations made by the PJC or the Commission itself. These were:

- to clarify the right of unincorporated associations to appear and be legally represented before ICAC - section 33A

- to streamline the procedure for the transmission of evidence of criminal offences of other jurisdictions to the appropriate authority - section 14

- to permit information about a public authority's performance to be given directly to the public authority as well as to the responsible Minister - section 14

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[14] Hansard, Legislative Assembly, 23 October 1991, pp3182-3185

[15] Ibid, p3182

[16] Ibid, p3184

- to clarify the grounds on which the Attorney General may grant assistance to witnesses who apply for financial or legal assistance in respect of their appearance before ICAC - section 52. The Attorney General is to have regard to any of the following considerations: the prospect of hardship to the witness if assistance is declined, the significance of the evidence that the witness is likely to give, and other matters relevant to the public interest. This Bill was assented to and commenced on 11 December 1991.

2.4 1992 Amendments

The Statutory Appointments Legislation (Parliamentary Veto) Amendment Bill was introduced and read a second time by the Minister for the Environment, on behalf of the Premier, in the Legislative Assembly on 9 April 1992.[17]

This legislation arose from the Charter of Reform entered into by the Government and the non-aligned Independent members. The aim behind it was to enable parliamentary supervision and right of veto of a number of statutory appointments. These positions (the ICAC Commissioner, the Auditor-General, the Director of Public Prosecutions and the Ombudsman) are ones where the officers are "responsible and accountable to Parliament because they are creatures of accountability and responsibility for all the citizens of this State, rather than merely to the Executive Government."[18]

The effect of this legislation, insofar as it applies to the ICAC Commissioner, is that proposed candidates for the position are examined by the Parliamentary Joint Committee on ICAC, which can veto proposed appointments - section 5A. This Committee will have an extended period of time to do this if it is unable to consider the matter within the originally scheduled time - section 64A. Any material arising from these deliberations is confidential - section 70(1A). This Bill was assented to and commenced on 19 May 1992.

No further amendments have been made to the ICAC Act although recommendations have been made by the PJC,[19] the ICAC and individual commentators since this time. These recommendations are examined in more detail in section four below. The need for a comprehensive review of the ICAC Act was also raised during the Parliamentary debate on the ICAC Metherell report with support for this review coming from a number of Members from all parties.

3 CRITICISMS

Since the introduction of the original ICAC legislation in 1988, criticism from varied quarters has been, to a greater or lesser degree, a constant. Broadly speaking the criticism levelled at the Commission can be placed in one of two main categories: procedural or philosophical. Some of these criticisms have been dealt with in court

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[17] Hansard, Legislative Assembly, 9 April 1992, p2479

[18] ibid.

[19] Report on Review of the ICAC Act, Parliament of New South Wales Committee on the ICAC, May 1993

proceedings, some by legislative amendment, while a number remain to be addressed.

3.1 Criticism on procedural grounds

3.1.1 Definition of corrupt conduct

The most trenchant criticism to date would appear to be that concerning the definition of corrupt conduct, especially following the decision by the Court of Appeal decision in the *Greiner and Moore* case in August 1992.[20] The matter of the Metherell resignation and subsequent appointment to a senior public service position was referred to the Commission by the Parliament pursuant to section 73 of the Act. This occurred after the ICAC Commissioner had advised the Premier that it was best placed to conduct an inquiry into the matter, if one were to be held, as it had the structure and expertise to commence and conduct a hearing quickly and because the events as alleged fell within the ICAC Act.

Public hearings were conducted with submissions on the evidence heard in private to ensure the distinction between sworn evidence and counsels' submissions was maintained. The Report of the first stage of the inquiry, which dealt with an examination of the facts and circumstances of the Metherell matter to determine whether there was any element of corrupt conduct involved, was made public on 19 June 1992. It contained findings that only the conduct of Mr Greiner and Mr Moore was corrupt within the meaning of sections 8 and 9 of the ICAC Act, in that it involved the partial exercise of their official functions and a breach of public trust, and could involve reasonable grounds for dismissing them from their ministerial positions. The Commission found that the conduct of others involved fell outside either section 8 or section 9.

After resigning from office on 24 June 1992, Premier Greiner and Mr Moore challenged the findings made by the Commission. The Court of Appeal handed down its decision on 21 August 1992. In a majority judgment, the Court declared that the finding in the Report that each plaintiff had engaged in "corrupt conduct" within the meaning of the ICAC Act was a nullity.

The provisions of the Act create a two step test to determine whether conduct is corrupt. First, the conduct has to fall within section 8. This section contains a long list of proscribed activities, many of which are unlawful and would be described as corrupt on any view, for example, bribery - s8(2)(b) and blackmail - s8(2)(c), others however are vague and not necessarily unlawful, for example, any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions - s8(1)(b). Second, if the conduct falls within section 8, could it constitute a criminal or disciplinary offence or reasonable grounds for dismissing, dispensing with the services of a public official - section 9 ? If the criteria in section 9 cannot be met, the conduct will not be corrupt. While the Court of Appeal did not criticize Commissioner Temby's finding that the conduct came within section 8, it did not think behaviour, which was not unlawful, could constitute grounds for the Governor or the Executive Council to reasonably dismiss the Premier or the Minister for the Environment.

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[20] *Greiner and Moore v Independent Commission Against Corruption* (1992) 28 NSWLR 125

Following this case both the Commission and the PJC recommended that the definition of corruption be simplified and clarified. The proposal favoured by both bodies was to repeal section 9, which would narrow the scope of findings of corrupt conduct. This proposal, which will be examined in detail below, has not been universally welcomed.[21]

It would appear from the definition of corrupt conduct in the Act, that much thought was given to the sort of conduct which should be caught and the need therefore to make the definition deliberately wide. The problem has been not so much with the types of conduct so characterised, but rather with the term "corrupt" itself and its application. Given that the word "corrupt" has very strong connotations, sufficient regard does not seem to have been had to what the general community understands by the words "corrupt conduct", nor that this understanding will vary, depending on the context from which the definition is derived.

Jackson and Smith[22] have posited that what is meant by corruption can be derived from three possible sources: the law, the public interest and a social definition derived from community perceptions. At law it may be possible to argue that if something is not illegal it cannot be corrupt, but in practice this defence is worth little when a public official is accused of conduct, which although not illegal may be seen by the community as inappropriate. Taking the "public interest" as a source is not particularly helpful either as there is no precise definition of what this term means and "almost everything has been said to be in the public interest at one time or another".[23] The last source is the community perception of corruption, which means that if the community thinks something is corrupt, then it is corrupt. And while this belief is based on perception rather than some objective test, it is even harder to dispel.

A clear pattern emerged from the responses in the Jackson and Smith study. Where there was agreement between parliamentarians and electors in strongly condemning conduct related to political activities (such as an official personally profiting from the government purchase of land), there were several common characteristics present: a material pay-off which was large and immediate, the use of public office and the type of favour involved. Where there was a difference of perception as to corruption, (such as a parliamentarian obtaining government contracts for a firm in one's own electorate) it was ascribed by Jackson and Smith to a contrast between an insider and an outsider perspective. Like the members of any profession, they said, parliamentarians develop informal conventions for daily business. To those inside the profession these conventions (which are largely invisible to those outside it) are just ways of doing business. However when they are

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[21] Gary Sturgess, the original architect of the ICAC legislation said it would be "positively dangerous" and that without section 9 the ICAC could become a "morals tribunal", 'Exit the nose-puller,' *Sydney Morning Herald*, 12/3/94.

[22] Michael Jackson and Rodney Smith teach political science at the University of Sydney and the University of New South Wales, respectively. They recently conducted research on what is meant by the term corruption by surveying more than 100 State parliamentarians and 500 citizens. They presented a number of scenarios about political activities (such as use of public moneys, official appointments, electoral donations, conflicts of interest and the like) and asked the participants to state how corrupt they thought the various activities were. The findings of this study were discussed in 'Scaling down the corruption hounds', *Sydney Morning Herald*, 14/4/94.

[23] ibid.

revealed, they attract criticism.

Jackson and Smith conclude their article by saying that insiders will tolerate practices that are invisible to the outside community and that "if these practices are not tested through exposure by the ICAC or a similar body to see if they are acceptable to the community, the danger is that insider toleration will expand to ever more unsavoury practices". It is interesting to note that this point now seems to have been picked up on as both the Commission and the PJC have recommended the abolition of the label of "corrupt conduct".[24]

3.1.2 Operations Review Committee

Some criticisms/recommendations have been made concerning the ORC:

- The Chair of the PJC should be a member of the ORC.[25] This suggestion was considered by the Government but not accepted. As part of the PJC function is to consider the interaction between the ICAC and the ORC, it was felt that the Chair of the PJC would be put in a difficult and untenable position if he or she were a member of both Committees.

- The ORC should be required to report to Parliament on its activities.[26]

- The composition of the ORC membership should be amended as it currently includes an officer heading an institution, which is often a target for the ICAC, namely the Commissioner of Police.[27]

The PJC has also produced a report recommending changes to the ORC. These are dealt with in detail below.

3.1.3 Parliamentary Joint Committee

Criticisms have been made of the PJC as an adequate form of accountability. To strengthen its role and functions, it has been suggested that its powers should be clarified, it should ratify all senior appointments to the ICAC, not just that of Commissioner, it should be given the power to issue guidelines as to the broad policies, priorities and practices of ICAC and following on from this, it should be given sufficient powers and resources to interrogate ICAC to ensure that ICAC follows the guidelines it sets.[28]

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[24] Op. cit., Note 19, Summary of Conclusions, pii

[25] This suggestion was made by the Member for South Coast during the original debate. Hansard, Legislative Assembly, 3 June 1988, p1549.

[26] Michael Bersten, 'ICAC: a critique', *Criminology Australia*, 1 (1) June-July, 1989, pp8-10

[27] ibid.

[28] ibid.

3.1.4 Independence of the Judiciary

At the time the legislation was introduced, criticisms were raised by the NSW Bar Association and members of the judiciary concerning the independence of the judiciary. In accordance with the separation of powers doctrine, the judicial function should be completely separate from the legislative and executive functions and it was felt that examination of the judiciary by a body such as ICAC may compromise this. However the Government's view was that everyone in public office is the same before the law including Ministers of the Crown, the judiciary or whoever.[29]

3.1.5 Referral of Matters by the Commission

In its Annual Report for 1989-90 the Commission[30] commented on two practical difficulties associated with Part 5 of the Act, which empowers it to refer matters to another body for investigation or other action. The first was that while ICAC may have the power to refer a matter to a "relevant authority", that body needs to be authorised under its own legislation to carry out the particular action. If it is not, then it cannot take any action in the matter. The second was that ICAC when it refers a matter, cannot direct but can only recommend what action should be taken by the relevant authority.

3.2 Criticism on philosophical grounds

Apart from criticisms of operational and procedural matters, criticisms have also been voiced on philosophical grounds. The most significant of which are outlined below.

3.2.1 Civil liberties

Concerns were expressed when the ICAC legislation was introduced that the special powers it had in relation to the conduct of both investigations and hearings (such as the power to issue search warrants and seek restraining injunctions), were too extensive and that they could have an adverse effect on civil liberties.[31] A more specific criticism of these powers is that they enable the Commission to lawfully initiate and conduct an inquiry with the following characteristics:[32]

- it can commence an investigation on the basis of mere rumour;
- individuals directly implicated by the rumours can be ordered, under threat of prosecution for contempt, to attend, answer questions and provide documents, with or without legal representation;

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[29] Hansard, Legislative Assembly, 3 June 1988, p1550

[30] Report of the Independent Commission Against Corruption for the year ended 1990, p100

[31] The following list - the ALP in the parliamentary debate, the Bar Association of NSW, the Council for Civil Liberties, the Australian Journalists Association, the Australian Criminal Lawyers Association and a number of newspapers - were cited by Michael Bersten in his article 'Making the ICAC work', *Current Issues in Criminal Justice* No 2, March 1990, pp67-117 at p85

[32] Patrick Fair, 'ICAC under the microscope - The need for reform', *Law Society Journal*, Vol 30 (11), December 1992, pp38-41

- individuals summoned before ICAC may be made subject to secrecy orders;

- individuals suspected of corrupt conduct need not be informed of what it is they are suspected of having done;

- in relation to hearings, there is no right for the persons being investigated to know the precise hypothesis which leads ICAC to believe they may be corrupt, no right to put a case in defence, no right to silence, no privilege against self-incrimination, no right entrenched in the legislation for persons damaged or defamed during the course of the investigation to be vindicated by the findings of the Commission nor by legal action outside it, no right for an affected person to be cleared other than to say that no criminal charges are recommended, ICAC is free to express an opinion regarding the conduct of the accused generally, without regard to evidence, which would be admissible in a court, or right of appeal by the person concerned;

- a person may have spent a lot of money in legal representation and be vindicated by the Commission in its Report, but that person will not be entitled to compensation.

According to Fair, the potential for an inquiry with these characteristics make ICAC "a serious affront to the basic rights and dignity of honest people in NSW".[33]

3.2.2 Public v Private hearings

Although it has been said that holding hearings in public is akin to "running show trials", in general there has been support for public hearings and the practice is cited to counter allegations that the Commission is a "star chamber". This view however is not universally shared [34] and criticisms have also been raised on occasion when matters have been heard in private.[35]

It is a matter of balancing the public interest with those of the individual. On the one hand it is important to instil confidence in the community that the ICAC does not operate in a covert manner and that its processes are open to public scrutiny. On the other hand, it is important to recognize the potential for damage to the reputations of individuals connected with an ICAC investigation. It was felt that sensational coverage of public

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[33] Ibid., p39

[34] W G Roser, 'The ICAC: the new star chamber', *Criminal Law Journal*, (1992) 16, pp225-245 and in 'ICAC laws blot on NSW: Wran', *Sydney Morning Herald*, 30/4/94, the former Premier is quoted as saying "... rid the ICAC legislation of its glaring abuses of civil rights and insert a sunset clause to provide for the termination of this star chamber approach to the dispensation of justice"

[35] Following the inquiry by the ICAC into the out-of-court settlement of a defamation case involving the Treasurer, Hon. P. Collins MP, although the Assistant Commissioner in charge of the inquiry, ultimately handed down a finding exonerating Mr Collins of any corrupt or improper conduct in the matter, criticisms were made of the way in which the inquiry was conducted. Public hearings were not held, only written submissions were considered. A view was expressed that the inquiry would have benefited if witnesses had been called and cross-examined - 'Questions still about Collins', *Sydney Morning Herald*, 29/1/94. Assistant Commissioner Holland QC felt however that there was "abundant evidence to establish the relevant facts without the necessity for hearings" '"Imprudent" Collins cleared over out-of-court settlement', *Sydney Morning Herald*, 29/1/94

hearings by the media heightens this. The 1991 Act amendments, which have lead to closing submissions frequently being heard in private, were introduced in an attempt to prevent premature views being expressed.

3.2.3 Contempt

It has also been argued that ICAC has the potential to act as an official secrets "watch-dog" given it's ability to make a finding of corrupt conduct in relation to misuse of information by a public official - section 8(1)(d). The concern is that if a public official "leaks" information in the public interest, the definition of corrupt conduct is so broad that this could be caught.[36] Moreover a journalist to whom this information has been passed, may be at risk of contempt charges if the source of the information is not revealed. An example of this was seen recently when the Commission commenced proceedings in the Supreme Court certifying contempt of the Commission by a Sydney journalist who would not reveal her source. The judge found the journalist had committed contempt of the Commission and handed down a two months suspended sentence. The decision is currently on appeal.

3.2.4 Hong Kong ICAC an inappropriate model

Comparisons are often drawn with the operations and achievements of the Hong Kong ICAC as the NSW ICAC was said to be modelled on it.[37] However certain differences in the operation and function of that body need to recognised.

Findlay[38] argues that the ICAC model set up in Hong Kong was socio-culturally specific and not readily transferable into a community which has a different social, cultural, legal and political environment. Corrupt practices such as "gift giving", commissions and bribes were a long practised tradition in Hong Kong commerce and to overcome them it was necessary to change the community's perception of corruption and its effect in order to prevent it. While the Hong Kong ICAC obviously had an investigative function, the emphasis was placed on corruption prevention through community awareness.

The Hong Kong ICAC differs from the NSW ICAC in the following ways: it is much larger and it examines corruption in both the public and private sectors. There is no exhaustive definition of corruption in the enabling legislation, which leaves it up to ICAC to determine, on a case by case basis. Investigations are carried out privately and unobtrusively with due regard for the need to protect the interests of persons under investigation. After the ICAC has conducted an investigation and assembled evidence, officers from the Attorney-General's Department examine it and advise on which cases should be prosecuted.

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[36] Op. cit., Note 31, p89

[37] However in a paper presented at a recent conference, Gary Sturgess, said that the NSW ICAC shared nothing in common with the Hong Kong ICAC except its name and that this had led to persistent confusion as to the fundamental nature of the NSW body. 'Guarding the Polity: the NSW ICAC' appears at Appendix 4 to the Collation of Evidence of the Commissioner on General Aspects of the Commission's Operations, 4 March 1994 at p8

[38] Mark Findlay, 'Institutional responses to corruption: some critical reflections on the ICAC', *Criminal Law Journal*, Vol 12 (5), October 1988, pp271-285

In a later article[39] Findlay questions some aspects of the NSW ICAC: it was created within a highly politicised environment, and as a consequence its mandate is far more open ended; its powers are significantly restrictive by comparison with the Hong Kong body; the NSW ICAC relies heavily on public inquiries to gather information and then this information is of limited application in any eventual criminal court proceedings. Public hearings can be used as "an opportunity for trial by media and the punitive public ransom of reputation". He says that the threat of public shaming might tend eventually to distance the ICAC from sources of community based information which are strenuously protected by privacy provisions in the Hong Kong legislation.

Findlay's underlying thesis is that the community values being appealed to in Hong Kong which make the Hong Kong ICAC work, do not strike the same chord in Australia with the result that the effectiveness of the NSW ICAC will be necessarily limited.

4 RECOMMENDATIONS FOR CHANGE

4.1 ICAC proposals

The ICAC has made recommendations for legislative change each year in its Annual Report. While a number of these have been implemented (extra-territorial service of ICAC summonses, broadening of production of documents powers, protection of confidentiality of complaints by prisoners), others have not.

Some of the recommendations not implemented to date are:

- a legislative amendment to permit transcripts from Commission hearings to be used in connection with committal proceedings in prosecutions resulting from Commission investigations;[40]

- creation of offences penalising wilful action which prejudices complainants to the Commission;

- extension of sections 93 and 94 to protect persons who have complained to the Commission in good faith and to protect persons who have been summonsed to appear or who have been served with a notice under sections 21 or 22;

- the forms of victimisation which are proscribed in section 93 and section 50 should be made consistent;

- section 109(5) should be extended to liability for disciplinary offences;

- the protection of section 109(5) and (6) should be extended to persons, acting in good faith, who make complaints or assist the Commission;

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[39] Mark Findlay, 'ICAC and the community', *Current Issues in Criminal Justice*, No 2, March 1990, pp118-128 at p123

[40] The first recommendation was contained in the Report of the Independent Commission Against Corruption for the year ended 30 June 1992, the following six points were contained in the Report for the year ended 30 June 1990

- section 11 should be amended to impose a duty on Ministers to report possible corrupt conduct despite the fact that Ministers are already caught by the Act in a general sense because each is a public official - s3(1).

4.2 Parliamentary Joint Committee proposals

The PJC which is established under section 63 of the ICAC Act, performs its functions by requesting the Commissioner to give evidence before it in public hearings twice yearly, by referral of unsolicited complaints from members of the public to the Commission for response, and by conducting inquiries on particular topics. The findings and recommendations of three major reports are discussed below.

4.2.1 Recommendations arising out of the PJC Report on the Operations Review Committee

The PJC also conducted an inquiry into the role of the ORC and its functions.[41] In this report it made a number of recommendations which in brief are as follows:

- section 59(1)(a), which sets out the functions of the ORC should be amended to clearly state the ORC's functions and provide for an orderly manner in which investigations can commence;

- the limits on what can be examined by the ORC should be extended to include the addition of a random audit role in relation to the categorisation of matters as "complaints" and "information" by the ICAC;

- consideration should be given to the establishment of an ORC sub-committee to consider minor complaints;

- the ORC should be able to call for ICAC staff to appear at ORC meetings to justify the recommendations contained in their reports;

- in the interests of public accountability and fairness, an amendment to section 20 to require ICAC to provide complainants whose matters are not investigated with reasons for its decisions;

- to ensure that the ORC is a credible accountability mechanism, it should report on its activities. Neither the PJC, ICAC or the ORC itself considered it appropriate though for the ORC to report to the PJC. It was recommended that an appropriate reporting mechanism would be for both the ORC and the PJC produce an Annual Report to Parliament. Details of the content of these Annual Reports were to be examined in conjunction with the ORC.

4.2.2 Report on the Review of the ICAC Act

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[41] Report on the Operations Review Committee and Assistant/Deputy Commissioners, Parliament of New South Wales Committee on ICAC, July 1992

Following the Court of Appeal decision in the *Greiner* case in August 1992, the PJC issued a discussion paper which identified ten key issues for review. At the conclusion of the inquiry, the Committee had resolved eight of the key issues and determined to refer the remaining two issues to the Law Reform Commission for further advice.

The following information is based on the Summary of Conclusions contained in its Report, which was released on 2 June 1993.[42]

The ten issues are as follows:

- Definition of "corrupt conduct"

The Committee found that the current definition is overly complex and fraught with difficulties and, according to the Court of Appeal, "apt to cause injustice". When looking at how the definition could be improved, the Committee endorsed the view that ICAC must be able to investigate all public officials, including ministers, members of parliament and judges - the "great and powerful" should not be outside the reach of the ICAC.[43]

The PJC recommended that section 9 be repealed and that section 8 should remain largely in its present form. The Committee expressed the view that the existing section 8 gives ICAC jurisdiction over "corrupt conduct" and that it may be more useful for the section to refer simply to "conduct" or, if it were necessary to define the conduct in some fashion, then a term like "relevant conduct" may be more appropriate. Section 8 should also be amended to expressly enable the ICAC to investigate possible criminal conduct related to official corruption, including matters where organised crime and official corruption may be linked.

These recommendations reflect statements made by both the Premier and the Attorney General in Second Reading speeches on the original legislation.[44]

- Findings about individuals

The PJC reaffirmed that ICAC is a fact finding investigative body and it agreed that the present requirement under the ICAC Act for the ICAC to place "labels" of corrupt conduct on individuals should be removed.

As to the nature of the findings of fact that the ICAC should be able to include in its reports, conflicting views were received. Submissions were made to the PJC that ICAC findings should be limited to "primary facts" in respect of adverse findings about identifiable persons. The point seems to be that ICAC should be able to make findings as

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[42] Op.Cit., note 19

[43] Ibid, pi

[44] "It has an extensive jurisdiction that applies across the entire public sector. No one has been exempted. Ministers, Members of Parliament, the judiciary and the Governor will all fall within the jurisdiction of the ICAC", Hansard, Legislative Assembly, 26 May 1988, p674 and "This body set up by the Government is the first of its kind. It is unique in that it makes the Government subject to examination". Hansard, Legislative Assembly, 3 June 1988, p1550

to what actually transpired, but it should not be able to interpret these factual findings to arrive at a judgment as to the nature and character of the conduct. If ICAC is in a position to make such a legal pronouncement, then provision should be made for a statutory right of appeal against its findings. However ICAC expressed the view that if it were limited in such a way, it could do little more than present a summary of the raw transcript as evidence.

The PJC determined to refer this matter to the Law Reform Commission for advice on: what is meant by "primary facts", what would the effect of the proposed limitation be upon ICAC's effectiveness and what the likelihood of litigation arising from the proposed limitation would be.

The PJC believes the requirement for ICAC to make statements of opinion about consideration of prosecution, disciplinary action or dismissal under s74A(2) of the Act should remain in place. However in relation to constitutional office holders, ICAC reports should not contain statements about consideration of dismissal. This decision should remain the prerogative of Parliament.

Section 73 should be amended to provide Parliament with the discretion to determine the extent of the findings it requires from the ICAC by varying limitations/requirements which apply to ICAC findings generally.

- Judicial review and appeal mechanisms

The PJC determined that the current extent and nature of judicial review of the ICAC is appropriate and that there is no need for common law remedies, available in the case of legal or procedural error by the ICAC, to be entrenched in legislation. The question of whether there should be an appeal mechanism to review findings of fact is linked to the question of the nature of findings of fact which the ICAC should be able to make. This issue will also be referred to the Law Reform Commission for advice.

- Industrial Tribunals

The PJC called for a review of the rights of public officials to have disciplinary or dismissal action arising from an ICAC inquiry reviewed, to ensure greater equity of access to industrial tribunals.

- Standards to be applied by the ICAC

Based on its interpretation of s9(1)(c), the Court of Appeal in the *Greiner and Moore* case, mandated that the ICAC apply objective standards, established and recognised at law. The Committee recommended the repeal of section 9 to simplify and clarify the definition of corruption, which will effectively remove this mandate. In its place, the PJC recommended that a new section be inserted into the ICAC Act, which would entrench the requirement for the ICAC to apply objective standards, established and recognised at law, in any findings which it makes about named or identifiable individuals in public reports.

- Protection of civil liberties

There should be judicial scrutiny applied to the exercise of coercive powers by the ICAC. While it did not recommend any changes to the power to issue search warrants (as there may be circumstances where this power is needed), the Committee endorsed the policy of Commissioner Temby that all search warrants should be sought from judges.

The PJC did not recommend any changes to the contempt provisions. It supported the principle that nothing should be done to suppress or discourage constructive criticism of the ICAC but felt that it was essential that ICAC have available to it all the means necessary to maintain proper control over investigations and hearings. The ability to take action against contempt in the face of the Commission is an essential tool to this end. It was recommended however that the Attorney General should establish an inquiry into the contempt provisions which operate in the Courts and other tribunals to ensure consistency across the board applies

- Follow up action on ICAC reports

If the ICAC is to have a long term effect upon corruption in NSW it is essential that its recommendations be acted upon and followed up. Parliament must retain the right to consider, debate and sometimes ultimately reject the ICAC recommendations for legislative change. Similarly the government must retain the right to consider and reject ICAC recommendations for changes to administrative procedures and practices. However when this happens, reasons for the decision to reject the ICAC's recommendation should be made available to the public.

The PJC recommended that the ICAC Act be amended to provide that the relevant Minister should inform the Parliament of his/her response to any ICAC report concerning his/her administration within 6 calendar months of the tabling of the ICAC report.

It recommended that the ICAC establish a protocol with the Director of Public Prosecutions, recommending an appropriate time frame in which prosecutions arising from ICAC reports should be completed. Similarly where ICAC recommends disciplinary or dismissal proceedings, an appropriate time frame for completion of such action should also be made.

- Profile of corruption

The Committee recognized that a profile of corruption in the NSW public sector prepared by ICAC could be a valuable exercise. This would enable an historical picture of corrupt conduct and the ICAC's work to build up over time. It could provide a benchmark against which the effectiveness of the ICAC and its target selection could be measured. It could also be an important tool in corruption prevention. As the preparation of such an overview would be an onerous task and the PJC said that in view of the ICAC's current heavy workload it was unlikely that the Commission would be in a position to produce such a profile of corruption in the short term. It would therefore not be appropriate to amend the ICAC Act to require the ICAC to prepare such a profile.

- False complaints and public statements

Any amendments to the ICAC Act to deal with the problems of false complaints and public statements about complaints must not discourage or inhibit genuine complainants

from coming forward and providing information to the ICAC. Section 81 provides a sanction against false complaints and the PJC recommended that this section be reviewed to determine whether it can be improved to ensure that action may be taken in all appropriate cases. Consideration should be given to requiring the ORC to advise the ICAC whenever it feels that action under section 81 would be appropriate in relation to a complaint with which it has dealt.

- Duty to notify Commission of possible corrupt conduct - section 11

This section places a duty on a specified set of people (the Ombudsman, the Commissioner of Police, the principal officer of a public authority and an officer who constitutes a public authority) to report to the Commission "any matter that the officer suspects on reasonable grounds concerns corrupt conduct". A number of ICAC's most important inquiries have resulted from reports under this section and it should not be weakened. But it can be improved to provide "a more workable regime from the point of view of public authorities".[45] The PJC recommended that it be amended to provide for a clear distinction to be drawn between serious matters which require immediate reporting and minor matters which can be reported by schedule. It should also be amended to include a provision as to the timeliness of reports of serious matters. If necessary, it should be amended to ensure that there is full and adequate consultation between ICAC and principal officers as to action to be taken on section 11 reports.

- Entrenchment of Committee recommendations

The PJC recommended that the regulation power in section 117 of the ICAC Act should be expanded to enable regulations to be made on procedural or policy matters on the initiative of the PJC. In formulating any such regulations the Committee must consult with the ICAC but the ICAC should not be able to veto the regulations.

It also recommended that the ICAC Act should be amended to require the ICAC to comply with the merit selection principles in the Public Sector Management Act 1988. The ICAC expressed the view that amending the Act in a manner generally consistent with the report of the Joint Parliamentary Committee would make it more effectively workable.[46]

The recommendations of the PJC, including the references to the Law Reform Commission, are still to be acted upon.[47]

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[45] Ibid, pviii

[46] Report of the Independent Commission Against Corruption for the year ended 30 June 1993, pvii.

[47] 'ICAC in limbo as Government stalls on changes', *Sydney Morning Herald*, 23/7/94 and in the "Collation of Evidence of the Commissioner of ICAC on General Aspects of the Commission's Operations", 4 March 1994, Commissioner Temby said at page 22, "It is disappointing and frustrating that 18 months after the Court of Appeal decision and 9 months after the PJC report, the Act remains unchanged, so far as the Commission knows there has been no referral to the Law Reform Commission as recommended by the PJC and the intentions of Government as to statutory amendment are unknown".

4.2.3 Report on the inquiry into section 52

Following its inquiry into section 52, involving legal representation before the Commission, the PJC made several recommendations in a report issued in June 1993.[48] The Committee's view was that section 52 should be amended to provide a rebuttable presumption in favour of the granting of assistance to "affected persons" and "persons substantially and directly interested in the subject-matter of a hearing". The decision-maker should be given a clear discretion to determine the appropriate level of representation and assistance.

The PJC recommended that the Attorney General remain the decision-maker in respect of section 52 applications and should exercise this function on the advice of crown law officers. In controversial cases (such as where an application has been made by a parliamentary colleague), the Attorney General should have the discretion to delegate this decision making power to the Solicitor General. Once the amendments are in place, the Attorney General should publish the criteria against which section 52 applications are to be made. An option of providing for the Attorney General's decisions under section 52 to be reviewed by the Legal Services Commissioner was also raised by the Committee.

4.3 Government proposals

In mid-June this year it was announced that Mr Justice O'Keefe was the Government's choice to succeed Mr Temby, whose term as ICAC Commissioner had expired in March. The proposal was referred to the PJC as required by the ICAC legislation and on 7 July support for the proposed appointment was given. However before Justice O'Keefe can take up the position, certain legislative amendments need to take place.

The present legislation stipulates that practising judges are not eligible to be appointed as ICAC Commissioner.[49] However Justice O'Keefe does not want to resign from the Supreme Court bench, as he would like to return once his five year term as ICAC Commissioner has expired. To permit Justice O'Keefe (or any other practising judge) to take up appointment as ICAC Commissioner, Schedule 1, clause 1 will need to be amended. Premier Fahey has justified the proposed amendment in the following terms:

> Judicial office holders are well qualified to fill the Commissioner position and the Government does not consider it desirable to allow obstacles to such appointments to exist... Rejection of the legislation would effectively remove from the pool of prospective ICAC Commissioners the very group of people who possess the highest skill and expertise required for the job.[50]

There is a divergence of opinion on whether judicial officers should sit for limited terms

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[48] Report on Inquiry into Section 52 of the ICAC Act and Legal Representation before ICAC, Parliament of New South Wales Committee on ICAC, June 1993

[49] As stated earlier, the reason given for this in the Second Reading speech to the original Act was to prevent resources being diverted from the judiciary

[50] 'O'Keefe ICAC job hangs in the balance', *Sydney Morning Herald*, 8/7/94

on other bodies and then return to the bench.[51] Apart from any question of perception, the other major argument relates to the potential for conflicts of interest. Namely if a judge returns to the bench after a term at a body such as ICAC, there may be cases over which he or she presides, where sensitive and highly confidential information learnt as ICAC Commissioner is involved. However in a situation such as this, it would be possible for the judge to decline to hear the matter. It should also be pointed out that as there are currently no restrictions on the future employment of the ICAC Commissioner once his or her term has expired, the possibility of that person being appointed to the Bench and confronting ICAC-related material already exists. There is also an argument for saying that if future prospects are guaranteed then the ICAC Commissioner can act without fear or favour.[52]

Another condition of Justice O'Keefe accepting the position is that an amendment to provisions regulating judicial pensions needs to be made. Supreme Court judges are not eligible for a pension until they have served five years and the position of ICAC Commissioner does not currently attract pension entitlements. If Justice O'Keefe resigns to take up the position of ICAC Commissioner, he would forfeit his judicial pension entitlement, as service at ICAC would not be recognized. However the proposed amendment would permit time spent at the ICAC to count as "service" for judicial pension purposes. In effect what is being proposed is the option of "secondment" from the Supreme Court to the ICAC position.

However concern has also been expressed that if this proposal is introduced then the cost of the ICAC Commissioner would be significantly increased.[53] Justice O'Keefe indicated in mid-August that he would not take up the position until the necessary amendments have been made and the Premier foreshadowed that legislation would be introduced on the first day of the Parliamentary Budget Session.[54]

4.4 Other recommendations

In Fair's article on ICAC previously referred to in this Briefing Note, recommendations for change were also made. He argued that "many of the weaknesses and inequities which come about through the operations of the ICAC can be overcome by modifications

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[51] In 1984 the former Chief Justice strongly opposed the appointment of Justice Stewart to the head of the National Crime Authority on the grounds, broadly, that it could damage the court for a judge to be seen as a "police officer". However it would appear from the appointment of Justice Wood to the Royal Commission into police corruption that the present Chief Justice does not share the same views in so far as a judge being seen as an "inquisitor" is concerned - 'ICAC put in jeopardy', *Sydney Morning Herald*, 9/7/94. More recently, the member for South Coast, has indicated that the PJC should consider "a clear career path for retiring ICAC Commissioners which included the automatic offer of a seat as a judge" 'Temby row may force changes to ICAC Act', *The Australian*, 30/7/94

[52] "The Commissioner will be able to make tough decisions in the knowledge that the re-appointment to the Supreme Court is guaranteed" - member for Bligh - 'ICAC put in jeopardy', *Sydney Morning Herald*, 9/7/94

[53] An ALP member of the PJC has said "The ICAC salary is considered sufficient not to need pension rights. Clearly if he is continuing as a judge then there is a considerable amount of extra money involved" 'ALP slams "benevolent fund" for ICAC Chief', *The Australian*, 8/7/94

[54] 'More delays for the new ICAC head', *Sydney Morning Herald*, 18/8/94

to the Act".[55] The following modifications were suggested:

- the definition of corruption should be deleted and replaced by a short definition such as "payment in money or kind to a public servant for benefits which the public servant is able to provide because of his or her public office";

- ICAC should be obliged to prove beyond reasonable doubt the precise substance of any rumour or allegation which triggers an inquiry before being permitted to embark upon a wide ranging fishing expedition;

- any wide ranging investigation must be properly described in terms of persons and government departments and should disclose precisely the corruption which ICAC believes might exist;

- the person who sits on an inquiry and writes the report should not be of the Commission. The process of inquiry would have integrity if the person receiving and reporting on ICAC's efforts was independent of ICAC;

- all parties called before ICAC should be entitled to legal costs;

- a fund should be established to compensate innocent parties for loss caused by the process of an ICAC investigation;

- if ICAC decides to proceed with an investigation which will result in a formal report, the Commissioner should have regard only to evidence normally admissible in a court;

- parties appearing before ICAC should be entitled to cross examine witnesses as of right;

- there should be an avenue for appeal from decisions made by ICAC during investigations, at hearings and in its reports.

An amendment has also been suggested by the member for South Coast, concerning the post employment of former ICAC Commissioners.[56] After the expiry of his term as ICAC Commissioner, Mr Temby QC, returned to the private Bar in Sydney. In this capacity he accepted a brief to represent the NSW Police Service at the upcoming Royal Commission into police corruption. His decision attracted wide spread criticism, as there was a perception that the potential for conflict of interest existed. Eventually the Premier intervened and ordered that Mr Temby's services not be used "to restore community faith that the Royal Commission would carry out its charter". It was mooted after this incident that the Parliamentary Joint Committee on ICAC should look at whether restrictions on future employment of ICAC Commissioners should be put in place.

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[55] Op. cit., Note 33, p41

[56] 'Temby row may force changes to ICAC Act', *The Australian*, 30/7/94

5 FUTURE DIRECTIONS

The future directions of ICAC will depend not only on the assessment of its performance and achievements to date, but on any re-assessment of its role and functions which flow from this. Amendments made to the Act resulting from these assessments will present a clearer picture of where ICAC is headed. It is also reasonable to assume that the different perspectives and experiences, which each new Commissioner will bring to the job, will to a certain extent, shape the direction ICAC takes.

5.1 Achievements

In its first five years of operation the ICAC conducted 66 formal investigations (including the Milloo inquiry into the relationship between police and criminals which recommended 12 serving and former police officers and a solicitor be considered for criminal or disciplinary charges). There have been approximately 280 recommendations for criminal prosecutions and 90 recommendations for disciplinary charges or dismissals. So far there have been 21 successful prosecutions and 72 disciplinary actions taken. It would appear from the number of cases referred to ICAC since its early days that public confidence has steadily grown. There were 3670 cases referred in the 1990/91 reporting year compared with 5150 cases in the 1992/93 reporting year.[57]

A Corruption Prevention Department, an Education Unit and a Research Unit were established within ICAC to carry out its corruption prevention and public education functions. Since the establishment of these services, the Commission has released discussion papers and a series of anti-corruption booklets, become involved in a project to put corruption prevention on the school curriculum, undertaken a major survey of public sector employees about their views on and understanding of corruption, instigated a number of public awareness campaigns through the media and completed a public education campaign during which ICAC officers visited 90% of the State over an 18 month period to explain ICAC's work to public officials.[58]

When the ICAC legislation was originally put in place, it was suggested that a review of ICAC's operations be conducted after it had had an opportunity to perform in practice, to ensure it was fulfilling its objectives and functions.[59] The main indicator of ICAC's effectiveness would seem to be the extent of public confidence in NSW public institutions. It would be equally important to see whether ICAC had failed to meet its goals or had abused its powers. This could be done by gauging the impact of the ICAC on the level of corrupt conduct, and on the conditions which make corruption likely and possible and by examining the nature and extent of any abuse of ICAC powers.

Recently the ICAC engaged the Roy Morgan Research Centre to carry out a random public attitude survey (sample comprised of 520 adults in NSW) to obtain information about the public's perceptions of corruption, their understanding of ICAC's work and

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[57] 'A tough act to follow', *The Australian*, 12/3/94.

[58] Achievements listed in the various ICAC Annual Reports

[59] Michael Bersten, op. cit., Note 32, p81

about their level of support for that work.[60] From this survey the following data emerged on the public's opinion about ICAC:

> 92% agreed or strongly agreed with the statement *Having the ICAC is a good thing for the people of NSW* (4% were unable to offer an opinion).
>
> 90% agreed or strongly agreed with the statement *The ICAC has increased public awareness about corruption in the NSW public sector* (3% were unable to offer an opinion).
>
> 82% agreed or strongly agreed with the statement *The ICAC is helping to make the NSW public sector more accountable* (8% were unable to offer an opinion).
>
> 80% considered that the Commission had been successful or very successful in *exposing some* of the corruption which has occurred in NSW (11% were unable to offer an opinion).
>
> 53% considered that the Commission had been successful or very successful in *reducing some* of the corruption which has occurred in NSW (17% were unable to offer an opinion).

Despite any of the achievements ICAC may have had,[61] and public statements of support,[62] there are those who feel that the extent of corruption in NSW does not justify the social, political, and economic costs of an agency such as ICAC.[63] Commentators such as Fair say that despite the enormous powers and economic resources available to it, ICAC has not discovered the serious corruption which was said to exist and which it was set up to eradicate. Yet there are significant costs in maintaining ICAC.

Fair says that if there were a genuine need for ICAC to exist for the public good, then the Government should be prepared to meet all costs associated with it. However as this is not the case, and individuals involved in ICAC investigations are not compensated for any loss they may suffer as a result, Fair argues that the social cost is too high. He also

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[60] Collation of Evidence from the Commissioner on General Aspects of the Commission's operations, March 1994, Appendix 1 "Community Attitudes to Corruption and the ICAC - ICAC Public Attitude Survey", pi

[61] An illustration of ICAC's view of its achievements can be found in the 1993 Annual Report. "The ICAC has been only one contributor to the improved integrity climate since it came into operation in early 1989, but that contribution is undeniable. In many areas the Commission has acted as an effective agent for principled change. It has helped to improve many public sector systems in a way that decreases their vulnerability to corrupt influences. In many reports to the Parliament it has disclosed improper practices and recommended change", pvi

[62] "The Premier and a number of other prominent political figures have pledged the continued existence of the Commission with powers which are effectively undiminished, even if varied in detail", Report of the Independent Commission Against Corruption for the year ended 30 June 1993, pvii

[63] In 'ICAC under the microscope - the need for reform', *Law Society Journal*, December 1992, at page 41 Patrick Fair suggests ICAC should be abolished, and former Liberal Minister Michael Yabsley has said "ICAC has been a huge mistake" - 'A tough act to follow', *The Australian*, 12/3/94

says that the establishment of ICAC is very much a political device and that whether ICAC actually has an impact on corruption, may not be as important as the statement it makes about the Government's preparedness to take on corruption directly and aggressively by the setting up of such a body.

5.2 Impact of Royal Commission into police corruption

On 12 May 1994 it was decided by a parliamentary majority to establish a Royal Commission into police corruption rather than refer the matter to ICAC. This action has been seen by some as an indication of a lack of faith and confidence in ICAC[64] and by others as a duplication and waste of resources.[65] The Royal Commission Act passed in 1923 was effectively exceeded by the ICAC Act when it was enacted in 1988 (under this legislation the ICAC was set up as a standing Royal Commission with more substantial powers). To effect the changes requested by Justice Wood to make the Royal Commission's powers as extensive as ICAC's, legislative amendment will be necessary. This can be done either by amending the Royal Commission Act or enacting a special piece of legislation, which will limit coverage to the Royal Commission into police corruption.

Given that investigations concerning the police service have figured largely in ICAC's work to date, it remains to be seen whether the setting up of the Royal Commission will have any effect on ICAC's future operations. It may mean that ICAC will conduct fewer specific investigations and focus more on its education and prevention role.[66]

It may be that the scope of the matters to be dealt with by the Royal Commission will be quite circumscribed and that matters will still be dealt with by the Ombudsman's Office, ICAC or the police service itself, as appropriate. The Royal Commissioner has requested that a proposed shake-up of the police internal affairs unit be postponed. If the proposal were to go ahead, serious complaints of police misconduct involving public interest such as misconduct involving drugs or police shootings of civilians would be removed from the police internal affairs unit and given to ICAC. Justice Wood has expressed concern that this might pre-empt the findings of the Royal Commission.

The Cabinet's Justice Sub-Committee has also considered an enhanced role for the Ombudsman's Office in the investigation of police matters[67] and it is understood that ICAC has argued previously that the system of police discipline should stay with the

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[64] 'Police in new NSW inquiry', Sydney Morning Herald, 13/5/94

[65] Given that the ICAC already has the powers, resources, infrastructure and ability to investigate alleged corruption in all areas of the public sector including the police service, Acting Commissioner Mant QC expressed disappointment in the lack of support for ICAC, which seemed to be implied by the setting up the Royal Commission - 'Failure gives opponents ammunition', *The Australian*, 13/5/94

[66] "Taking the police service away from ICAC's duties... has meant a shift in strategy for the Commission, there would be fewer public hearings and a greater accent on "a more systemic, educational approach"- 'Inquiry decision attacked by Mant', *Sydney Morning Herald*, 4/8/94

[67] 'Delay police shake-up - Wood', *Sydney Morning Herald*, 13/8/94

police: "... Commissioner Temby also said police needed to take responsibility for their own discipline as the most significant reforms could be achieved from within".[68]

The outcomes of the Royal Commission may help determine the future role and functions ICAC, but this will only be known in the fullness of time. Questions about ICAC's future were also raised in relation to the ICAC inquiry into the treatment of staff complaints in a Minister's Office. This inquiry was held after ICAC received a complaint from the Shadow Attorney General in relation to the circumstances surrounding the resignation of the former Minister for Police.[69] The fact that this matter was referred to ICAC was seen by some as a downgrading of ICAC. Gary Sturgess said the Commission had become irrelevant "if that is the highest priority the ICAC has got at the moment then it's quite simple - they have got nothing to do and they should be abolished".[70]

5.3 Functions

Under the Act the ICAC has three main functions: to investigate allegations of corruption, to devise strategies to prevent corruption and to educate the public as to the nature and effect of corruption. To date its investigative function has received prominence (it may be that this is, in fact, not the case but merely a perception created by media coverage) and it could be that more emphasis will be placed in the future on its preventative and educative role.

This is also more likely as it is increasingly recognized that corruption is a systemic problem rather than a problem caused by individual "rotten apples" and that preventing corruption occurs more through organisational and management reform than through the removal of specific individuals. Likewise educating the public to see "corrupt conduct" as an unacceptable social practice will probably have a wider impact than individual investigations.[71]

It may be that ICAC develops more of an advisory function. Apart from any role it may play in providing government departments and authorities with corruption prevention strategies and commenting on practices and procedures which are, or should be, in place, there is scope for ICAC to provide advice in relation to legislative proposals. Given the

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[68] 'Temby blast over ICAC replacement', *The Australian*, 5/3/94

[69] This inquiry was held after ICAC received a complaint from the Shadow Attorney General in relation to the circumstances surrounding the resignation of the former Minister for Police. Report on ICAC Inquiry into the Treatment of Staff Complaints in a Minister's Office, August 1994.

[70] 'Dump ICAC: Griffiths probe not warranted', *Sun Telegraph*, 24/7/94

[71] Michael Bersten op. cit., Note 32, p102. The former Chair of the Public Accounts Committee suggested that consideration be given to strengthening the corruption prevention role of the ICAC when amendments to the legislation are being made. He cited evidence before the Public Accounts Committee that public and private CEOs "want greater interaction with, and more timely advice from, the ICAC rather than damaging public hearings after the event" - 'There's no reason to be so cautious over ICAC', *Sydney Morning Herald*, January 1994. ICAC itself has suggested that it could do more advisory work similar to that carried out by the Auditor General

experience and information it has gained from its inquiries and investigations, ICAC is well placed to fulfil this function. It has already commented on a number of legislative proposals (the bribery and extortion offences in the Crimes (Corruption) Amendment Bill 1992, the proposed whistleblower legislation, and disclosure of political donations) and may be used increasingly in this fashion in the future.

On the other hand, caution has been expressed about devolving ICAC's investigative powers in favour of more education and anti-corruption work. Commissioner Temby said:

> Corruption has been reduced ... it will never be eradicated ... for years to come, there will be a continuing need for a substantial program of investigative work supported by public hearings as a general rule ... public exposure was in itself a significant deterrent.[72]

And suggestions have been made that the scope of its investigations should be broadened. In an article which appeared in the *Sydney Morning Herald* on 14 April 1994, Malcolm Kerr, Chair of the PJC said:

> ... to date the Commission has made a solid foundation to combat corruption. In the future, the Commission must use this foundation of experience and knowledge to begin what will be a most difficult task: to strike at the heart of the corruption that allows the illegal drug trade and organized crime to persist in NSW.

As discussed at length above, the direction ICAC takes in the future will depend upon the assessment of its achievements to date and whether, in light of these achievements, its original functions are still seen as appropriate. In 1992 Commissioner Temby said of ICAC's role "If what we do doesn't lead to change in laws or practices in some way which the public see as being desirable then there is no point to what we do".[73] Whether this view still has currency in 1994 remains to be seen.

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[72] 'Temby bows out in anger', *Tele-Mirror*, 5/3/94

[73] 'Commission impossible', *Polemic*, Vol 3 (2), 1992, pp102-105